

Case No. 3:21-cv-01010-E

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

v.

JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY
INVESTMENT TRUST,
Defendants.

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL
MANAGEMENT, L.P.'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO CONSOLIDATE NOTES ACTIONS**

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Case No. 3:21-cv-00881-X

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

v.

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,
Defendant.

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Case No. No. 3:21-cv-00880-C

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

v.

NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND
THE DUGABOY INVESTMENT TRUST,
Defendants.

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL
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Case No. 3:21-cv-01378-N

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

v.

HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES
DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT
TRUST,
Defendants.

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL
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Case No. 3:21-CV-01379-X

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

v.

HCRE PARTNERS, LLC n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC,
JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY
INVESTMENT TRUST,
Defendants.

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL
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Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
1.	<i>Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas, Case No. 19-34054-sgj, D.I. 186 (Bankr. N.D. Tex. Dec. 4, 2021)</i>	1-3						X	
2.	<i>Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified), Case No. 19-34054-sgj, D.I. 1808 (Bankr. N.D. Tex. Jan. 22, 2021)</i>	4-70						X	
3.	<i>James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., Case No. 19-34054-sgj, D.I. 1661 (Bankr. N.D. Tex. Jan. 5, 2021)</i>	71-79						X	
4.	<i>The Dugaboy Investment Trust and Get Good Trust's Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization, Case No. 19-34054-sgj, D.I. 1667 (Bankr. N.D. Tex. Jan. 5, 2021)</i>	80-114						X	
5.	<i>Funds and Advisors' Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., Case No. 19-34054-sgj, D.I. 1670 (Bankr. N.D. Tex. Jan. 5, 2021)</i>	115-165						X	
6.	<i>NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization, Case No. 19-34054-sgj, D.I. 1673 (Bankr. N.D. Tex. Jan. 5, 2021)</i>	166-173						X	
7.	<i>Docket entry re: Confirmation Hearing Continued on February 3, 2021 at 9:30 a.m., Case No. 19-34054-sgj, D.I. 1885 (Bankr. N.D. Tex.)</i>	174-175						X	

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
8.	Transcript of Hearing Held February 3, 2021, Case No. 19-34054-sgj (Bankr. N.D. Tex.)	176-433						X	
9.	<i>Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief</i> , Case No. 19-34054-sgj, D.I. 1943 (Bankr. N.D. Tex. Feb. 22, 2021)	434-595						X	
10.	<i>Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)</i> , Exh. B., Case No. 19-34054-sgj, D.I. 1875 (Bankr. N.D. Tex. Feb. 1, 2021)	596-644						X	
11.	<i>Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.</i> , Case No. 19-34054-sgj, D.I. 2700 (Bankr. N.D. Tex. Aug. 11, 2021)	645-649						X	
12.	<i>Order on Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021</i> , Adv. Proc. No. 21-3010-sgj, D.I. 25 (Bankr. N.D. Tex. Feb. 24, 2021)	650-655							21-3010
13.	May 28, 2021 deposition transcript of James Dondero	656-718	X						
14.	<i>Stipulation in Support of 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</i> , Case No.	719-727						X	

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
	19-34054-sgj, D.I. 338 (Bankr. N.D. Tex. Jan. 9, 2020)								
15.	<i>Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course</i> , Case No. 19-34054-sgj, D.I. 339 (Bankr. N.D. Tex. Jan. 9, 2020)	728-733						X	
16.	<i>Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate</i> , Adv. Proc. No. 21-3003, D.I. 1 (Bankr. N.D. Tex. Jan. 22, 2021)	734-758	X						
17.	<i>Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate</i> , Adv. Proc. No. 21-3004, D.I. 1 (Bankr. N.D. Tex. Jan. 22, 2021)	759-779		X					
18.	<i>Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate</i> , Adv. Proc. No. 21-3005, D.I. 1 (Bankr. N.D. Tex. Jan. 22, 2021)	780-807			X				
19.	<i>Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate</i> , Adv. Proc. No. 21-3006, D.I. 1 (Bankr. N.D. Tex. Jan. 22, 2021)	808-819				X			
20.	<i>Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate</i> , Adv. Proc. No. 21-3007, D.I. 1 (Bankr. N.D. Tex. Jan. 22, 2021)	820-857					X		

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
21.	<i>Defendant James Dondero's Original Answer, Adv. Proc. No. 21-3003, D.I. 6 (Bankr. N.D. Tex. Mar. 16, 2021)</i>	858-866	X						
22.	<i>Defendant's Original Answer, Adv. Proc. No. 21-3004, D.I. 6 (Bankr. N.D. Tex. Mar. 1, 2021)</i>	867-874		X					
23.	<i>Defendant's Original Answer, Adv. Proc. No. 21-3005, D.I. 6 (Bankr. N.D. Tex. Mar. 1, 2021)</i>	875-883			X				
24.	<i>Highland Capital Management Services, Inc.'s Answer to Plaintiff's Complaint, Adv. Proc. No. 21-3006, D.I. 6 (Bankr. N.D. Tex. Mar. 3, 2021)</i>	884-893				X			
25.	<i>HCRE Partners, LLC's Answer to Plaintiff's Complaint, Adv. Proc. No. 21-3007, D.I. 7 (Bankr. N.D. Tex. Mar. 3, 2021)</i>	894-903					X		
26.	<i>Defendant James Dondero's Objections and Responses to Highland Capital Management, L.P.'s First Request for Admissions, Adv. Proc. No. 21-3003, D.I. 38-3 (Bankr. N.D. Tex. Apr. 28, 2021)</i>	904-910	X						
27.	<i>Defendant James Dondero's Amended Answer, Adv. Proc. No. 21-3003, D.I. 16 (Bankr. N.D. Tex. Apr. 6, 2021)</i>	911-919	X						
28.	<i>Defendant James Dondero's Rule 26 Initial Disclosures, Adv. Proc. No. 21-3003 (Bankr. N.D. Tex. Apr. 15, 2021)</i>	920-928	X						
29.	<i>Defendant James Dondero's Objections and Answers to Highland Capital Management L.P.'s First Set of Interrogatories, Adv. Proc.</i>	929-935	X						

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
	No. 21-3003, D.I. 38-4 (Bankr. N.D. Tex. Apr. 26, 2021)								
30.	<i>Defendant's First Amended Answer</i> , Adv. Proc. No. 21-3005, D.I. 50 (Bankr. N.D. Tex. Aug. 9, 2021)	936-944			X				
31.	<i>Highland Capital Management Services, Inc.'s First Amended Answer to Plaintiff's Complaint</i> , Adv. Proc. No. 21-3006, D.I. 34 (Bankr. N.D. Tex. Jun. 11, 2021)	945-955				X			
32.	<i>NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC's First Amended Answer to Plaintiff's Complaint</i> , Adv. Proc. No. 21-3007, D.I. 34 (Bankr. N.D. Tex. Jun. 11, 2021)	956-966					X		
33.	<i>Defendant's Amended Answer</i> , Adv. Proc. No. 21-3004, D.I. 48 (Bankr. N.D. Tex. July 6, 2021)	967-976		X					
34.	<i>Defendant's Motion for Leave to Amend Answer</i> , Adv. Proc. No. 21-3004, D.I. 32 (Bankr. N.D. Tex. May 22, 2021)	977-1026		X					
35.	<i>James Dondero's Motion and Memorandum of Law in Support to Withdraw the Reference</i> , Adv. Proc. No. 21-3003, D.I. 21 (Bankr. N.D. Tex. Apr. 15, 2021)	1027-1047	X						
36.	<i>Defendant's Motion to Withdraw the Reference</i> , Adv. Proc. No. 21-3004, D.I. 20 (Bankr. N.D. Tex. Apr. 13, 2021)	1048-1051		X					
37.	<i>Defendant's Motion to Withdraw the Reference</i> , Adv. Proc. No. 21-3005, D.I. 19 (Bankr. N.D. Tex. Apr. 13, 2021)	1052-1055			X				

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
38.	<i>Highland Capital Management Services, Inc.'s Motion to Withdraw the Reference</i> , Adv. Proc. No. 21-3006, D.I. 19 (Bankr. N.D. Tex. Jun. 3, 2021)	1056-1060				X			
39.	<i>Defendant's Motion to Withdraw the Reference</i> , Adv. Proc. No. 21-3007, D.I. 20 (Bankr. N.D. Tex. Jun. 3, 2021)	1061-1065					X		
40.	<i>Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court</i> , Adv. Proc. No. 21-3003, D.I. 67 (Bankr. N.D. Tex. July 6, 2021)	1066-1081	X						
41.	<i>Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court</i> , Adv. Proc. No. 21-3004, D.I. 50 (Bankr. N.D. Tex. July 8, 2021)	1082-1094		X					
42.	<i>Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court</i> , Adv. Proc. No. 21-3005, D.I. 40 (Bankr. N.D. Tex. July 8, 2021)	1095-1107			X				

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
43.	<i>Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court, Adv. Proc. No. 21-3006, D.I. 47 (Bankr. N.D. Tex. July 14, 2021)</i>	1108-1120				X			
44.	<i>Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court, Adv. Proc. No. 21-3007, D.I. 44 (Bankr. N.D. Tex. July 14, 2021)</i>	1121-1133					X		
45.	<i>Order on Notice of Transmittal Regarding Withdrawal of Reference re: Report and Recommendation, Case No. 3:21-cv-00880-C, D.I. 10 (N.D. Tex. July 28, 2021)</i>	1134-1136							X
46.	<i>Order re: Report and Recommendation to District Court Proposing that it: (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court, Case No. 3:21-cv-00881-X, D.I. 14 (N.D. Tex. Sep. 14, 2021)</i>	1137-1139							X
47.	<i>Order on Motion to Withdraw Reference, Case No. 3:21-cv-01378-N, D.I. 5 (N.D. Tex. July 26, 2021)</i>	1140-1141							X

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
48.	<i>Order re: Notice of Transmittal Regarding Withdrawal of Reference re: Report and Recommendation, Case No. 3:21-cv-01379-N, D.I. 14 (N.D. Tex. Aug. 17, 2021)</i>	1142-1144							X
49.	<i>Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues, Adv. Proc. No. 21-3003, D.I. 86 (Bankr. N.D. Tex. Sep. 7, 2021)</i>	1145-1154	X						
50.	<i>Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues, Adv. Proc. No. 21-3005, D.I. 70 (Bankr. N.D. Tex. Sep. 7, 2021)</i>	1155-1164			X				
51.	<i>Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues, Adv. Proc. No. 21-3006, D.I. 75 (Bankr. N.D. Tex. Sep. 7, 2021)</i>	1165-1174				X			
52.	<i>Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues, Adv. Proc. No. 21-3007, D.I. 70 (Bankr. N.D. Tex. Sep. 7, 2021)</i>	1175-1184					X		
53.	<i>Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues, Adv. Proc. No. 21-3004, D.I. 68 (Bankr. N.D. Tex. Sep. 7, 2021)</i>	1185-1194		X					
54.	<i>Order Granting Debtor's Unopposed Motion for Leave to Serve and File Amended Complaint, Adv. Proc. No. 21-3003, D.I. 75 (Bankr. N.D. Tex. Aug. 23, 2021)</i>	1195-1197	X						

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
55.	<i>Order Granting Debtor's Unopposed Motion for Leave to Serve and File Amended Complaint, Adv. Proc. No. 21-3005, D.I. 57 (Bankr. N.D. Tex. Aug. 23, 2021)</i>	1198-1200			X				
56.	<i>Order Granting Debtor's Unopposed Motion for Leave to Serve and File Amended Complaint, Adv. Proc. No. 21-3006, D.I. 64 (Bankr. N.D. Tex. Aug. 23, 2021)</i>	1201-1203				X			
57.	<i>Order Granting Debtor's Unopposed Motion for Leave to Serve and File Amended Complaint, Adv. Proc. No. 21-3007, D.I. 59 (Bankr. N.D. Tex. Aug. 23, 2021)</i>	1204-1206					X		
58.	<i>Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty, Adv. Proc. No. 21-3003, D.I. 79 (Bankr. N.D. Tex. Aug. 27, 2021)</i>	1207-1277	X						
59.	<i>Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty, Adv. Proc. No. 21-3005, D.I. 63 (Bankr. N.D. Tex. Aug. 27, 2021)</i>	1278-1351			X				
60.	<i>Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty, Adv. Proc. No. 21-3006, D.I. 68 (Bankr. N.D. Tex. Aug. 27, 2021)</i>	1352-1435				X			

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
61.	<i>Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty, Adv. Proc. No. 21-3007, D.I. 63 (Bankr. N.D. Tex. Aug. 27, 2021)</i>	1436-1519					X		
62.	<i>Defendant James Dondero's Answer to Amended Complaint, Adv. Proc. No. 21-3003, D.I. 83 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1520-1535	X						
63.	<i>Defendant NexPoint Advisors, L.P.'s Answer to Amended Complaint, Adv. Proc. No. 21-3005, D.I. 64 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1536-1549			X				
64.	<i>Defendant Highland Capital Management Services, Inc.'s Answer to Amended Complaint, Adv. Proc. No. 21-3006, D.I. 73 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1550-1565				X			
65.	<i>Defendant HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)'s Answer to Amended Complaint, Adv. Proc. No. 21-3007, D.I. 68 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1566-1582					X		
66.	<i>Motion to Compel Arbitration and Stay Litigation, Adv. Proc. No. 21-3003, D.I. 80 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1583-1610	X						
67.	<i>Appendix in Support of Defendants' Motion to Compel Arbitration and Stay Litigation, Adv. Proc. No. 21-3003, D.I. 81 (Bankr. N.D. Tex. Sep. 1, 2021)</i>	1611-1713	X						

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
68.	<i>Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Fifth, Sixth, and Seventh Claims for Relief</i> , Adv. Proc. No. 21-3003, D.I. 82 (Bankr. N.D. Tex. Sep. 1, 2021)	1714-1746	X						
69.	<i>Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3005, D.I. 66 (Bankr. N.D. Tex. Sep. 1, 2021)	1747-1774			X				
70.	<i>Appendix in Support of Defendants' Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3005, D.I. 67 (Bankr. N.D. Tex. Sep. 1, 2021)	1775-1876			X				
71.	<i>Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Fifth, Sixth, and Seventh Claims for Relief</i> , Adv. Proc. No. 21-3005, D.I. 68 (Bankr. N.D. Tex. Sep. 1, 2021)	1877-1910			X				
72.	<i>Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3005, D.I. 69 (Bankr. N.D. Tex. Sep. 1, 2021)	1911-1938			X				
73.	<i>Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3006, D.I. 70 (Bankr. N.D. Tex. Sep. 1, 2021)	1939-1966				X			
74.	<i>Appendix in Support of Defendants' Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3006, D.I. 71 (Bankr. N.D. Tex. Sep. 1, 2021)	1967-2068				X			
75.	<i>Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Fifth, Sixth, and Seventh Claims for Relief</i> , Adv. Proc. No. 21-3006, D.I. 72 (Bankr. N.D. Tex. Sep. 1, 2021)	2069-2102				X			

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
76.	<i>Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3007, D.I. 65 (Bankr. N.D. Tex. Sep. 1, 2021)	2103-2130					X		
77.	<i>Appendix in Support of Defendants' Motion to Compel Arbitration and Stay Litigation</i> , Adv. Proc. No. 21-3007, D.I. 66 (Bankr. N.D. Tex. Sep. 1, 2021)	2131-2232					X		
78.	<i>Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Fifth, Sixth, and Seventh Claims for Relief</i> , Adv. Proc. No. 21-3007, D.I. 67 (Bankr. N.D. Tex. Sep. 1, 2021)	2233-2266					X		
79.	<i>Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines</i> , Adv. Proc. No. 21-3005, D.I. 86 (Bankr. N.D. Tex. Oct. 29, 2021)	2267-2712			X				
80.	<i>Defendant Highland Capital Management Services, Inc.'s Motion to Extend Expert Disclosure and Discovery Deadlines</i> , Adv. Proc. No. 21-3006, D.I. 91 (Bankr. N.D. Tex. Oct. 29, 2021)	2713-3163				X			
81.	<i>Defendant HCRE Partners, LLC's Motion to Extend Expert Disclosure and Discovery Deadlines</i> , Adv. Proc. No. 21-3007, D.I. 86 (Bankr. N.D. Tex. Oct. 29, 2021)	3164-3614					X		
82.	<i>Amended Stipulation Regarding Briefing and Hearing Schedule</i> , Adv. Proc. No. 21-3005, D.I. 99 (Bankr. N.D. Tex. Nov. 23, 2021)	3615-3624			X				

Ex.	Description	Appx. #	21-3003	21-3004	21-3005	21-3006	21-3007	19-34054	Other
83.	<i>Amended Stipulation Regarding Briefing and Hearing Schedule, Adv. Proc. No. 21-3006, D.I. 104 (Bankr. N.D. Tex. Nov. 23, 2021)</i>	3625-3634				X			
84.	<i>Amended Stipulation Regarding Briefing and Hearing Schedule, Adv. Proc. No. 21-3007, D.I. 99 (Bankr. N.D. Tex. Nov. 23, 2021)</i>	3635-3644					X		

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Dated: December 7, 2021.

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EXHIBIT 1

**IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF DELAWARE**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-12239 (CSS)
Debtor.	)	Ref. Docket No.: 86

**ORDER TRANSFERRING VENUE OF THIS CASE TO THE UNITED STATES
 BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS**

Upon the motion (the “Motion”)² of the Committee requesting entry of an order (this “Order”) transferring the venue of the above-captioned chapter 11 case to the United States Bankruptcy Court for the Northern District of Texas; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this matter being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue of this Motion being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and adequate notice of, and the

¹ The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.
² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.



opportunity for a hearing on, the Motion having been given; and for the reasons stated on the record, it is HEREBY ORDERED THAT:

1. Effective as of the date of this Order, the above-captioned chapter 11 case shall be transferred to the Dallas Bankruptcy Court pursuant to 28 U.S.C. § 1412.

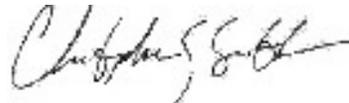


EXHIBIT 2

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DEBTOR’S CHAPTER 11 PLAN OF REORGANIZATION

HIGHLAND CAPITAL MANAGEMENT, L.P., as debtor and debtor-in-possession in the above-captioned case (the “Debtor”), proposes the following chapter 11 plan of reorganization (the “Plan”) for, among other things, the resolution of the outstanding Claims against, and Equity Interests in, the Debtor. Unless otherwise noted, capitalized terms used in this Plan have the meanings set forth in Article I of this Plan. The Debtor is the proponent of this Plan within the meaning of section 1129 of the Bankruptcy Code.

Reference is made to the Disclosure Statement (as such term is defined herein and distributed contemporaneously herewith) for a discussion of the Debtor’s history, business, results of operations, historical financial information, projections and assets, and for a summary and analysis of this Plan and the treatment provided for herein. There also are other agreements and documents that may be Filed with the Bankruptcy Court that are referenced in this Plan or the Disclosure Statement as Exhibits and Plan Documents. All such Exhibits and Plan Documents are incorporated into and are a part of this Plan as if set forth in full herein. Subject to the other provisions of this Plan, and in accordance with the requirements set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Debtor reserves the right to alter, amend, modify, revoke, or withdraw this Plan prior to the Effective Date.

If this Plan cannot be confirmed, for any reason, then subject to the terms set forth herein, this Plan may be revoked.

ARTICLE I.
RULES OF INTERPRETATION, COMPUTATION OF TIME,
GOVERNING LAW AND DEFINED TERMS

A. Rules of Interpretation, Computation of Time and Governing Law

For purposes hereof: (a) in the appropriate context, each term, whether stated in the singular or the plural, shall include both the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and the neuter gender; (b) any reference herein to a contract, lease, instrument, release, indenture or other agreement or document being in a particular form or on particular terms and conditions means that the referenced document, as previously amended, modified or supplemented, if applicable, shall be substantially in that form or substantially on those terms and conditions; (c) any reference herein to an existing document or exhibit having been Filed or to be Filed shall mean that document or exhibit, as it may thereafter be amended, modified or supplemented in accordance with its terms; (d) unless otherwise specified, all references herein to “Articles,” “Sections,” “Exhibits” and “Plan Documents” are references to Articles, Sections, Exhibits and Plan Documents hereof or hereto; (e) unless otherwise stated, the words “herein,” “hereof,” “hereunder” and “hereto” refer to this Plan in its entirety rather than to a particular portion of this Plan; (f) captions and headings to Articles and Sections are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation hereof; (g) any reference to an Entity as a Holder of a Claim or Equity Interest includes such Entity’s successors and assigns;

(h) the rules of construction set forth in section 102 of the Bankruptcy Code shall apply; (i) any term used in capitalized form herein that is not otherwise defined but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in the Bankruptcy Code or the Bankruptcy Rules, as the case may be; and (j) “\$” or “dollars” means Dollars in lawful currency of the United States of America. The provisions of Bankruptcy Rule 9006(a) shall apply in computing any period of time prescribed or allowed herein.

B. Defined Terms

Unless the context otherwise requires, the following terms shall have the following meanings when used in capitalized form herein:

1. “*Acis*” means collectively Acis Capital Management, L.P. and Acis Capital Management GP, LLP.

2. “*Administrative Expense Claim*” means any Claim for costs and expenses of administration of the Chapter 11 Case that is Allowed pursuant to sections 503(b), 507(a)(2), 507(b) or 1114(2) of the Bankruptcy Code, including, without limitation, (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor; and (b) all fees and charges assessed against the Estate pursuant to sections 1911 through 1930 of chapter 123 of title 28 of the United States Code, and that have not already been paid by the Debtor during the Chapter 11 Case and a Professional Fee Claim.

3. “*Administrative Expense Claims Bar Date*” means, with respect to any Administrative Expense Claim (other than a Professional Fee Claim) becoming due on or prior to the Effective Date, 5:00 p.m. (prevailing Central Time) on such date that is forty-five days after the Effective Date.

4. “*Administrative Expense Claims Objection Deadline*” means, with respect to any Administrative Expense Claim, the later of (a) ninety (90) days after the Effective Date and (b) sixty (60) days after the timely Filing of the applicable request for payment of such Administrative Expense Claim; *provided, however*, that the Administrative Expense Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee.

5. “*Affiliate*” of any Person means any Entity that, with respect to such Person, either (i) is an “affiliate” as defined in section 101(2) of the Bankruptcy Code, or (ii) is an “affiliate” as defined in Rule 405 of the Securities Act of 1933, or (iii) directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. For the purposes of this definition, the term “control” (including, without limitation, the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction in any respect of the management or policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

6. “*Allowed*” means, with respect to any Claim, except as otherwise provided in the Plan: (a) any Claim that is evidenced by a Proof of Claim that has been timely Filed by the

Bar Date, or that is not required to be evidenced by a Filed Proof of Claim under the Bankruptcy Code or a Final Order; (b) a Claim that is listed in the Schedules as not contingent, not unliquidated, and not disputed and for which no Proof of Claim has been timely filed; (c) a Claim Allowed pursuant to the Plan or an order of the Bankruptcy Court that is not stayed pending appeal; or (d) a Claim that is not Disputed (including for which a Proof of Claim has been timely filed in a liquidated and noncontingent amount that has not been objected to by the Claims Objection Deadline or as to which any such objection has been overruled by Final Order); *provided, however*, that with respect to a Claim described in clauses (a) and (b) above, such Claim shall be considered Allowed only if and to the extent that, with respect to such Claim, no objection to the allowance thereof has been interposed within the applicable period of time fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, or such an objection is so interposed and the Claim shall have been Allowed as set forth above.

7. “*Allowed Claim or Equity Interest*” means a Claim or an Equity Interest of the type that has been Allowed.

8. “*Assets*” means all of the rights, titles, and interest of the Debtor, Reorganized Debtor, or Claimant Trust, in and to property of whatever type or nature, including, without limitation, real, personal, mixed, intellectual, tangible, and intangible property, the Debtor’s books and records, and the Causes of Action.

9. “*Available Cash*” means any Cash in excess of the amount needed for the Claimant Trust and Reorganized Debtor to maintain business operations as determined in the sole discretion of the Claimant Trustee.

10. “*Avoidance Actions*” means any and all avoidance, recovery, subordination or other actions or remedies that may be brought by and on behalf of the Debtor or its Estate under the Bankruptcy Code or applicable nonbankruptcy law, including, without limitation, actions or remedies arising under sections 502, 510, 544, 545, and 547-553 of the Bankruptcy Code or under similar state or federal statutes and common law, including fraudulent transfer laws

11. “*Ballot*” means the form(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

12. “*Bankruptcy Code*” means title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended from time to time and as applicable to the Chapter 11 Case.

13. “*Bankruptcy Court*” means the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, or any other court having jurisdiction over the Chapter 11 Case.

14. “*Bankruptcy Rules*” means the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, in each case as amended from time to time and as applicable to the Chapter 11 Case.

15. “*Bar Date*” means the applicable deadlines set by the Bankruptcy Court for the filing of Proofs of Claim against the Debtor as set forth in the Bar Date Order, which deadlines may be or have been extended for certain Claimants by order of the Bankruptcy Court.

16. “*Bar Date Order*” means the *Order (I) Establishing Bar Dates for Filing Proofs of Claim and (II) Approving the Form and Manner of Notice Thereof* [D.I. 488].

17. “*Business Day*” means any day, other than a Saturday, Sunday or “legal holiday” (as defined in Bankruptcy Rule 9006(a)).

18. “*Cash*” means the legal tender of the United States of America or the equivalent thereof.

19. “*Causes of Action*” means any action, claim, cross-claim, third-party claim, cause of action, controversy, demand, right, Lien, indemnity, contribution, guaranty, suit, obligation, liability, debt, damage, judgment, account, defense, remedy, offset, power, privilege, license and franchise of any kind or character whatsoever, in each case whether known, unknown, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, foreseen or unforeseen, direct or indirect, choate or inchoate, secured or unsecured, assertable directly or derivatively (including, without limitation, under alter ego theories), whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity or pursuant to any other theory of law. For the avoidance of doubt, Cause of Action includes, without limitation,: (a) any right of setoff, counterclaim or recoupment and any claim for breach of contract or for breach of duties imposed by law or in equity; (b) the right to object to Claims or Equity Interests; (c) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (d) any claim or defense including fraud, mistake, duress and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; (e) any claims under any state or foreign law, including, without limitation, any fraudulent transfer or similar claims; (f) the Avoidance Actions, and (g) the Estate Claims. The Causes of Action include, without limitation, the Causes of Action belonging to the Debtor’s Estate listed on the schedule of Causes of Action to be filed with the Plan Supplement.

20. “*CEO/CRO*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer.

21. “*Chapter 11 Case*” means the Debtor’s case under chapter 11 of the Bankruptcy Code commenced on the Petition Date in the Delaware Bankruptcy Court and transferred to the Bankruptcy Court on December 4, 2019, and styled *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj-11.

22. “*Claim*” means any “claim” against the Debtor as defined in section 101(5) of the Bankruptcy Code.

23. “*Claims Objection Deadline*” means the date that is 180 days after the Confirmation Date; *provided, however*, the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee.

24. “*Claimant Trust*” means the trust established for the benefit of the Claimant Trust Beneficiaries on the Effective Date in accordance with the terms of this Plan and the Claimant Trust Agreement.

25. “*Claimant Trust Agreement*” means the agreement Filed in the Plan Supplement establishing and delineating the terms and conditions of the Claimant Trust.

26. “*Claimant Trust Assets*” means (i) other than the Reorganized Debtor Assets (which are expressly excluded from this definition), all other Assets of the Estate, including, but not limited to, all Causes of Action, Available Cash, any proceeds realized or received from such Assets, all rights of setoff, recoupment, and other defenses with respect, relating to, or arising from such Assets, (ii) any Assets transferred by the Reorganized Debtor to the Claimant Trust on or after the Effective Date, (iii) the limited partnership interests in the Reorganized Debtor, and (iv) the ownership interests in New GP LLC. For the avoidance of doubt, any Causes of Action that, for any reason, are not capable of being transferred to the Claimant Trust shall constitute Reorganized Debtor Assets.

27. “*Claimant Trust Beneficiaries*” means the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, including, upon Allowance, Disputed General Unsecured Claims and Disputed Subordinated Claims that become Allowed following the Effective Date, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, post-petition interest from the Petition Date at the Federal Judgment Rate in accordance with the terms and conditions set forth in the Claimant Trust Agreement and all Disputed Claims in Class 8 and Class 9 have been resolved, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests.

28. “*Claimant Trustee*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer, or such other Person identified in the Plan Supplement who will act as the trustee of the Claimant Trust in accordance with the Plan, the Confirmation Order, and Claimant Trust Agreement or any replacement trustee pursuant to (and in accordance with) the Claimant Trust Agreement. The Claimant Trustee shall be responsible for, among other things, monetizing the Estate’s investment assets, resolving Claims (other than those Claims assigned to the Litigation Sub-Trust for resolution), and, as the sole officer of New GP LLC, winding down the Reorganized Debtor’s business operations.

29. “*Claimant Trust Expenses*” means all reasonable legal and other reasonable professional fees, costs, and expenses incurred by the Trustees on account of administration of the Claimant Trust, including any reasonable administrative fees and expenses, reasonable attorneys’ fees and expenses, reasonable insurance costs, taxes, reasonable escrow expenses, and other expenses.

30. “*Claimant Trust Interests*” means the non-transferable interests in the Claimant Trust that are issued to the Claimant Trust Beneficiaries pursuant to this Plan; *provided, however*, Holders of Class A Limited Partnership Interests, Class B Limited Partnership Interests, and Class C Limited Partnership Interests will not be deemed to hold

Claimant Trust Interests unless and until the Contingent Claimant Trust Interests distributed to such Holders vest in accordance with the terms of this Plan and the Claimant Trust Agreement.

31. “*Claimant Trust Oversight Committee*” means the committee of five Persons established pursuant to ARTICLE IV of this Plan to oversee the Claimant Trustee’s performance of its duties and otherwise serve the functions described in this Plan and the Claimant Trust Agreement.

32. “*Class*” means a category of Holders of Claims or Equity Interests as set forth in ARTICLE III hereof pursuant to section 1122(a) of the Bankruptcy Code.

33. “*Class A Limited Partnership Interest*” means the Class A Limited Partnership Interests as defined in the Limited Partnership Agreement held by The Dugaboy Investment Trust, Mark and Pamela Okada Family Trust – Exempt Trust 2, Mark and Pamela Okada – Exempt Descendants’ Trust, and Mark Kiyoshi Okada, and the General Partner Interest.

34. “*Class B Limited Partnership Interest*” means the Class B Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

35. “*Class B/C Limited Partnership Interests*” means, collectively, the Class B Limited Partnership and Class C Limited Partnership Interests.

36. “*Class C Limited Partnership Interest*” means the Class C Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

37. “*Committee*” means the Official Committee of Unsecured Creditors appointed by the U.S. Trustee pursuant to 11 U.S.C. § 1102(a)(1) on October 29, 2019 [D.I. 65], consisting of (i) the Redeemer Committee of Highland Crusader Fund, (ii) Meta-e Discovery, (iii) UBS, and (iv) Acis.

38. “*Confirmation Date*” means the date on which the clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court.

39. “*Confirmation Hearing*” means the hearing held by the Bankruptcy Court pursuant to section 1128 of the Bankruptcy Code to consider confirmation of this Plan, as such hearing may be adjourned or continued from time to time.

40. “*Confirmation Order*” means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

41. “*Convenience Claim*” means any prepetition, liquidated, and unsecured Claim against the Debtor that as of the Confirmation Date is less than or equal to \$1,000,000 or any General Unsecured Claim that makes the Convenience Class Election. For the avoidance of doubt, the Reduced Employee Claims will be Convenience Claims.

42. “*Convenience Claim Pool*” means the \$13,150,000 in Cash that shall be available upon the Effective Date for distribution to Holders of Convenience Claims under the Plan as set forth herein. Any Cash remaining in the Convenience Claim Pool after all distributions on account of Convenience Claims have been made will be transferred to the Claimant Trust and administered as a Claimant Trust Asset.

43. “*Convenience Class Election*” means the option provided to each Holder of a General Unsecured Claim that is a liquidated Claim as of the Confirmation Date on their Ballot to elect to reduce their claim to \$1,000,000 and receive the treatment provided to Convenience Claims.

44. “*Contingent Claimant Trust Interests*” means the contingent Claimant Trust Interests to be distributed to Holders of Class A Limited Partnership Interests, Holders of Class B Limited Partnership Interests, and Holders of Class C Limited Partnership Interests in accordance with this Plan, the rights of which shall not vest, and consequently convert to Claimant Trust Interests, unless and until the Claimant Trustee Files a certification that all holders of Allowed General Unsecured Claims have been paid indefeasibly in full, plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, all accrued and unpaid post-petition interest from the Petition Date at the Federal Judgment Rate and all Disputed Claims in Class 8 and Class 9 have been resolved. As set forth in the Claimant Trust Agreement, the Contingent Claimant Trust Interests distributed to the Holders of Class A Limited Partnership Interests will be subordinated to the Contingent Claimant Trust Interests distributed to the Holders of Class B/C Limited Partnership Interests.

45. “*Debtor*” means Highland Capital Management, L.P. in its capacity as debtor and debtor in possession in the Chapter 11 Case.

46. “*Delaware Bankruptcy Court*” means the United States Bankruptcy Court for the District of Delaware.

47. “*Disclosure Statement*” means that certain *Disclosure Statement for Debtor’s Fifth Amended Chapter 11 Plan of Reorganization*, as amended, supplemented, or modified from time to time, which describes this Plan, including all exhibits and schedules thereto and references therein that relate to this Plan.

48. “*Disputed*” means with respect to any Claim or Equity Interest, any Claim or Equity Interest that is not yet Allowed.

49. “*Disputed Claims Reserve*” means the appropriate reserve(s) or account(s) to be established on the Initial Distribution Date and maintained by the Claimant Trustee for distributions on account of Disputed Claims that may subsequently become an Allowed Claim.

50. “*Disputed Claims Reserve Amount*” means, for purposes of determining the Disputed Claims Reserve, the Cash that would have otherwise been distributed to a Holder of a Disputed Claim at the time any distributions of Cash are made to the Holders of Allowed Claims. The amount of the Disputed Claim upon which the Disputed Claims Reserve is calculated shall be: (a) the amount set forth on either the Schedules or the filed Proof of Claim, as applicable; (b) the amount agreed to by the Holder of the Disputed Claim and the Claimant Trustee or

Reorganized Debtor, as applicable; (c) the amount ordered by the Bankruptcy Court if it enters an order disallowing, in whole or in part, a Disputed Claim; or (d) as otherwise ordered by the Bankruptcy Court, including an order estimating the Disputed Claim.

51. “*Distribution Agent*” means the Claimant Trustee, or any party designated by the Claimant Trustee to serve as distribution agent under this Plan.

52. “*Distribution Date*” means the date or dates determined by the Reorganized Debtor or the Claimant Trustee, as applicable, on or after the Initial Distribution Date upon which the Distribution Agent shall make distributions to holders of Allowed Claims and Interests entitled to receive distributions under the Plan.

53. “*Distribution Record Date*” means the date for determining which Holders of Claims and Equity Interests are eligible to receive distributions hereunder, which date shall be the Effective Date or such later date determined by the Bankruptcy Court.

54. “*Effective Date*” means the Business Day that this Plan becomes effective as provided in ARTICLE VIII hereof.

55. “*Employees*” means the employees of the Debtor set forth in the Plan Supplement.

56. “*Enjoined Parties*” means (i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero (“Dondero”), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing.

57. “*Entity*” means any “entity” as defined in section 101(15) of the Bankruptcy Code and also includes any Person or any other entity.

58. “*Equity Interest*” means any Equity Security in the Debtor, including, without limitation, all issued, unissued, authorized or outstanding partnership interests, shares, of stock or limited company interests, the Class A Limited Partnership Interests, the Class B Limited Partnership Interests, and the Class C Limited Partnership Interests.

59. “*Equity Security*” means an “equity security” as defined in section 101(16) of the Bankruptcy Code.

60. “*Estate*” means the bankruptcy estate of the Debtor created by virtue of section 541 of the Bankruptcy Code upon the commencement of the Chapter 11 Case.

61. “*Estate Claims*” has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [D.I. 354].

62. “*Exculpated Parties*” means, collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), NexBank, SSB (and any of its subsidiaries), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Exculpated Party.”

63. “*Executory Contract*” means a contract to which the Debtor is a party that is subject to assumption or rejection under sections 365 or 1123 of the Bankruptcy Code.

64. “*Exhibit*” means an exhibit annexed hereto or to the Disclosure Statement (as such exhibits are amended, modified or otherwise supplemented from time to time), which are incorporated by reference herein.

65. “*Federal Judgment Rate*” means the post-judgment interest rate set forth in 28 U.S.C. § 1961 as of the Effective Date.

66. “*File*” or “*Filed*” or “*Filing*” means file, filed or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Case.

67. “*Final Order*” means an order or judgment of the Bankruptcy Court, which is in full force and effect, and as to which the time to appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing has expired and as to which no appeal, petition for *certiorari*, or other proceedings for a new trial, reargument or rehearing shall then be pending or as to which any right to appeal, petition for *certiorari*, new trial, reargument, or rehearing shall have been waived in writing in form and substance satisfactory to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, or, in the event that an appeal, writ of *certiorari*, new trial, reargument, or rehearing thereof has been sought, such order of the Bankruptcy Court shall have been determined by the highest court to which such order was appealed, or *certiorari*, new trial, reargument or rehearing shall have been denied and the time to take any further appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing shall have expired; *provided, however*, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be Filed with respect to such order shall not preclude such order from being a Final Order.

68. “*Frontier Secured Claim*” means the loan from Frontier State Bank to the Debtor in the principal amount of \$7,879,688.00 made pursuant to that certain First Amended and Restated Loan Agreement, dated March 29, 2018.

69. “*General Partner Interest*” means the Class A Limited Partnership Interest held by Strand, as the Debtor’s general partner.

70. “*General Unsecured Claim*” means any prepetition Claim against the Debtor that is not Secured and is not a/an: (a) Administrative Expense Claim; (b) Professional Fee Claim; (c) Priority Tax Claim; (d) Priority Non-Tax Claim; or (e) Convenience Claim.

71. “*Governmental Unit*” means a “governmental unit” as defined in section 101(27) of the Bankruptcy Code.

72. “*GUC Election*” means the option provided to each Holder of a Convenience Claim on their Ballot to elect to receive the treatment provided to General Unsecured Claims.

73. “*Holder*” means an Entity holding a Claim against, or Equity Interest in, the Debtor.

74. “*Impaired*” means, when used in reference to a Claim or Equity Interest, a Claim or Equity Interest that is impaired within the meaning of section 1124 of the Bankruptcy Code.

75. “*Independent Directors*” means John S. Dubel, James P. Seery, Jr., and Russell Nelms, the independent directors of Strand appointed on January 9, 2020, and any additional or replacement directors of Strand appointed after January 9, 2020, but prior to the Effective Date.

76. “*Initial Distribution Date*” means, subject to the “Treatment” sections in ARTICLE III hereof, the date that is on or as soon as reasonably practicable after the Effective Date, when distributions under this Plan shall commence to Holders of Allowed Claims and Equity Interests.

77. “*Insurance Policies*” means all insurance policies maintained by the Debtor as of the Petition Date.

78. “*Jefferies Secured Claim*” means any Claim in favor of Jefferies, LLC, arising under that certain Prime Brokerage Customer Agreement, dated May 24, 2013, between the Debtor and Jefferies, LLC, that is secured by the assets, if any, maintained in the prime brokerage account created by such Prime Brokerage Customer Agreement.

79. “*Lien*” means a “lien” as defined in section 101(37) of the Bankruptcy Code and, with respect to any asset, includes, without limitation, any mortgage, lien, pledge, charge, security interest or other encumbrance of any kind, or any other type of preferential arrangement that has the practical effect of creating a security interest, in respect of such asset.

80. “*Limited Partnership Agreement*” means that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, as amended.

81. “*Litigation Sub-Trust*” means the sub-trust established within the Claimant Trust or as a wholly –owned subsidiary of the Claimant Trust on the Effective Date in each case in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement and Claimant Trust Agreement. As set forth in the Litigation Sub-Trust Agreement, the Litigation Sub-Trust shall hold the Claimant Trust Assets that are Estate Claims.

82. “*Litigation Sub-Trust Agreement*” means the agreement filed in the Plan Supplement establishing and delineating the terms and conditions of the Litigation Sub-Trust.

83. “*Litigation Trustee*” means the trustee appointed by the Committee and reasonably acceptable to the Debtor who shall be responsible for investigating, litigating, and settling the Estate Claims for the benefit of the Claimant Trust in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement.

84. “*Managed Funds*” means Highland Multi-Strategy Credit Fund, L.P., Highland Restoration Capital Partners, L.P., and any other investment vehicle managed by the Debtor pursuant to an Executory Contract assumed pursuant to this Plan.

85. “*New Frontier Note*” means that promissory note to be provided to the Allowed Holders of Class 2 Claims under this Plan and any other documents or security agreements securing the obligations thereunder.

86. “*New GP LLC*” means a limited liability company incorporated in the State of Delaware pursuant to the New GP LLC Documents to serve as the general partner of the Reorganized Debtor on the Effective Date.

87. “*New GP LLC Documents*” means the charter, operating agreement, and other formational documents of New GP LLC.

88. “*Ordinary Course Professionals Order*” means that certain *Order Pursuant to Sections 105(a), 327, 328, and 330 of the Bankruptcy Code Authorizing the Debtor to Retain, Employ, and Compensate Certain Professionals Utilized by the Debtor in the Ordinary Course* [D.I. 176].

89. “*Other Unsecured Claim*” means any Secured Claim other than the Jefferies Secured Claim and the Frontier Secured Claim.

90. “*Person*” means a “person” as defined in section 101(41) of the Bankruptcy Code and also includes any natural person, individual, corporation, company, general or limited partnership, limited liability company, unincorporated organization firm, trust, estate, business trust, association, joint stock company, joint venture, government, governmental agency, Governmental Unit or any subdivision thereof, the United States Trustee, or any other entity, whether acting in an individual, fiduciary or other capacity.

91. “*Petition Date*” means October 16, 2019.

92. “*Plan*” means this *Debtor’s Fifth Amended Chapter 11 Plan of Reorganization*, including the Exhibits and the Plan Documents and all supplements, appendices,

and schedules thereto, either in its present form or as the same may be altered, amended, modified or otherwise supplemented from time to time.

93. “*Plan Distribution*” means the payment or distribution of consideration to Holders of Allowed Claims and Allowed Equity Interests under this Plan.

94. “*Plan Documents*” means any of the documents, other than this Plan, but including, without limitation, the documents to be filed with the Plan Supplement, to be executed, delivered, assumed, or performed in connection with the occurrence of the Effective Date, and as may be modified consistent with the terms hereof with the consent of the Committee.

95. “*Plan Supplement*” means the ancillary documents necessary for the implementation and effectuation of the Plan, including, without limitation, (i) the form of Claimant Trust Agreement, (ii) the forms of New GP LLC Documents, (iii) the form of Reorganized Limited Partnership Agreement, (iv) the Sub-Servicer Agreement (if applicable), (v) the identity of the initial members of the Claimant Trust Oversight Committee, (vi) the form of Litigation Sub-Trust Agreement; (vii) the schedule of retained Causes of Action; (viii) the New Frontier Note, (ix) the schedule of Employees; (x) the form of Senior Employee Stipulation,; and (xi) the schedule of Executory Contracts and Unexpired Leases to be assumed pursuant to this Plan, which, in each case, will be in form and substance reasonably acceptable to the Debtor and the Committee.

96. “*Priority Non-Tax Claim*” means a Claim entitled to priority pursuant to section 507(a) of the Bankruptcy Code, including any Claims for paid time-off entitled to priority under section 507(a)(4) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

97. “*Pro Rata*” means the proportion that (a) the Allowed amount of a Claim or Equity Interest in a particular Class bears to (b) the aggregate Allowed amount of all Claims or Equity Interests in such Class.

98. “*Professional*” means (a) any Entity employed in the Chapter 11 Case pursuant to section 327, 328 363 or 1103 of the Bankruptcy Code or otherwise and (b) any Entity seeking compensation or reimbursement of expenses in connection with the Chapter 11 Case pursuant to sections 327, 328, 330, 331, 363, 503(b), 503(b)(4) and 1103 of the Bankruptcy Code.

99. “*Professional Fee Claim*” means a Claim under sections 328, 330(a), 331, 363, 503 or 1103 of the Bankruptcy Code, with respect to a particular Professional, for compensation for services rendered or reimbursement of costs, expenses or other charges incurred after the Petition Date and prior to and including the Effective Date.

100. “*Professional Fee Claims Bar Date*” means with respect to Professional Fee Claims, the Business Day which is sixty (60) days after the Effective Date or such other date as approved by order of the Bankruptcy Court.

101. “*Professional Fee Claims Objection Deadline*” means, with respect to any Professional Fee Claim, thirty (30) days after the timely Filing of the applicable request for payment of such Professional Fee Claim.

102. “*Professional Fee Reserve*” means the reserve established and funded by the Claimant Trustee pursuant this Plan to provide sufficient funds to satisfy in full unpaid Allowed Professional Fee Claims.

103. “*Proof of Claim*” means a written proof of Claim or Equity Interest Filed against the Debtor in the Chapter 11 Case.

104. “*Priority Tax Claim*” means any Claim of a Governmental Unit of the kind specified in section 507(a)(8) of the Bankruptcy Code.

105. “*Protected Parties*” means, collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the Claimant Trust Oversight Committee (in their official capacities), (xiii) New GP LLC, (xiv) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), NexBank, SSB (and any of its subsidiaries), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Protected Party.”

106. “*PTO Claims*” means any Claim for paid time off in favor of any Debtor employee in excess of the amount that would qualify as a Priority Non-Tax Claim under section 507(a)(4) of the Bankruptcy Code.

107. “*Reduced Employee Claims*” has the meaning set forth in ARTICLE IX.D.

108. “*Reinstated*” means, with respect to any Claim or Equity Interest, (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim or Equity Interest in accordance with section 1124 of the Bankruptcy Code or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim or Equity Interest to demand or receive accelerated payment of such Claim or Equity Interest after the occurrence of a default: (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code or of a kind that section 365(b)(2) of the Bankruptcy Code expressly does not require to be cured; (ii) reinstating the maturity of such Claim or Equity Interest as such maturity existed before such default; (iii) compensating the Holder of such Claim or Equity Interest for any

damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; (iv) if such Claim or Equity Interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to section 365(b)(1)(A) of the Bankruptcy Code, compensating the Holder of such Claim or Equity Interest (other than any Debtor or an insider of any Debtor) for any actual pecuniary loss incurred by such Holder as a result of such failure; and (v) not otherwise altering the legal, equitable, or contractual rights to which such Claim entitles the Holder of such Claim.

109. “*Rejection Claim*” means any Claim for monetary damages as a result of the rejection of an executory contract or unexpired lease pursuant to the Confirmation Order.

110. “*Related Entity*” means, without duplication, (a) Dondero, (b) Mark Okada (“Okada”), (c) Grant Scott (“Scott”), (d) Hunter Covitz (“Covitz”), (e) any entity or person that was an insider of the Debtor on or before the Petition Date under Section 101(31) of the Bankruptcy Code, including, without limitation, any entity or person that was a non-statutory insider, (f) any entity that, after the Effective Date, is an insider or Affiliate of one or more of Dondero, Okada, Scott, Covitz, or any of their respective insiders or Affiliates, including, without limitation, The Dugaboy Investment Trust, (g) the Hunter Mountain Investment Trust and any of its direct or indirect parents, (h) the Charitable Donor Advised Fund, L.P., and any of its direct or indirect subsidiaries, and (i) Affiliates of the Debtor and any other Entities listed on the Related Entity List.

111. “*Related Entity List*” means that list of Entities filed with the Plan Supplement.

112. “*Related Persons*” means, with respect to any Person, such Person’s predecessors, successors, assigns (whether by operation of law or otherwise), and each of their respective present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives, in each case solely in their capacity as such.

113. “*Released Parties*” means, collectively, (i) the Independent Directors; (ii) Strand (solely from the date of the appointment of the Independent Directors through the Effective Date); (iii) the CEO/CRO; (iv) the Committee; (v) the members of the Committee (in their official capacities), (vi) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case; and (vii) the Employees.

114. “*Reorganized Debtor*” means the Debtor, as reorganized pursuant to this Plan on and after the Effective Date.

115. “*Reorganized Debtor Assets*” means any limited and general partnership interests held by the Debtor, the management of the Managed Funds and those Causes of Action (including, without limitation, claims for breach of fiduciary duty), that, for any reason, are not capable of being transferred to the Claimant Trust. For the avoidance of doubt, “Reorganized

Debtor Assets” includes any partnership interests or shares of Managed Funds held by the Debtor but does not include the underlying portfolio assets held by the Managed Funds.

116. “*Reorganized Limited Partnership Agreement*” means that certain Fifth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., by and among the Claimant Trust, as limited partner, and New GP LLC, as general partner, Filed with the Plan Supplement.

117. “*Restructuring*” means the restructuring of the Debtor, the principal terms of which are set forth in this Plan and the Disclosure Statement.

118. “*Retained Employee Claim*” means any Claim filed by a current employee of the Debtor who will be employed by the Reorganized Debtor upon the Effective Date.

119. “*Schedules*” means the schedules of Assets and liabilities, statements of financial affairs, lists of Holders of Claims and Equity Interests and all amendments or supplements thereto Filed by the Debtor with the Bankruptcy Court [D.I. 247].

120. “*Secured*” means, when referring to a Claim: (a) secured by a Lien on property in which the Debtor’s Estate has an interest, which Lien is valid, perfected, and enforceable pursuant to applicable law or by reason of a Bankruptcy Court order, or that is subject to setoff pursuant to section 553 of the Bankruptcy Code, to the extent of the value of the creditor’s interest in the interest of the Debtor’s Estate in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code or (b) Allowed pursuant to the Plan as a Secured Claim.

121. “*Security*” or “*security*” means any security as such term is defined in section 101(49) of the Bankruptcy Code.

122. “*Senior Employees*” means the senior employees of the Debtor Filed in the Plan Supplement.

123. “*Senior Employee Stipulation*” means the agreements filed in the Plan Supplement between each Senior Employee and the Debtor.

124. “*Stamp or Similar Tax*” means any stamp tax, recording tax, personal property tax, conveyance fee, intangibles or similar tax, real estate transfer tax, sales tax, use tax, transaction privilege tax (including, without limitation, such taxes on prime contracting and owner-builder sales), privilege taxes (including, without limitation, privilege taxes on construction contracting with regard to speculative builders and owner builders), and other similar taxes imposed or assessed by any Governmental Unit.

125. “*Statutory Fees*” means fees payable pursuant to 28 U.S.C. § 1930.

126. “*Strand*” means Strand Advisors, Inc., the Debtor’s general partner.

127. “*Sub-Servicer*” means a third-party selected by the Claimant Trustee to service or sub-service the Reorganized Debtor Assets.

128. “*Sub-Servicer Agreement*” means the agreement that may be entered into providing for the servicing of the Reorganized Debtor Assets by the Sub-Servicer.

129. “*Subordinated Claim*” means any Claim that is subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or order entered by the Bankruptcy Court.

130. “*Subordinated Claimant Trust Interests*” means the Claimant Trust Interests to be distributed to Holders of Allowed Subordinated Claims under the Plan, which such interests shall be subordinated in right and priority to the Claimant Trust Interests distributed to Holders of Allowed General Unsecured Claims as provided in the Claimant Trust Agreement.

131. “*Trust Distribution*” means the transfer of Cash or other property by the Claimant Trustee to the Claimant Trust Beneficiaries.

132. “*Trustees*” means, collectively, the Claimant Trustee and Litigation Trustee.

133. “*UBS*” means, collectively, UBS Securities LLC and UBS AG London Branch.

134. “*Unexpired Lease*” means a lease to which the Debtor is a party that is subject to assumption or rejection under section 365 of the Bankruptcy Code.

135. “*Unimpaired*” means, with respect to a Class of Claims or Equity Interests that is not impaired within the meaning of section 1124 of the Bankruptcy Code.

136. “*Voting Deadline*” means the date and time by which all Ballots to accept or reject the Plan must be received in order to be counted under the Order of the Bankruptcy Court approving the Disclosure Statement as containing adequate information pursuant to section 1125(a) of the Bankruptcy Code and authorizing the Debtor to solicit acceptances of the Plan.

137. “*Voting Record Date*” means November 23, 2020.

ARTICLE II.

ADMINISTRATIVE EXPENSES AND PRIORITY TAX CLAIMS

A. Administrative Expense Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized

Debtor, as applicable, and such Holder; *provided, however*, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

If an Administrative Expense Claim (other than a Professional Fee Claim) is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must File, on or before the applicable Administrative Expense Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for allowance and payment of such Administrative Expense Claim.

Objections to any Administrative Expense Claim (other than a Professional Fee Claim) must be Filed and served on the Debtor or the Reorganized Debtor, as applicable, and the party asserting such Administrative Expense Claim by the Administrative Expense Claims Objection Deadline.

B. Professional Fee Claims

Professionals or other Entities asserting a Professional Fee Claim for services rendered through the Effective Date must submit fee applications under sections 327, 328, 329,330, 331, 503(b) or 1103 of the Bankruptcy Code and, upon entry of an order of the Bankruptcy Court granting such fee applications, such Professional Fee Claim shall promptly be paid in Cash in full to the extent provided in such order.

Professionals or other Entities asserting a Professional Fee Claim for services rendered on or prior to the Effective Date must File, on or before the Professional Fee Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated as requiring such notice by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for final allowance of such Professional Fee Claim.

Objections to any Professional Fee Claim must be Filed and served on the Debtor or Reorganized Debtor, as applicable, and the party asserting the Professional Fee Claim by the Professional Fee Claim Objection Deadline. Each Holder of an Allowed Professional Fee Claim will be paid by the Debtor or the Claimant Trust, as applicable, in Cash within ten (10) Business Days of entry of the order approving such Allowed Professional Fee Claim.

On the Effective Date, the Claimant Trustee shall establish the Professional Fee Reserve. The Professional Fee Reserve shall vest in the Claimant Trust and shall be maintained by the Claimant Trustee in accordance with the Plan and Claimant Trust Agreement. The Claimant Trust shall fund the Professional Fee Reserve on the Effective Date in an estimated amount determined by the Debtor in good faith prior to the Confirmation Date and that approximates the total projected amount of unpaid Professional Fee Claims on the Effective Date. Following the payment of all Allowed Professional Fee Claims, any excess funds in the Professional Fee

Reserve shall be released to the Claimant Trust to be used for other purposes consistent with the Plan and the Claimant Trust Agreement.

C. Priority Tax Claims

On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Priority Tax Claim is an Allowed Priority Tax Claim as of the Effective Date or (ii) the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, each Holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Priority Tax Claim, at the election of the Debtor: (a) Cash in an amount equal to the amount of such Allowed Priority Tax Claim, (b) payment of such Allowed Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code; or (c) such other less favorable treatment as agreed to in writing by the Debtor and such Holder. Payment of statutory fees due pursuant to 28 U.S.C. § 1930(a)(6) will be made at all appropriate times until the entry of a final decree; *provided, however*, that the Debtor may prepay any or all such Claims at any time, without premium or penalty.

**ARTICLE III.
CLASSIFICATION AND TREATMENT OF
CLASSIFIED CLAIMS AND EQUITY INTERESTS**

A. Summary

All Claims and Equity Interests, except Administrative Expense Claims and Priority Tax Claims, are classified in the Classes set forth below. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims, and Priority Tax Claims have not been classified.

The categories of Claims and Equity Interests listed below classify Claims and Equity Interests for all purposes including, without limitation, confirmation and distribution pursuant to the Plan and pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan deems a Claim or Equity Interest to be classified in a particular Class only to the extent that the Claim or Equity Interest qualifies within the description of that Class and will be deemed classified in a different Class to the extent that any remainder of such Claim or Equity Interest qualifies within the description of such different Class. A Claim or Equity Interest is in a particular Class only to the extent that any such Claim or Equity Interest is Allowed in that Class and has not been paid, released or otherwise settled (in each case, by the Debtor or any other Entity) prior to the Effective Date.

B. Summary of Classification and Treatment of Classified Claims and Equity Interests

Class	Claim	Status	Voting Rights
1	Jefferies Secured Claim	Unimpaired	Deemed to Accept
2	Frontier Secured Claim	Impaired	Entitled to Vote
3	Other Secured Claims	Unimpaired	Deemed to Accept
4	Priority Non-Tax Claim	Unimpaired	Deemed to Accept
5	Retained Employee Claim	Unimpaired	Deemed to Accept
6	PTO Claims	Unimpaired	Deemed to Accept
7	Convenience Claims	Impaired	Entitled to Vote
8	General Unsecured Claims	Impaired	Entitled to Vote
9	Subordinated Claims	Impaired	Entitled to Vote
10	Class B/C Limited Partnership Interests	Impaired	Entitled to Vote
11	Class A Limited Partnership Interests	Impaired	Entitled to Vote

C. Elimination of Vacant Classes

Any Class that, as of the commencement of the Confirmation Hearing, does not have at least one Holder of a Claim or Equity Interest that is Allowed in an amount greater than zero for voting purposes shall be considered vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class.

D. Impaired/Voting Classes

Claims and Equity Interests in Class 2 and Class 7 through Class 11 are Impaired by the Plan, and only the Holders of Claims or Equity Interests in those Classes are entitled to vote to accept or reject the Plan.

E. Unimpaired/Non-Voting Classes

Claims in Class 1 and Class 3 through Class 6 are Unimpaired by the Plan, and such Holders are deemed to have accepted the Plan and are therefore not entitled to vote on the Plan.

F. Impaired/Non-Voting Classes

There are no Classes under the Plan that will not receive or retain any property and no Classes are deemed to reject the Plan.

G. Cramdown

If any Class of Claims or Equity Interests is deemed to reject this Plan or does not vote to accept this Plan, the Debtor may (i) seek confirmation of this Plan under section 1129(b) of the Bankruptcy Code or (ii) amend or modify this Plan in accordance with the terms hereof and the

Bankruptcy Code. If a controversy arises as to whether any Claims or Equity Interests, or any class of Claims or Equity Interests, are Impaired, the Bankruptcy Court shall, after notice and a hearing, determine such controversy on or before the Confirmation Date.

H. Classification and Treatment of Claims and Equity Interests

1. Class 1 – Jefferies Secured Claim

- *Classification:* Class 1 consists of the Jefferies Secured Claim.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 1 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 1 Claim, at the election of the Debtor: (A) Cash equal to the amount of such Allowed Class 1 Claim; (B) such other less favorable treatment as to which the Debtor and the Holder of such Allowed Class 1 Claim will have agreed upon in writing; or (C) such other treatment rendering such Claim Unimpaired. Each Holder of an Allowed Class 1 Claim will retain the Liens securing its Allowed Class 1 Claim as of the Effective Date until full and final payment of such Allowed Class 1 Claim is made as provided herein.
- *Impairment and Voting:* Class 1 is Unimpaired, and the Holders of Class 1 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 1 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

2. Class 2 – Frontier Secured Claim

- *Classification:* Class 2 consists of the Frontier Secured Claim.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 2 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 2 Claim: (A) Cash in an amount equal to all accrued but unpaid interest on the Frontier Claim through and including the Effective Date and (B) the New Frontier Note. The Holder of an Allowed Class 2 Claim will retain the Liens securing its Allowed Class 2 Claim as of the Effective Date until full and final payment of such Allowed Class 2 Claim is made as provided herein.
- *Impairment and Voting:* Class 2 is Impaired, and the Holders of Class 2 Claims are entitled to vote to accept or reject this Plan.

3. Class 3 – Other Secured Claims

- *Classification:* Class 3 consists of the Other Secured Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 3 Claim is Allowed on the Effective Date or (ii) the date on which such Class 3 Claim becomes an Allowed Class 3 Claim, each Holder of an Allowed Class 3 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 3 Claim, at the option of the Debtor, or following the Effective Date, the Reorganized Debtor or Claimant Trustee, as applicable, (i) Cash equal to such Allowed Other Secured Claim, (ii) the collateral securing its Allowed Other Secured Claim, plus postpetition interest to the extent required under Bankruptcy Code Section 506(b), or (iii) such other treatment rendering such Claim Unimpaired.
- *Impairment and Voting:* Class 3 is Unimpaired, and the Holders of Class 3 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 3 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

4. Class 4 – Priority Non-Tax Claims

- *Classification:* Class 4 consists of the Priority Non-Tax Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 4 Claim is Allowed on the Effective Date or (ii) the date on which such Class 4 Claim becomes an Allowed Class 4 Claim, each Holder of an Allowed Class 4 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 4 Claim Cash equal to the amount of such Allowed Class 4 Claim.
- *Impairment and Voting:* Class 4 is Unimpaired, and the Holders of Class 4 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 4 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

5. Class 5 – Retained Employee Claims

- *Classification:* Class 5 consists of the Retained Employee Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the Effective Date, each Allowed Class 5 Claim will be Reinstated.

- *Impairment and Voting:* Class 5 is Unimpaired, and the Holders of Class 5 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 5 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

6. Class 6 – PTO Claims

- *Classification:* Class 6 consists of the PTO Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 6 Claim is Allowed on the Effective Date or (ii) the date on which such Class 6 Claim becomes an Allowed Class 6 Claim, each Holder of an Allowed Class 6 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 6 Claim Cash equal to the amount of such Allowed Class 6 Claim.
- *Impairment and Voting:* Class 6 is Unimpaired, and the Holders of Class 6 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 6 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

7. Class 7 – Convenience Claims

- *Classification:* Class 7 consists of the Convenience Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 7 Claim is Allowed on the Effective Date or (ii) the date on which such Class 7 Claim becomes an Allowed Class 7 Claim, each Holder of an Allowed Class 7 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Class 7 Claim (1) the treatment provided to Allowed Holders of Class 8 General Unsecured Claims if the Holder of such Class 7 Claim makes the GUC Election or (2) an amount in Cash equal to the lesser of (a) 85% of the Allowed amount of such Holder's Class 7 Claim or (b) such Holder's Pro Rata share of the Convenience Claims Cash Pool.
- *Impairment and Voting:* Class 7 is Impaired, and the Holders of Class 7 Claims are entitled to vote to accept or reject this Plan.

8. Class 8 – General Unsecured Claims

- *Classification:* Class 8 consists of the General Unsecured Claims.

- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 8 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Claimant Trust Interests, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing, or (iii) the treatment provided to Allowed Holders of Class 7 Convenience Claims if the Holder of such Class 8 General Unsecured Claim is eligible and makes a valid Convenience Class Election.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any General Unsecured Claim, except with respect to any General Unsecured Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 8 is Impaired, and the Holders of Class 8 Claims are entitled to vote to accept or reject this Plan.

9. Class 9 – Subordinated Claims

- *Classification:* Class 9 consists of the Subordinated Claims.

Treatment: On the Effective Date, Holders of Subordinated Claims shall receive either (i) their Pro Rata share of the Subordinated Claimant Trust Interests or, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee may agree upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Subordinated Claim, except with respect to any Subordinated Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 9 is Impaired, and the Holders of Class 9 Claims are entitled to vote to accept or reject this Plan.

10. Class 10 – Class B/C Limited Partnership Interests

- *Classification:* Class 10 consists of the Class B/C Limited Partnership Interests.

- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 10 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Class B/C Limited Partnership Interest Claim, except with respect to any Class B/C Limited Partnership Interest Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 10 is Impaired, and the Holders of Class 10 Claims are entitled to vote to accept or reject this Plan.

11. Class 11 – Class A Limited Partnership Interests

- *Classification:* Class 11 consists of the Class A Limited Partnership Interests.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 11 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Class A Limited Partnership Interest, except with respect to any Class A Limited Partnership Interest Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 11 is Impaired, and the Holders of Class 11 Claims are entitled to vote to accept or reject this Plan.

I. Special Provision Governing Unimpaired Claims

Except as otherwise provided in the Plan, nothing under the Plan will affect the Debtor's rights in respect of any Unimpaired Claims, including, without limitation, all rights in respect of legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claims.

J. Subordinated Claims

The allowance, classification, and treatment of all Claims under the Plan shall take into account and conform to the contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. Under section 510 of the Bankruptcy Code, upon written notice and hearing, the Debtor the Reorganized Debtor, and the Claimant Trustee reserve the right to seek entry of an order by the Bankruptcy Court to re-classify or to subordinate any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan that becomes a subordinated Claim at any time shall be modified to reflect such subordination.

ARTICLE IV.
MEANS FOR IMPLEMENTATION OF THIS PLAN

A. Summary

As discussed in the Disclosure Statement, the Plan will be implemented through (i) the Claimant Trust, (ii) the Litigation Sub-Trust, and (iii) the Reorganized Debtor.

On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust. The Claimant Trust, as limited partner, will ratify New GP LLC’s appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor’s limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor’s current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to this Plan and the Claimant Trust Agreement, and the Litigation Trustee will pursue, if applicable, the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan. The Reorganized Debtor will administer the Reorganized Debtor Assets and, if needed, with the utilization of a Sub-Servicer, which administration will include, among other things, managing the wind down of the Managed Funds.

Although the Reorganized Debtor will manage the wind down of the Managed Funds, it is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be

cost effective.

The Reorganized Debtor will distribute all proceeds from the wind down to the Claimant Trust, as its limited partner, and New GP LLC, as its general partner, in each case in accordance with the Reorganized Limited Partnership Agreement. Such proceeds, along with the proceeds of the Claimant Trust Assets, will ultimately be distributed to the Claimant Trust Beneficiaries as set forth in this Plan and the Claimant Trust Agreement.

B. The Claimant Trust²

1. Creation and Governance of the Claimant Trust and Litigation Sub-Trust.

On or prior to the Effective Date, the Debtor and the Claimant Trustee shall execute the Claimant Trust Agreement and shall take all steps necessary to establish the Claimant Trust and the Litigation Sub-Trust in accordance with the Plan in each case for the benefit of the Claimant Trust Beneficiaries. Additionally, on or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax.

The Claimant Trustee shall be the exclusive trustee of the Claimant Trust Assets, excluding the Estate Claims and the Litigation Trustee shall be the exclusive trustee with respect to the Estate Claims in each case for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Claimant Trust Assets. The Claimant Trustee shall also be responsible for resolving all Claims and Equity Interests in Class 8 through Class 11, under the supervision of the Claimant Trust Oversight Committee.

On the Effective Date, the Claimant Trustee and Litigation Trustee shall execute the Litigation Sub-Trust Agreement and shall take all steps necessary to establish the Litigation Sub-Trust. Upon the creation of the Litigation Sub-Trust, the Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate Claims. The Claimant Trust shall be governed by the Claimant Trust Agreement and administered by the Claimant Trustee. The powers, rights, and responsibilities of the Claimant Trustee shall be specified in the Claimant Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting to the Claimant Trust Oversight Committee as may be set forth in the Claimant Trust Agreement. The Claimant Trust shall hold and distribute the Claimant Trust Assets (including the proceeds from the Estate Claims, if any) in accordance with the provisions of the Plan and the Claimant Trust Agreement; *provided* that the Claimant Trust Oversight Committee may direct the Claimant Trust to reserve

² In the event of a conflict between the terms of this summary and the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, the terms of the Claimant Trust Agreement or the Litigation Sub-Trust Agreement, as applicable, shall control.

Cash from distributions as necessary to fund the Claimant Trust and Litigation Sub-Trust. Other rights and duties of the Claimant Trustee and the Claimant Trust Beneficiaries shall be as set forth in the Claimant Trust Agreement. After the Effective Date, neither the Debtor nor the Reorganized Debtor shall have any interest in the Claimant Trust Assets.

The Litigation Sub-Trust shall be governed by the Litigation Sub-Trust Agreement and administered by the Litigation Trustee. The powers, rights, and responsibilities of the Litigation Trustee shall be specified in the Litigation Sub-Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting as may be set forth in the Litigation Sub-Trust Agreement. The Litigation Sub-Trust shall investigate, prosecute, settle, or otherwise resolve the Estate Claims in accordance with the provisions of the Plan and the Litigation Sub-Trust Agreement and shall distribute the proceeds therefrom to the Claimant Trust for distribution. Other rights and duties of the Litigation Trustee shall be as set forth in the Litigation Sub-Trust Agreement.

2. Claimant Trust Oversight Committee

The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will be overseen by the Claimant Trust Oversight Committee, subject to the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as applicable.

The Claimant Trust Oversight Committee will initially consist of five members. Four of the five members will be representatives of the members of the Committee: (i) the Redeemer Committee of Highland Crusader Fund, (ii) UBS, (iii) Acis, and (iv) Meta-e Discovery. The fifth member will be an independent, natural Person chosen by the Committee and reasonably acceptable to the Debtor. The members of the Claimant Trust Oversight Committee may be replaced as set forth in the Claimant Trust Agreement. The identity of the members of the Claimant Trust Oversight Committee will be disclosed in the Plan Supplement.

As set forth in the Claimant Trust Agreement, in no event will any member of the Claimant Trust Oversight Committee with a Claim against the Estate be entitled to vote, opine, or otherwise be involved in any matters related to such member's Claim.

The independent member(s) of the Claimant Trust Oversight Committee may be entitled to compensation for their services as set forth in the Claimant Trust Agreement. Any member of the Claimant Trust Oversight Committee may be removed, and successor chosen, in the manner set forth in the Claimant Trust Agreement.

3. Purpose of the Claimant Trust.

The Claimant Trust shall be established for the purpose of (i) managing and monetizing the Claimant Trust Assets, subject to the terms of the Claimant Trust Agreement and the oversight of the Claimant Trust Oversight Committee, (ii) serving as the limited partner of, and holding the limited partnership interests in, the Reorganized Debtor, (iii) serving as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner, (iv) in its capacity as the sole member and manager of New GP LLC, overseeing the management and

monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement; and (v) administering the Disputed Claims Reserve and serving as Distribution Agent with respect to Disputed Claims in Class 7 or Class 8.

In its management of the Claimant Trust Assets, the Claimant Trust will also reconcile and object to the General Unsecured Claims, Subordinated Claims, Class B/C Limited Partnership Interests, and Class A Limited Partnership Interests, as provided for in this Plan and the Claimant Trust Agreement, and make Trust Distributions to the Claimant Trust Beneficiaries in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business.

The purpose of the Reorganized Debtor is discussed at greater length in ARTICLE IV.C.

4. Purpose of the Litigation Sub-Trust.

The Litigation Sub-Trust shall be established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims. Any proceeds therefrom shall be distributed by the Litigation Sub-Trust to the Claimant Trust for distribution to the Claimant Trust Beneficiaries pursuant to the terms of the Claimant Trust Agreement.

5. Claimant Trust Agreement and Litigation Sub-Trust Agreement.

The Claimant Trust Agreement generally will provide for, among other things:

- (i) the payment of the Claimant Trust Expenses;
- (ii) the payment of other reasonable expenses of the Claimant Trust;
- (iii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation;
- (iv) the investment of Cash by the Claimant Trustee within certain limitations, including those specified in the Plan;
- (v) the orderly monetization of the Claimant Trust Assets;
- (vi) litigation of any Causes of Action, which may include the prosecution, settlement, abandonment, or dismissal of any such Causes of Action, subject to reporting and oversight by the Claimant Trust Oversight Committee;
- (vii) the resolution of Claims and Equity Interests in Class 8 through Class 11, subject to reporting and oversight by the Claimant Trust Oversight Committee;
- (viii) the administration of the Disputed Claims Reserve and distributions to be made therefrom; and
- (ix) the management of the Reorganized Debtor, including the utilization of a Sub-Servicer, with the Claimant Trust serving as the managing member of New GP LLC.

Except as otherwise ordered by the Bankruptcy Court, the Claimant Trust Expenses shall be paid from the Claimant Trust Assets in accordance with the Plan and Claimant Trust Agreement. The Claimant Trustee may establish a reserve for the payment of Claimant Trust Expense (including, without limitation, any reserve for potential indemnification claims as authorized and provided under the Claimant Trust Agreement), and shall periodically replenish such reserve, as necessary.

In furtherance of, and consistent with the purpose of, the Claimant Trust and the Plan, the Trustees, for the benefit of the Claimant Trust, shall, subject to reporting and oversight by the Claimant Trust Oversight Committee as set forth in the Claimant Trust Agreement: (i) hold the Claimant Trust Assets for the benefit of the Claimant Trust Beneficiaries, (ii) make Distributions to the Claimant Trust Beneficiaries as provided herein and in the Claimant Trust Agreement, and (iii) have the sole power and authority to prosecute and resolve any Causes of Action and objections to Claims and Equity Interests (other than those assigned to the Litigation Sub-Trust), without approval of the Bankruptcy Court. Except as otherwise provided in the Claimant Trust Agreement, the Claimant Trustee shall be responsible for all decisions and duties with respect to the Claimant Trust and the Claimant Trust Assets; *provided, however*, that the prosecution and resolution of any Estate Claims included in the Claimant Trust Assets shall be the responsibility of the Litigation Trustee. The Litigation Sub-Trust Agreement generally will provide for, among other things:

- (i) the payment of other reasonable expenses of the Litigation Sub-Trust;
- (ii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and
- (iii) the investigation and prosecution of Estate Claims, which may include the prosecution, settlement, abandonment, or dismissal of any such Estate Claims, subject to reporting and oversight as set forth in the Litigation Sub-Trust Agreement.

The Trustees, on behalf of the Claimant Trust and Litigation Sub-Trust, as applicable, may each employ, without further order of the Bankruptcy Court, employees and other professionals (including those previously retained by the Debtor and the Committee) to assist in carrying out the Trustees' duties hereunder and may compensate and reimburse the reasonable expenses of these professionals without further Order of the Bankruptcy Court from the Claimant Trust Assets in accordance with the Plan and the Claimant Trust Agreement.

The Claimant Trust Agreement and Litigation Sub-Trust Agreement may include reasonable and customary provisions that allow for indemnification by the Claimant Trust in favor of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee. Any such indemnification shall be the sole responsibility of the Claimant Trust and payable solely from the Claimant Trust Assets.

6. Compensation and Duties of Trustees.

The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement and the Litigation Sub-Trust

Agreement, as appropriate. The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

7. Cooperation of Debtor and Reorganized Debtor.

To effectively investigate, prosecute, compromise and/or settle the Claims and/or Causes of Action that constitute Claimant Trust Assets (including Estate Claims), the Claimant Trustee, Litigation Trustee, and each of their professionals may require reasonable access to the Debtor's and Reorganized Debtor's documents, information, and work product relating to the Claimant Trust Assets. Accordingly, the Debtor and the Reorganized Debtor, as applicable, shall reasonably cooperate with the Claimant Trustee and Litigation Trustee, as applicable, in their prosecution of Causes of Action and in providing the Claimant Trustee and Litigation Trustee with copies of documents and information in the Debtor's possession, custody, or control on the Effective Date that either Trustee indicates relates to the Estate Claims or other Causes of Action.

The Debtor and Reorganized Debtor shall preserve all records, documents or work product (including all electronic records, documents, or work product) related to the Claims and Causes of Action, including Estate Claims, until the earlier of (a) the dissolution of the Reorganized Debtor or (b) termination of the Claimant Trust and Litigation Sub-Trust.

8. United States Federal Income Tax Treatment of the Claimant Trust.

Unless the IRS requires otherwise, for all United States federal income tax purposes, the parties shall treat the transfer of the Claimant Trust Assets to the Claimant Trust as: (a) a transfer of the Claimant Trust Assets (other than the amounts set aside in the Disputed Claims Reserve, if the Claimant Trustee makes the election described in Section 7 below) directly to the applicable Claimant Trust Beneficiaries followed by (b) the transfer by the such Claimant Trust Beneficiaries to the Claimant Trust of such Claimant Trust Assets in exchange for the Claimant Trust Interests. Accordingly, the applicable Claimant Trust Beneficiaries shall be treated for United States federal income tax purposes as the grantors and owners of their respective share of the Claimant Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes.

9. Tax Reporting.

(a) The Claimant Trustee shall file tax returns for the Claimant Trust treating the Claimant Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claims Reserve as a separate taxable entity.

(b) The Claimant Trustee shall be responsible for payment, out of the Claimant Trust Assets, of any taxes imposed on the Claimant Trust or its assets.

(c) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Claimant Trust Beneficiaries of such valuation, and such valuation shall be used consistently for all federal income tax purposes.

(d) The Claimant Trustee shall distribute such tax information to the applicable Claimant Trust Beneficiaries as the Claimant Trustee determines is required by applicable law.

10. Claimant Trust Assets.

The Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Causes of Action included in the Claimant Trust Assets (except for the Estate Claims) without any further order of the Bankruptcy Court, and the Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to sell, liquidate, or otherwise monetize all Claimant Trust Assets, except as otherwise provided in this Plan or in the Claimant Trust Agreement, without any further order of the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Litigation Trustee shall have the exclusive right to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Estate Claims included in the Claimant Trust Assets without any further order of the Bankruptcy Court.

From and after the Effective Date, the Trustees, in accordance with section 1123(b)(3) and (4) of the Bankruptcy Code, and on behalf of the Claimant Trust, shall each serve as a representative of the Estate with respect to any and all Claimant Trust Assets, including the Causes of Action and Estate Claims, as appropriate, and shall retain and possess the right to (a) commence, pursue, settle, compromise, or abandon, as appropriate, any and all Causes of Action in any court or other tribunal and (b) sell, liquidate, or otherwise monetize all Claimant Trust Assets.

11. Claimant Trust Expenses.

From and after the Effective Date, the Claimant Trust shall, in the ordinary course of business and without the necessity of any approval by the Bankruptcy Court, pay the reasonable professional fees and expenses incurred by the Claimant Trust, the Litigation Sub-Trust, and any professionals retained by such parties and entities from the Claimant Trust Assets, except as otherwise provided in the Claimant Trust Agreement.

12. Trust Distributions to Claimant Trust Beneficiaries.

The Claimant Trustee, in its discretion, may make Trust Distributions to the Claimant Trust Beneficiaries at any time and/or use the Claimant Trust Assets or proceeds thereof, *provided* that such Trust Distributions or use is otherwise permitted under the terms of the Plan, the Claimant Trust Agreement, and applicable law.

13. Cash Investments.

With the consent of the Claimant Trust Oversight Committee, the Claimant Trustee may invest Cash (including any earnings thereon or proceeds therefrom) in a manner consistent with the terms of the Claimant Trust Agreement; *provided, however*, that such investments are

investments permitted to be made by a “liquidating trust” within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings or other controlling authorities.

14. Dissolution of the Claimant Trust and Litigation Sub-Trust.

The Trustees and the Claimant Trust and Litigation Sub-Trust shall be discharged or dissolved, as the case may be, at such time as: (a) the Litigation Trustee determines that the pursuit of Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate Claims, (b) the Claimant Trustee determines that the pursuit of Causes of Action (other than Estate Claims) is not likely to yield sufficient additional proceeds to justify further pursuit of such Causes of Action, (c) the Claimant Trustee determines that the pursuit of sales of other Claimant Trust Assets is not likely to yield sufficient additional proceeds to justify further pursuit of such sales of Claimant Trust Assets, (d) all objections to Disputed Claims and Equity Interests are fully resolved, (e) the Reorganized Debtor is dissolved, and (f) all Distributions required to be made by the Claimant Trustee to the Claimant Trust Beneficiaries under the Plan have been made, but in no event shall the Claimant Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions, without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes) is necessary to facilitate or complete the recovery on, and liquidation of, the Claimant Trust Assets; *provided, however*, that each extension must be approved, upon a finding that the extension is necessary to facilitate or complete the recovery on, and liquidation of the Claimant Trust Assets, by the Bankruptcy Court within 6 months of the beginning of the extended term and no extension, together with any prior extensions, shall exceed three years without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes.

Upon dissolution of the Claimant Trust, and pursuant to the Claimant Trust Agreement, any remaining Claimant Trust Assets that exceed the amounts required to be paid under the Plan will be transferred (in the sole discretion of the Claimant Trustee) in Cash or in-kind to the Holders of the Claimant Trust Interests as provided in the Claimant Trust Agreement.

C. The Reorganized Debtor

1. Corporate Existence

The Debtor will continue to exist after the Effective Date, with all of the powers of partnerships pursuant to the law of the State of Delaware and as set forth in the Reorganized Limited Partnership Agreement.

2. Cancellation of Equity Interests and Release

On the Effective Date, (i) all prepetition Equity Interests, including the Class A Limited Partnership Interests and the Class B/C Limited Partnership Interests, in the Debtor shall be canceled, and (ii) all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, the Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement.

3. Issuance of New Partnership Interests

On the Effective Date, the Debtor or the Reorganized Debtor, as applicable, will issue new Class A Limited Partnership Interests to (i) the Claimant Trust, as limited partner, and (ii) New GP LLC, as general partner, and will admit (a) the Claimant Trust as the limited partner of the Reorganized Debtor, and (b) New GP LLC as the general partner of the Reorganized Debtor. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor. Also, on the Effective Date, the Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement and receive partnership interests in the Reorganized Debtor consistent with the terms of the Reorganized Limited Partnership Agreement.

The Reorganized Limited Partnership Agreement does not provide for, and specifically disclaims, the indemnification obligations under the Limited Partnership Agreement, including any such indemnification obligations that accrued or arose or could have been brought prior to the Effective Date. Any indemnification Claims under the Limited Partnership Agreement that accrued, arose, or could have been filed prior to the Effective Date will be resolved through the Claims resolution process provided that a Claim is properly filed in accordance with the Bankruptcy Code, the Plan, or the Bar Date Order. Each of the Debtor, the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust reserve all rights with respect to any such indemnification Claims.

4. Management of the Reorganized Debtor

Subject to and consistent with the terms of the Reorganized Limited Partnership Agreement, the Reorganized Debtor shall be managed by its general partner, New GP LLC. The initial officers and employees of the Reorganized Debtor shall be selected by the Claimant Trustee. The Reorganized Debtor may, in its discretion, also utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees.

As set forth in the Reorganized Limited Partnership Agreement, New GP LLC will receive a fee for managing the Reorganized Debtor. Although New GP LLC will be a limited liability company, it will elect to be treated as a C-Corporation for tax purposes. Therefore, New GP LLC (and any taxable income attributable to it) will be subject to corporate income taxation on a standalone basis, which may reduce the return to Claimants.

5. Vesting of Assets in the Reorganized Debtor

Except as otherwise provided in this Plan or the Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.

The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

6. Purpose of the Reorganized Debtor

Except as may be otherwise provided in this Plan or the Confirmation Order, the Reorganized Debtor will continue to manage the Reorganized Debtor Assets (which shall include, for the avoidance of doubt, serving as the investment manager of the Managed Funds) and may use, acquire or dispose of the Reorganized Debtor Assets and compromise or settle any Claims with respect to the Reorganized Debtor Assets without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules. The Reorganized Debtor shall oversee the resolution of Claims in Class 1 through Class 7.

Without limiting the foregoing, the Reorganized Debtor will pay the charges that it incurs after the Effective Date for Professionals' fees, disbursements, expenses or related support services (including reasonable fees relating to the preparation of Professional fee applications) in the ordinary course of business and without application or notice to, or order of, the Bankruptcy Court.

7. Distribution of Proceeds from the Reorganized Debtor Assets; Transfer of Reorganized Debtor Assets

Any proceeds received by the Reorganized Debtor will be distributed to the Claimant Trust, as limited partner, and New GP LLC, as general partner, in the manner set forth in the Reorganized Limited Partnership Agreement. As set forth in the Reorganized Limited Partnership Agreement, the Reorganized Debtor may, from time to time distribute Reorganized Debtor Assets to the Claimant Trust either in Cash or in-kind, including to institute the wind-down and dissolution of the Reorganized Debtor. Any assets distributed to the Claimant Trust will be (i) deemed transferred in all respects as forth in ARTICLE IV.B.1, (ii) deemed Claimant Trust Assets, and (iii) administered as Claimant Trust Assets.

D. Company Action

Each of the Debtor, the Reorganized Debtor, and the Trustees, as applicable, may take any and all actions to execute, deliver, File or record such contracts, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and implement the provisions of this Plan, the Claimant Trust Agreement, the Reorganized Limited Partnership Agreement, or the New GP LLC Documents, as applicable, in

the name of and on behalf of the Debtor, the Reorganized Debtor, or the Trustees, as applicable, and in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, officers, or directors of the Debtor or the Reorganized Debtor, as applicable, or by any other Person.

Prior to, on or after the Effective Date (as appropriate), all matters provided for pursuant to this Plan that would otherwise require approval of the stockholders, partners, directors, managers, or members of the Debtor, any Related Entity, or any Affiliate thereof (as of prior to the Effective Date) will be deemed to have been so approved and will be in effect prior to, on or after the Effective Date (as appropriate) pursuant to applicable law and without any requirement of further action by the stockholders, partners, directors, managers or members of such Persons, or the need for any approvals, authorizations, actions or consents of any Person.

All matters provided for in this Plan involving the legal or corporate structure of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, and any legal or corporate action required by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, in connection with this Plan, will be deemed to have occurred and will be in full force and effect in all respects, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, partners, directors, managers, or members of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, or by any other Person. On the Effective Date, the appropriate officers of the Debtor and the Reorganized Debtor, as applicable, as well as the Trustees, are authorized to issue, execute, deliver, and consummate the transactions contemplated by, the contracts, agreements, documents, guarantees, pledges, consents, securities, certificates, resolutions and instruments contemplated by or described in this Plan in the name of and on behalf of the Debtor and the Reorganized Debtor, as well as the Trustees, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. The appropriate officer of the Debtor, the Reorganized Debtor, as well as the Trustees, will be authorized to certify or attest to any of the foregoing actions.

E. Release of Liens, Claims and Equity Interests

Except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, from and after the Effective Date and concurrently with the applicable distributions made pursuant to the Plan, all Liens, Claims, Equity Interests, mortgages, deeds of trust, or other security interests against the property of the Estate will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity. Any Entity holding such Liens or Equity Interests extinguished pursuant to the prior sentence will, pursuant to section 1142 of the Bankruptcy Code, promptly execute and deliver to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, such instruments of termination, release, satisfaction and/or assignment (in recordable form) as may be reasonably requested by the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable. For the avoidance of

doubt, this section is in addition to, and shall not be read to limit in any respects, ARTICLE IV.C.2.

F. Cancellation of Notes, Certificates and Instruments

Except for the purpose of evidencing a right to a distribution under this Plan and except as otherwise set forth in this Plan, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to this Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. For the avoidance of doubt, this section is in addition to, and shall not be read to limit in any respects, ARTICLE IV.C.2.

G. Cancellation of Existing Instruments Governing Security Interests

Upon payment or other satisfaction of an Allowed Class 1 or Allowed Class 2 Claim, or promptly thereafter, the Holder of such Allowed Class 1 or Allowed Class 2 Claim shall deliver to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, any collateral or other property of the Debtor held by such Holder, together with any termination statements, instruments of satisfaction, or releases of all security interests with respect to its Allowed Class 1 or Allowed Class 2 Claim that may be reasonably required to terminate any related financing statements, mortgages, mechanics' or other statutory Liens, or *lis pendens*, or similar interests or documents.

H. Control Provisions

To the extent that there is any inconsistency between this Plan as it relates to the Claimant Trust, the Claimant Trust Agreement, the Reorganized Debtor, or the Reorganized Limited Partnership Agreement, this Plan shall control.

I. Treatment of Vacant Classes

Any Claim or Equity Interest in a Class considered vacant under ARTICLE III.C of this Plan shall receive no Plan Distributions.

J. Plan Documents

The documents, if any, to be Filed as part of the Plan Documents, including any documents filed with the Plan Supplement, and any amendments, restatements, supplements, or other modifications to such documents, and any consents, waivers, or other deviations under or from any such documents, shall be incorporated herein by this reference (including to the applicable definitions in ARTICLE I hereof) and fully enforceable as if stated in full herein.

The Debtor and the Committee are currently working to finalize the forms of certain of the Plan Documents to be filed with the Plan Supplement. To the extent that the Debtor and the Committee cannot agree as to the form and content of such Plan Documents, they intend to submit the issue to non-binding mediation pursuant to the *Order Directing Mediation* entered on August 3, 2020 [D.I. 912].

K. Highland Capital Management, L.P. Retirement Plan and Trust

The Highland Capital Management, L.P. Retirement Plan And Trust (“Pension Plan”) is a single-employer defined benefit pension plan covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). 29 U.S.C. §§ 1301-1461. The Debtor is the contributing sponsor and, as such, the PBGC asserts that the Debtor is liable along with any members of the contributing sponsor’s controlled-group within the meaning of 29 U.S.C. §§ 1301(a)(13), (14) with respect to the Pension Plan.

Upon the Effective Date, the Reorganized Debtor shall be deemed to have assumed the Pension Plan and shall comply with all applicable statutory provisions of ERISA and the Internal Revenue Code (the “IRC”), including, but not limited to, satisfying the minimum funding standards pursuant to 26 U.S.C. §§ 412, 430, and 29 U.S.C. §§ 1082, 1083; paying the PBGC premiums in accordance with 29 U.S.C. §§ 1306 and 1307; and administering the Pension Plan in accordance with its terms and the provisions of ERISA and the IRC. In the event that the Pension Plan terminates after the Plan of Reorganization Effective Date, the PBGC asserts that the Reorganized Debtor and each of its controlled group members will be responsible for the liabilities imposed by Title IV of ERISA.

Notwithstanding any provision of the Plan, the Confirmation Order, or the Bankruptcy Code (including section 1141 thereof) to the contrary, neither the Plan, the Confirmation Order, or the Bankruptcy Code shall be construed as discharging, releasing, exculpating or relieving the Debtor, the Reorganized Debtor, or any person or entity in any capacity, from any liability or responsibility, if any, with respect to the Pension Plan under any law, governmental policy, or regulatory provision. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility against any person or entity as a result of any of the provisions of the Plan, the Confirmation Order, or the Bankruptcy Code. The Debtor reserves the right to contest any such liability or responsibility.

ARTICLE V.
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

A. Assumption, Assignment, or Rejection of Executory Contracts and Unexpired Leases

Unless an Executory Contract or Unexpired Lease: (i) was previously assumed or rejected by the Debtor pursuant to this Plan on or prior to the Confirmation Date; (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) is the subject of a motion to assume filed by the Debtor on or before the Confirmation Date; (iv) contains a change of control or similar provision that would be triggered by the Chapter 11 Case (unless such provision has been irrevocably waived); or (v) is specifically designated as a

contract or lease to be assumed in the Plan or the Plan Supplement, on the Confirmation Date, each Executory Contract and Unexpired Lease shall be deemed rejected pursuant to section 365 of the Bankruptcy Code, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, unless such Executory Contract or Unexpired Lease is listed in the Plan Supplement.

At any time on or prior to the Confirmation Date, the Debtor may (i) amend the Plan Supplement in order to add or remove a contract or lease from the list of contracts to be assumed or (ii) assign (subject to applicable law) any Executory Contract or Unexpired Lease, as determined by the Debtor in consultation with the Committee, or the Reorganized Debtor, as applicable.

The Confirmation Order will constitute an order of the Bankruptcy Court approving the above-described assumptions, rejections, and assumptions and assignments. Except as otherwise provided herein or agreed to by the Debtor and the applicable counterparty, each assumed Executory Contract or Unexpired Lease shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto. Modifications, amendments, supplements, and restatements to prepetition Executory Contracts and Unexpired Leases that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Executory Contract or Unexpired Lease or the validity, priority, or amount of any Claims that may arise in connection therewith. To the extent applicable, no change of control (or similar provision) will be deemed to occur under any such Executory Contract or Unexpired Lease.

If certain, but not all, of a contract counterparty's Executory Contracts and/or Unexpired Leases are rejected pursuant to the Plan, the Confirmation Order shall be a determination that such counterparty's Executory Contracts and/or Unexpired Leases that are being assumed pursuant to the Plan are severable agreements that are not integrated with those Executory Contracts and/or Unexpired Leases that are being rejected pursuant to the Plan. Parties seeking to contest this finding with respect to their Executory Contracts and/or Unexpired Leases must file a timely objection to the Plan on the grounds that their agreements are integrated and not severable, and any such dispute shall be resolved by the Bankruptcy Court at the Confirmation Hearing (to the extent not resolved by the parties prior to the Confirmation Hearing).

Notwithstanding anything herein to the contrary, the Debtor shall assume or reject that certain real property lease with Crescent TC Investors L.P. ("Landlord") for the Debtor's headquarters located at 200/300 Crescent Ct., Suite #700, Dallas, Texas 75201 (the "Lease") in accordance with the notice to Landlord, procedures and timing required by 11 U.S.C. §365(d)(4), as modified by that certain *Agreed Order Granting Motion to Extend Time to Assume or Reject Unexpired Nonresidential Real Property Lease* [Docket No. 1122].

B. Claims Based on Rejection of Executory Contracts or Unexpired Leases

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Confirmation Date shall be deemed rejected, pursuant to the Confirmation Order. Any Person asserting a Rejection Claim shall File a proof of claim within thirty days of the Effective Date. Any Rejection Claims that are not timely Filed pursuant to this Plan shall be forever disallowed

and barred. If one or more Rejection Claims are timely Filed, the Claimant Trustee may File an objection to any Rejection Claim.

Rejection Claims shall be classified as General Unsecured Claims and shall be treated in accordance with ARTICLE III of this Plan.

C. Cure of Defaults for Assumed or Assigned Executory Contracts and Unexpired Leases

Any monetary amounts by which any Executory Contract or Unexpired Lease to be assumed or assigned hereunder is in default shall be satisfied, under section 365(b)(1) of the Bankruptcy Code, by the Debtor upon assumption or assignment thereof, by payment of the default amount in Cash as and when due in the ordinary course or on such other terms as the parties to such Executory Contracts may otherwise agree. The Debtor may serve a notice on the Committee and parties to Executory Contracts or Unexpired Leases to be assumed or assigned reflecting the Debtor's or Reorganized Debtor's intention to assume or assign the Executory Contract or Unexpired Lease in connection with this Plan and setting forth the proposed cure amount (if any).

If a dispute regarding (1) the amount of any payments to cure a default, (2) the ability of the Debtor, the Reorganized Debtor, or any assignee to provide "adequate assurance of future performance" (within the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed or assigned or (3) any other matter pertaining to assumption or assignment, the cure payments required by section 365(b)(1) of the Bankruptcy Code will be made following the entry of a Final Order or orders resolving the dispute and approving the assumption or assignment.

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 Confirmation Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

ARTICLE VI.
PROVISIONS GOVERNING DISTRIBUTIONS

A. Dates of Distributions

Except as otherwise provided in this Plan, on the Effective Date or as soon as reasonably practicable thereafter (or if a Claim is not an Allowed Claim or Equity Interest on the Effective Date, on the date that such Claim or Equity Interest becomes an Allowed Claim or Equity

Interest, or as soon as reasonably practicable thereafter), each Holder of an Allowed Claim or Equity Interest against the Debtor shall receive the full amount of the distributions that this Plan provides for Allowed Claims or Allowed Equity Interests in the applicable Class and in the manner provided herein. If any payment or act under this Plan is required to be made or performed on a date that is not on a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date. If and to the extent there are Disputed Claims or Equity Interests, distributions on account of any such Disputed Claims or Equity Interests shall be made pursuant to the provisions provided in this Plan. Except as otherwise provided in this Plan, Holders of Claims and Equity Interests shall not be entitled to interest, dividends or accruals on the distributions provided for therein, regardless of whether distributions are delivered on or at any time after the Effective Date.

Upon the Effective Date, all Claims and Equity Interests against the Debtor shall be deemed fixed and adjusted pursuant to this Plan and none of the Debtor, the Reorganized Debtor, or the Claimant Trust will have liability on account of any Claims or Equity Interests except as set forth in this Plan and in the Confirmation Order. All payments and all distributions made by the Distribution Agent under this Plan shall be in full and final satisfaction, settlement and release of all Claims and Equity Interests against the Debtor and the Reorganized Debtor.

At the close of business on the Distribution Record Date, the transfer ledgers for the Claims against the Debtor and the Equity Interests in the Debtor shall be closed, and there shall be no further changes in the record holders of such Claims and Equity Interests. The Debtor, the Reorganized Debtor, the Trustees, and the Distribution Agent, and each of their respective agents, successors, and assigns shall have no obligation to recognize the transfer of any Claims against the Debtor or Equity Interests in the Debtor occurring after the Distribution Record Date and shall be entitled instead to recognize and deal for all purposes hereunder with only those record holders stated on the transfer ledgers as of the close of business on the Distribution Record Date irrespective of the number of distributions to be made under this Plan to such Persons or the date of such distributions.

B. Distribution Agent

Except as provided herein, all distributions under this Plan shall be made by the Claimant Trustee, as Distribution Agent, or by such other Entity designated by the Claimant Trustee, as a Distribution Agent on the Effective Date or thereafter. The Reorganized Debtor will be the Distribution Agent with respect to Claims in Class 1 through Class 7.

The Claimant Trustee, or such other Entity designated by the Claimant Trustee to be the Distribution Agent, shall not be required to give any bond or surety or other security for the performance of such Distribution Agent's duties unless otherwise ordered by the Bankruptcy Court.

The Distribution Agent shall be empowered to (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties under this Plan; (b) make all distributions contemplated hereby; (c) employ professionals to represent it with respect to its responsibilities; and (d) exercise such other powers as may be vested in the

Distribution Agent by order of the Bankruptcy Court, pursuant to this Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions hereof.

The Distribution Agent shall not have any obligation to make a particular distribution to a specific Holder of an Allowed Claim if such Holder is also the Holder of a Disputed Claim.

C. Cash Distributions

Distributions of Cash may be made by wire transfer from a domestic bank, except that Cash payments made to foreign creditors may be made in such funds and by such means as the Distribution Agent determines are necessary or customary in a particular foreign jurisdiction.

D. Disputed Claims Reserve

On or prior to the Initial Distribution Date, the Claimant Trustee shall establish, fund and maintain the Disputed Claims Reserve(s) in the appropriate Disputed Claims Reserve Amounts on account of any Disputed Claims.

E. Distributions from the Disputed Claims Reserve

The Disputed Claims Reserve shall at all times hold Cash in an amount no less than the Disputed Claims Reserve Amount. To the extent a Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, within 30 days of the date on which such Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, the Claimant Trustee shall distribute from the Disputed Claims Reserve to the Holder thereof any prior distributions, in Cash, that would have been made to such Allowed Claim if it had been Allowed as of the Effective Date. For the avoidance of doubt, each Holder of a Disputed Claim that subsequently becomes an Allowed Claim will also receive its Pro Rata share of the Claimant Trust Interests. If, upon the resolution of all Disputed Claims any Cash remains in the Disputed Claims Reserve, such Cash shall be transferred to the Claimant Trust and be deemed a Claimant Trust Asset.

F. Rounding of Payments

Whenever this Plan would otherwise call for, with respect to a particular Person, payment of a fraction of a dollar, the actual payment or distribution shall reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down. To the extent that Cash to be distributed under this Plan remains undistributed as a result of the aforementioned rounding, such Cash or stock shall be treated as “Unclaimed Property” under this Plan.

G. De Minimis Distribution

Except as to any Allowed Claim that is Unimpaired under this Plan, none of the Debtor, the Reorganized Debtor, or the Distribution Agent shall have any obligation to make any Plan Distributions with a value of less than \$100, unless a written request therefor is received by the Distribution Agent from the relevant recipient at the addresses set forth in ARTICLE VI.J hereof within 120 days after the later of the (i) Effective Date and (ii) the date such Claim becomes an Allowed Claim. *De minimis* distributions for which no such request is timely received shall

revert to the Claimant Trust. Upon such reversion, the relevant Allowed Claim (and any Claim on account of missed distributions) shall be automatically deemed satisfied, discharged and forever barred, notwithstanding any federal or state escheat laws to the contrary.

H. Distributions on Account of Allowed Claims

Except as otherwise agreed by the Holder of a particular Claim or as provided in this Plan, all distributions shall be made pursuant to the terms of this Plan and the Confirmation Order. Except as otherwise provided in this Plan, distributions to any Holder of an Allowed Claim shall, to the extent applicable, be allocated first to the principal amount of any such Allowed Claim, as determined for U.S. federal income tax purposes and then, to the extent the consideration exceeds such amount, to the remainder of such Claim comprising accrued but unpaid interest, if any (but solely to the extent that interest is an allowable portion of such Allowed Claim).

I. General Distribution Procedures

The Distribution Agent shall make all distributions of Cash or other property required under this Plan, unless this Plan specifically provides otherwise. All Cash and other property held by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, for ultimate distribution under this Plan shall not be subject to any claim by any Person.

J. Address for Delivery of Distributions

Distributions to Holders of Allowed Claims, to the extent provided for under this Plan, shall be made (1) at the addresses set forth in any written notices of address change delivered to the Debtor and the Distribution Agent; (2) at the address set forth on any Proofs of Claim Filed by such Holders (to the extent such Proofs of Claim are Filed in the Chapter 11 Case), (2), or (3) at the addresses in the Debtor's books and records.

If there is any conflict or discrepancy between the addresses set forth in (1) through (3) in the foregoing sentence, then (i) the address in Section (2) shall control; (ii) if (2) does not apply, the address in (1) shall control, and (iii) if (1) does not apply, the address in (3) shall control.

K. Undeliverable Distributions and Unclaimed Property

If the distribution to the Holder of any Allowed Claim is returned to the Reorganized Debtor or the Claimant Trust as undeliverable, no further distribution shall be made to such Holder, and Distribution Agent shall not have any obligation to make any further distribution to the Holder, unless and until the Distribution Agent is notified in writing of such Holder's then current address.

Any Entity that fails to claim any Cash within six months from the date upon which a distribution is first made to such Entity shall forfeit all rights to any distribution under this Plan and such Cash shall thereafter be deemed an Claimant Trust Asset in all respects and for all purposes. Entities that fail to claim Cash shall forfeit their rights thereto and shall have no claim whatsoever against the Debtor's Estate, the Reorganized Debtor, the Claimant Trust, or against any Holder of an Allowed Claim to whom distributions are made by the Distribution Agent.

L. Withholding Taxes

In connection with this Plan, to the extent applicable, the Distribution Agent shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions made pursuant to this Plan shall be subject to such withholding and reporting requirements. The Distribution Agent shall be entitled to deduct any U.S. federal, state or local withholding taxes from any Cash payments made with respect to Allowed Claims, as appropriate. As a condition to receiving any distribution under this Plan, the Distribution Agent may require that the Holder of an Allowed Claim entitled to receive a distribution pursuant to this Plan provide such Holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Distribution Agent to comply with applicable tax reporting and withholding laws. If a Holder fails to comply with such a request within one year, such distribution shall be deemed an unclaimed distribution. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the applicable recipient for all purposes of this Plan.

M. Setoffs

The Distribution Agent may, to the extent permitted under applicable law, set off against any Allowed Claim and any distributions to be made pursuant to this Plan on account of such Allowed Claim, the claims, rights and causes of action of any nature that the Debtor, the Reorganized Debtor, or the Distribution Agent may hold against the Holder of such Allowed Claim that are not otherwise waived, released or compromised in accordance with this Plan; *provided, however*, that neither such a setoff nor the allowance of any Claim hereunder shall constitute a waiver or release by the Debtor, the Reorganized Debtor, or the Claimant Trustee of any such claims, rights and causes of action that the Debtor, the Reorganized Debtor, or Claimant Trustee possesses against such Holder. Any Holder of an Allowed Claim subject to such setoff reserves the right to challenge any such setoff in the Bankruptcy Court or any other court with jurisdiction with respect to such challenge.

N. Surrender of Cancelled Instruments or Securities

As a condition precedent to receiving any distribution pursuant to this Plan on account of an Allowed Claim evidenced by negotiable instruments, securities, or notes canceled pursuant to ARTICLE IV of this Plan, the Holder of such Claim will tender the applicable negotiable instruments, securities, or notes evidencing such Claim (or a sworn affidavit identifying the negotiable instruments, securities, or notes formerly held by such Holder and certifying that they have been lost), to the Distribution Agent unless waived in writing by the Distribution Agent.

O. Lost, Stolen, Mutilated or Destroyed Securities

In addition to any requirements under any applicable agreement and applicable law, any Holder of a Claim or Equity Interest evidenced by a security or note that has been lost, stolen, mutilated, or destroyed will, in lieu of surrendering such security or note to the extent required by this Plan, deliver to the Distribution Agent: (i) evidence reasonably satisfactory to the Distribution Agent of such loss, theft, mutilation, or destruction; and (ii) such security or indemnity as may be required by the Distribution Agent to hold such party harmless from any

damages, liabilities, or costs incurred in treating such individual as a Holder of an Allowed Claim or Equity Interest. Upon compliance with ARTICLE VI.O of this Plan as determined by the Distribution Agent, by a Holder of a Claim evidenced by a security or note, such Holder will, for all purposes under this Plan, be deemed to have surrendered such security or note to the Distribution Agent.

ARTICLE VII.
PROCEDURES FOR RESOLVING CONTINGENT,
UNLIQUIDATED AND DISPUTED CLAIMS

A. Filing of Proofs of Claim

Unless such Claim appeared in the Schedules and is not listed as disputed, contingent, or unliquidated, or such Claim has otherwise been Allowed or paid, each Holder of a Claim was required to file a Proof of Claim on or prior to the Bar Date.

B. Disputed Claims

Following the Effective Date, each of the Reorganized Debtor or the Claimant Trustee, as applicable, may File with the Bankruptcy Court an objection to the allowance of any Disputed Claim or Disputed Equity Interest, request the Bankruptcy Court subordinate any Claims to Subordinated Claims, or any other appropriate motion or adversary proceeding with respect to the foregoing by the Claims Objection Deadline or, at the discretion of the Reorganized Debtor or Claimant Trustee, as applicable, compromised, settled, withdrew or resolved without further order of the Bankruptcy Court, and (ii) unless otherwise provided in the Confirmation Order, the Reorganized Debtor or the Claimant Trust, as applicable, are authorized to settle, or withdraw any objections to, any Disputed Claim or Disputed Equity Interests following the Effective Date without further notice to creditors (other than the Entity holding such Disputed Claim or Disputed Equity Interest) or authorization of the Bankruptcy Court, in which event such Claim or Equity Interest shall be deemed to be an Allowed Claim or Equity Interest in the amount compromised for purposes of this Plan.

C. Procedures Regarding Disputed Claims or Disputed Equity Interests

No payment or other distribution or treatment shall be made on account of a Disputed Claim or Disputed Equity Interest unless and until such Disputed Claim or Disputed Equity Interest becomes an Allowed Claim or Equity Interests and the amount of such Allowed Claim or Equity Interest, as applicable, is determined by order of the Bankruptcy Court or by stipulation between the Reorganized Debtor or Claimant Trust, as applicable, and the Holder of the Claim or Equity Interest.

D. Allowance of Claims and Equity Interests

Following the date on which a Disputed Claim or Disputed Equity Interest becomes an Allowed Claim or Equity Interest after the Distribution Date, the Distribution Agent shall make a distribution to the Holder of such Allowed Claim or Equity Interest in accordance with the Plan.

1. Allowance of Claims

After the Effective Date and subject to the other provisions of this Plan, the Reorganized Debtor or the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Claim. Except as expressly provided in this Plan or in any order entered in the Chapter 11 Case prior to the Effective Date (including, without limitation, the Confirmation Order), no Claim or Equity Interest will become an Allowed Claim or Equity Interest unless and until such Claim or Equity Interest is deemed Allowed under this Plan or the Bankruptcy Code or the Bankruptcy Court has entered an order, including, without limitation, the Confirmation Order, in the Chapter 11 Case allowing such Claim or Equity Interest.

2. Estimation

Subject to the other provisions of this Plan, the Debtor, prior to the Effective Date, and the Reorganized Debtor or the Claimant Trustee, as applicable, after the Effective Date, may, at any time, request that the Bankruptcy Court estimate (a) any Disputed Claim or Disputed Equity Interest pursuant to applicable law and in accordance with this Plan and (b) any contingent or unliquidated Claim pursuant to applicable law, including, without limitation, section 502(c) of the Bankruptcy Code, and the Bankruptcy Court will retain jurisdiction under 28 U.S.C. §§ 157 and 1334 to estimate any Disputed Claim or Disputed Equity Interest, contingent Claim or unliquidated Claim, including during the litigation concerning any objection to any Claim or Equity Interest or during the pendency of any appeal relating to any such objection. All of the aforementioned objection, estimation and resolution procedures are cumulative and not exclusive of one another. Claims or Equity Interests may be estimated and subsequently compromised, settled, withdrawn or resolved by any mechanism approved by the Bankruptcy Court. The rights and objections of all parties are reserved in connection with any such estimation proceeding.

3. Disallowance of Claims

Any Claims or Equity Interests held by Entities from which property is recoverable under sections 542, 543, 550, or 553 of the Bankruptcy Code, or that are a transferee of a transfer avoidable under sections 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code, shall be deemed disallowed pursuant to section 502(d) of the Bankruptcy Code, and holders of such Claims or Interests may not receive any distributions on account of such Claims or Interests until such time as such Causes of Action against that Entity have been settled or a Bankruptcy Court Order with respect thereto has been entered and all sums due, if any, to the Reorganized Debtor or the Claimant Trust, as applicable, by that Entity have been turned over or paid to the Reorganized Debtor or the Claimant Trust, as applicable.

EXCEPT AS OTHERWISE PROVIDED HEREIN OR AS AGREED TO BY THE DEBTOR, REORGANIZED DEBTOR, OR CLAIMANT TRUSTEE, AS APPLICABLE, ANY AND ALL PROOFS OF CLAIM FILED AFTER THE BAR DATE SHALL BE DEEMED DISALLOWED AND EXPUNGED AS OF THE EFFECTIVE DATE WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTCY COURT, AND HOLDERS OF SUCH CLAIMS MAY NOT RECEIVE ANY DISTRIBUTIONS ON ACCOUNT OF SUCH CLAIMS, UNLESS SUCH

LATE PROOF OF CLAIM HAS BEEN DEEMED TIMELY FILED BY A FINAL ORDER.

**ARTICLE VIII.
EFFECTIVENESS OF THIS PLAN**

A. Conditions Precedent to the Effective Date

The Effective Date of this Plan will be conditioned upon the satisfaction or waiver by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee with such consent not to be unreasonably withheld), pursuant to the provisions of ARTICLE VIII.B of this Plan of the following:

- This Plan and the Plan Documents, including the Claimant Trust Agreement and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to this Plan shall have been Filed in form and substance reasonably acceptable to the Debtor and the Committee.
- The Confirmation Order shall have become a Final Order and shall be in form and substance reasonably acceptable to the Debtor and the Committee. The Confirmation Order shall provide that, among other things, (i) the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee are authorized to take all actions necessary or appropriate to effectuate and consummate this Plan, including, without limitation, (a) entering into, implementing, effectuating, and consummating the contracts, instruments, releases, and other agreements or documents created in connection with or described in this Plan, (b) assuming the Executory Contracts and Unexpired Leases set forth in the Plan Supplement, (c) making all distributions and issuances as required under this Plan; and (d) entering into any transactions as set forth in the Plan Documents; (ii) the provisions of the Confirmation Order and this Plan are nonseverable and mutually dependent; (iii) the implementation of this Plan in accordance with its terms is authorized; (iv) pursuant to section 1146 of the Bankruptcy Code, the delivery of any deed or other instrument or transfer order, in furtherance of, or in connection with this Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under this Plan, shall not be subject to any Stamp or Similar Tax; and (v) the vesting of the Claimant Trust Assets in the Claimant Trust and the Reorganized Debtor Assets in the Reorganized Debtor, in each case as of the Effective Date free and clear of liens and claims to the fullest extent permissible under applicable law pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.
- All documents and agreements necessary to implement this Plan, including without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, in each case in form and substance reasonably acceptable to the Debtor and the Committee, shall have (a) been tendered for delivery, and (b) been effected by, executed by, or otherwise deemed binding

upon, all Entities party thereto and shall be in full force and effect. All conditions precedent to such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements.

- All authorizations, consents, actions, documents, approvals (including any governmental approvals), certificates and agreements necessary to implement this Plan, including, without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, shall have been obtained, effected or executed and delivered to the required parties and, to the extent required, filed with the applicable governmental units in accordance with applicable laws and any applicable waiting periods shall have expired without any action being taken or threatened by any competent authority that would restrain or prevent effectiveness or consummation of the Restructuring.
- The Debtor shall have obtained applicable directors' and officers' insurance coverage that is acceptable to each of the Debtor, the Committee, the Claimant Trust Oversight Committee, the Claimant Trustee and the Litigation Trustee.
- The Professional Fee Reserve shall be funded pursuant to this Plan in an amount determined by the Debtor in good faith.

B. Waiver of Conditions

The conditions to effectiveness of this Plan set forth in this ARTICLE VIII (other than that the Confirmation Order shall have been entered) may be waived in whole or in part by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee) and any applicable parties in Section VII.A of this Plan, without notice, leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or effectuate this Plan. The failure to satisfy or waive a condition to the Effective Date may be asserted by the Debtor regardless of the circumstances giving rise to the failure of such condition to be satisfied. The failure of the Debtor to exercise any of the foregoing rights will not be deemed a waiver of any other rights, and each right will be deemed an ongoing right that may be asserted at any time by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable.

C. Dissolution of the Committee

On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee's Professionals will cease to have any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's

Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan and the Claimant Trust Agreement in connection with such representation.

ARTICLE IX.
EXCULPATION, INJUNCTION AND RELATED PROVISIONS

A. General

Notwithstanding anything contained in the Plan to the contrary, the allowance, classification and treatment of all Allowed Claims and Equity Interests and their respective distributions and treatments under the Plan shall take into account the relative priority and rights of the Claims and the Equity Interests in each Class in connection with any contractual, legal and equitable subordination rights relating thereto whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code, or otherwise.

B. Discharge of Claims

To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by this Plan or the Confirmation Order, all consideration distributed under this Plan will be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to this Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

C. Exculpation

Subject in all respects to ARTICLE XII.D of this Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); *provided, however*, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross

negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.

D. Releases by the Debtor

On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person.

Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

Notwithstanding anything herein to the contrary, any release provided pursuant to this ARTICLE IX.D (i) with respect to a Senior Employee, is conditioned in all respects on (a) such Senior Employee executing a Senior Employee Stipulation on or prior to the Effective Date and (b) the reduction of such Senior Employee's Allowed Claim as set forth in the Senior Employee Stipulation (such amount, the "Reduced Employee Claim"), and (ii) with respect to any Employee, including a Senior Employee, shall be deemed null and void and of no force and effect (1) if there is more than one member of the Claimant Trust Oversight Committee who does not represent entities holding a Disputed or Allowed Claim (the "Independent Members"), the Claimant Trustee and the Independent Members by majority vote determine or (2) if there is only one Independent Member, the Independent Member after discussion with the Claimant Trustee, determines (in each case after discussing with the full Claimant Trust Oversight Committee) that such Employee (regardless of whether the Employee is then currently employed by the Debtor, the Reorganized Debtor, or the Claimant Trustee):

- sues, attempts to sue, or threatens or works with or assists any entity or person to sue, attempt to sue, or threaten the Reorganized Debtor, the Claimant Trust, the Litigation

Sub-Trust, or any of their respective employees or agents, or any Released Party on or in connection with any claim or cause of action arising prior to the Effective Date,

- has taken any action that, impairs or harms the value of the Claimant Trust Assets or the Reorganized Debtor Assets, or
- (x) upon the request of the Claimant Trustee, has failed to provide reasonable assistance in good faith to the Claimant Trustee or the Reorganized Debtor with respect to (1) the monetization of the Claimant Trust Assets or Reorganized Debtor Assets, as applicable, or (2) the resolution of Claims, or (y) has taken any action that impedes or frustrates the Claimant Trustee or the Reorganized Debtor with respect to any of the foregoing.

Provided, however, that the release provided pursuant to this ARTICLE IX.D will vest and the Employee will be indefeasibly released pursuant to this ARTICLE IX.D if such Employee's release has not been deemed null and void and of no force and effect on or prior to the date that is the date of dissolution of the Claimant Trust pursuant to the Claimant Trust Agreement.

By executing the Senior Employee Stipulation embodying this release, each Senior Employee acknowledges and agrees, without limitation, to the terms of this release and the tolling agreement contained in the Senior Employee Stipulation.

The provisions of this release and the execution of a Senior Employee Stipulation will not in any way prevent or limit any Employee from (i) prosecuting its Claims, if any, against the Debtor's Estate, (ii) defending him or herself against any claims or causes of action brought against the Employee by a third party, or (iii) assisting other persons in defending themselves from any Estate Claims brought by the Litigation Trustee (but only with respect to Estate Claims brought by the Litigation Trustee and not collection or other actions brought by the Claimant Trustee).

E. Preservation of Rights of Action

1. Maintenance of Causes of Action

Except as otherwise provided in this Plan, after the Effective Date, the Reorganized Debtor or the Claimant Trust will retain all rights to commence, pursue, litigate or settle, as appropriate, any and all Causes of Action included in the Reorganized Debtor Assets or Claimant Trust Assets, as applicable, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including, without limitation, in an adversary proceeding Filed in the Chapter 11 Case and, as the successors in interest to the Debtor and the Estate, may, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any or all of the Causes of Action without notice to or approval from the Bankruptcy Court.

2. Preservation of All Causes of Action Not Expressly Settled or Released

Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in this Plan or any Final

Order (including, without limitation, the Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor or Claimant Trust, as applicable (including, without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of this Plan based on the Disclosure Statement, this Plan or the Confirmation Order, except where such Causes of Action have been expressly released in this Plan or any other Final Order (including, without limitation, the Confirmation Order). In addition, the right of the Reorganized Debtor or the Claimant Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

F. Injunction

Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or

arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

G. Duration of Injunctions and Stays

ARTICLE II. Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Court will enter an equivalent order under Section 105.

H. Continuance of January 9 Order

Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, the restrictions set forth in paragraphs 9 and 10 of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [D.I. 339] shall remain in full force and effect following the Effective Date.

**ARTICLE X.
BINDING NATURE OF PLAN**

On the Effective Date, and effective as of the Effective Date, the Plan, including, without limitation, the provisions in ARTICLE IX, will bind, and will be deemed binding upon, all Holders of Claims against and Equity Interests in the Debtor and such Holder's respective successors and assigns, to the maximum extent permitted by applicable law, notwithstanding whether or not such Holder will receive or retain any property or interest in property under the Plan. All Claims and Debts shall be fixed and adjusted pursuant to this Plan. The Plan shall also bind any taxing authority, recorder of deeds, or similar official for any county, state,

Governmental Unit or parish in which any instrument related to the Plan or related to any transaction contemplated thereby is to be recorded with respect to any taxes of the kind specified in Bankruptcy Code section 1146(a).

ARTICLE XI.
RETENTION OF JURISDICTION

Pursuant to sections 105 and 1142 of the Bankruptcy Code and notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall, after the Effective Date, retain such jurisdiction over the Chapter 11 Case and all Entities with respect to all matters related to the Chapter 11 Case, the Reorganized Debtor, the Claimant Trust, and this Plan to the maximum extent legally permissible, including, without limitation, jurisdiction to:

- allow, disallow, determine, liquidate, classify, estimate or establish the priority, secured, unsecured, or subordinated status of any Claim or Equity Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of any Claim or Equity Interest;
- grant or deny any applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or this Plan, for periods ending on or before the Effective Date; *provided, however*, that, from and after the Effective Date, the Reorganized Debtor shall pay Professionals in the ordinary course of business for any work performed after the Effective Date subject to the terms of this Plan and the Confirmation Order, and such payment shall not be subject to the approval of the Bankruptcy Court;
- resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which the Debtor is party or with respect to which the Debtor, Reorganized Debtor, or Claimant Trust may be liable and to adjudicate and, if necessary, liquidate, any Claims arising therefrom, including, without limitation, any dispute regarding whether a contract or lease is or was executory or expired;
- make any determination with respect to a claim or cause of action against a Protected Party as set forth in ARTICLE IX;
- resolve any claim or cause of action against an Exculpated Party or Protected Party arising from or related to the Chapter 11 Case, the negotiation of this Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, or the transactions in furtherance of the foregoing;
- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any sale, disposition, assignment or other transfer of the Reorganized Debtor Assets or Claimant Trust Assets, including any break-up compensation or

expense reimbursement that may be requested by a purchaser thereof; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;

- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any borrowing or the incurrence of indebtedness, whether secured or unsecured by the Reorganized Debtor or Claimant Trust; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;
- resolve any issues related to any matters adjudicated in the Chapter 11 Case;
- ensure that distributions to Holders of Allowed Claims and Allowed Equity Interests are accomplished pursuant to the provisions of this Plan;
- decide or resolve any motions, adversary proceedings, contested or litigated matters and any other Causes of Action (including Estate Claims) that are pending as of the Effective Date or that may be commenced in the future, including approval of any settlements, compromises, or other resolutions as may be requested by the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee whether under Bankruptcy Rule 9019 or otherwise, and grant or deny any applications involving the Debtor that may be pending on the Effective Date or instituted by the Reorganized Debtor, the Claimant Trustee, or Litigation Trustee after the Effective Date, provided that the Reorganized Debtor, the Claimant Trustee, and the Litigation Trustee shall reserve the right to commence actions in all appropriate forums and jurisdictions;
- enter such orders as may be necessary or appropriate to implement, effectuate, or consummate the provisions of this Plan, the Plan Documents, and all other contracts, instruments, releases, and other agreements or documents adopted in connection with this Plan, the Plan Documents, or the Disclosure Statement;
- resolve any cases, controversies, suits or disputes that may arise in connection with the implementation, effectiveness, consummation, interpretation, or enforcement of this Plan or any Entity's obligations incurred in connection with this Plan;
- issue injunctions and enforce them, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with implementation, effectiveness, consummation, or enforcement of this Plan, except as otherwise provided in this Plan;
- enforce the terms and conditions of this Plan and the Confirmation Order;
- resolve any cases, controversies, suits or disputes with respect to the release, exculpation, indemnification, and other provisions contained herein and enter such

orders or take such others actions as may be necessary or appropriate to implement or enforce all such releases, injunctions and other provisions;

- enter and implement such orders or take such others actions as may be necessary or appropriate if the Confirmation Order is modified, stayed, reversed, revoked or vacated;
- resolve any other matters that may arise in connection with or relate to this Plan, the Disclosure Statement, the Confirmation Order, the Plan Documents, or any contract, instrument, release, indenture or other agreement or document adopted in connection with this Plan or the Disclosure Statement; and
- enter an order concluding or closing the Chapter 11 Case after the Effective Date.

ARTICLE XII. **MISCELLANEOUS PROVISIONS**

A. Payment of Statutory Fees and Filing of Reports

All outstanding Statutory Fees shall be paid on the Effective Date. All such fees payable, and all such fees that become due and payable, after the Effective Date shall be paid by the Reorganized Debtor when due or as soon thereafter as practicable until the Chapter 11 Case is closed, converted, or dismissed. The Claimant Trustee shall File all quarterly reports due prior to the Effective Date when they become due, in a form reasonably acceptable to the U.S. Trustee. After the Effective Date, the Claimant Trustee shall File with the Bankruptcy Court quarterly reports when they become due, in a form reasonably acceptable to the U.S. Trustee. The Reorganized Debtor shall remain obligated to pay Statutory Fees to the Office of the U.S. Trustee until the earliest of the Debtor's case being closed, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code.

B. Modification of Plan

Effective as of the date hereof and subject to the limitations and rights contained in this Plan: (a) the Debtor reserves the right, in accordance with the Bankruptcy Code and the Bankruptcy Rules, to amend or modify this Plan prior to the entry of the Confirmation Order with the consent of the Committee, such consent not to be unreasonably withheld; and (b) after the entry of the Confirmation Order, the Debtor may, after notice and hearing and entry of an order of the Bankruptcy Court, amend or modify this Plan, in accordance with section 1127(b) of the Bankruptcy Code or remedy any defect or omission or reconcile any inconsistency in this Plan in such manner as may be necessary to carry out the purpose and intent of this Plan.

C. Revocation of Plan

The Debtor reserves the right to revoke or withdraw this Plan prior to the Confirmation Date and to File a subsequent chapter 11 plan with the consent of the Committee. If the Debtor revokes or withdraws this Plan prior to the Confirmation Date, then: (i) this Plan shall be null and void in all respects; (ii) any settlement or compromise embodied in this Plan, assumption of Executory Contracts or Unexpired Leases effected by this Plan and any document or agreement

executed pursuant hereto shall be deemed null and void except as may be set forth in a separate order entered by the Bankruptcy Court; and (iii) nothing contained in this Plan shall: (a) constitute a waiver or release of any Claims by or against, or any Equity Interests in, the Debtor or any other Entity; (b) prejudice in any manner the rights of the Debtor or any other Entity; or (c) constitute an admission, acknowledgement, offer or undertaking of any sort by the Debtor or any other Entity.

D. Obligations Not Changed

Notwithstanding anything in this Plan to the contrary, nothing herein will affect or otherwise limit or release any non-Debtor Entity's (including any Exculpated Party's) duties or obligations, including any contractual and indemnification obligations, to the Debtor, the Reorganized Debtor, or any other Entity whether arising under contract, statute, or otherwise.

E. Entire Agreement

Except as otherwise described herein, this Plan supersedes all previous and contemporaneous negotiations, promises, covenants, agreements, understandings, and representations on such subjects, all of which have become merged and integrated into this Plan.

F. Closing of Chapter 11 Case

The Claimant Trustee shall, after the Effective Date and promptly after the full administration of the Chapter 11 Case, File with the Bankruptcy Court all documents required by Bankruptcy Rule 3022 and any applicable order of the Bankruptcy Court to close the Chapter 11 Case.

G. Successors and Assigns

This Plan shall be binding upon and inure to the benefit of the Debtor and its successors and assigns, including, without limitation, the Reorganized Debtor and the Claimant Trustee. The rights, benefits, and obligations of any Person or Entity named or referred to in this Plan shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor, or assign of such Person or Entity.

H. Reservation of Rights

Except as expressly set forth herein, this Plan shall have no force or effect unless and until the Bankruptcy Court enters the Confirmation Order and the Effective Date occurs. Neither the filing of this Plan, any statement or provision contained herein, nor the taking of any action by the Debtor, the Reorganized Debtor, the Claimant Trustee, or any other Entity with respect to this Plan shall be or shall be deemed to be an admission or waiver of any rights of: (1) the Debtor, the Reorganized Debtor, or the Claimant Trustee with respect to the Holders of Claims or Equity Interests or other Entity; or (2) any Holder of a Claim or an Equity Interest or other Entity prior to the Effective Date.

Neither the exclusion or inclusion by the Debtor of any contract or lease on any exhibit, schedule, or other annex to this Plan or in the Plan Documents, nor anything contained in this

Plan, will constitute an admission by the Debtor that any such contract or lease is or is not an executory contract or lease or that the Debtor, the Reorganized Debtor, the Claimant Trustee, or their respective Affiliates has any liability thereunder.

Except as explicitly provided in this Plan, nothing herein shall waive, excuse, limit, diminish, or otherwise alter any of the defenses, claims, Causes of Action, or other rights of the Debtor, the Reorganized Debtor, or the Claimant Trustee under any executory or non-executory contract.

Nothing in this Plan will increase, augment, or add to any of the duties, obligations, responsibilities, or liabilities of the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, under any executory or non-executory contract or lease.

If there is a dispute regarding whether a contract or lease is or was executory at the time of its assumption under this Plan, the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, shall have thirty (30) days following entry of a Final Order resolving such dispute to alter their treatment of such contract.

I. Further Assurances

The Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, all Holders of Claims and Equity Interests receiving distributions hereunder, and all other Entities shall, from time to time, prepare, execute and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of this Plan or the Confirmation Order. On or before the Effective Date, the Debtor shall File with the Bankruptcy Court all agreements and other documents that may be necessary or appropriate to effectuate and further evidence the terms and conditions hereof.

J. Severability

If, prior to the Confirmation Date, any term or provision of this Plan is determined by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court will have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision will then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order will constitute a judicial determination and will provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

K. Service of Documents

All notices, requests, and demands to or upon the Debtor, the Reorganized Debtor, or the Claimant Trustee to be effective shall be in writing and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when actually delivered addressed as follows:

If to the Claimant Trust:

Highland Claimant Trust
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.

If to the Debtor:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.

with copies to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Attn: Jeffrey N. Pomerantz, Esq.
Ira D. Kharasch, Esq.
Gregory V. Demo, Esq.

If to the Reorganized Debtor:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.

with copies to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Attn: Jeffrey N. Pomerantz, Esq.
Ira D. Kharasch, Esq.
Gregory V. Demo, Esq.

L. Exemption from Certain Transfer Taxes Pursuant to Section 1146(a) of the Bankruptcy Code

To the extent permitted by applicable law, pursuant to section 1146(a) of the Bankruptcy Code, any transfers of property pursuant hereto shall not be subject to any Stamp or Similar Tax or governmental assessment in the United States, and the Confirmation Order shall direct the appropriate federal, state or local governmental officials or agents or taxing authority to forego

the collection of any such Stamp or Similar Tax or governmental assessment and to accept for filing and recordation instruments or other documents pursuant to such transfers of property without the payment of any such Stamp or Similar Tax or governmental assessment. Such exemption specifically applies, without limitation, to (i) all actions, agreements and documents necessary to evidence and implement the provisions of and the distributions to be made under this Plan; (ii) the maintenance or creation of security or any Lien as contemplated by this Plan; and (iii) assignments, sales, or transfers executed in connection with any transaction occurring under this Plan.

M. Governing Law

Except to the extent that the Bankruptcy Code, the Bankruptcy Rules or other federal law is applicable, or to the extent that an exhibit or schedule to this Plan provides otherwise, the rights and obligations arising under this Plan shall be governed by, and construed and enforced in accordance with, the laws of Texas, without giving effect to the principles of conflicts of law of such jurisdiction; *provided, however*, that corporate governance matters relating to the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trust, as applicable, shall be governed by the laws of the state of organization of the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trustee, as applicable.

N. Tax Reporting and Compliance

The Debtor is hereby authorized to request an expedited determination under section 505(b) of the Bankruptcy Code of the tax liability of the Debtor is for all taxable periods ending after the Petition Date through, and including, the Effective Date.

O. Exhibits and Schedules

All exhibits and schedules to this Plan, if any, including the Exhibits and the Plan Documents, are incorporated and are a part of this Plan as if set forth in full herein.

P. Controlling Document

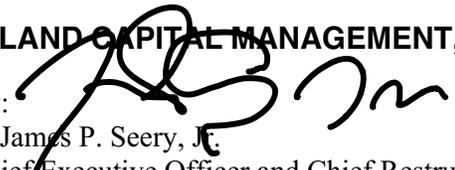
In the event of an inconsistency between this Plan and any other instrument or document created or executed pursuant to this Plan, or between this Plan and the Disclosure Statement, this Plan shall control. The provisions of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and of the Confirmation Order, on the other hand, shall be construed in a manner consistent with each other so as to effectuate the purposes of each; *provided, however*, that if there is determined to be any inconsistency between any provision of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and any provision of the Confirmation Order, on the other hand, that cannot be so reconciled, then, solely to the extent of such inconsistency, the provisions of the Confirmation Order shall govern, and any such provisions of the Confirmation Order shall be deemed a modification of this Plan, the Disclosure Statement, and the Plan Documents, as applicable.

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Dated: January 22, 2021

Respectfully submitted,

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: 

James P. Seery, Jr.
Chief Executive Officer and Chief Restructuring
Officer

Prepared by:

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EXHIBIT 3

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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, § **Case No. 19-34054**
L.P., §
§
Debtor. § **Chapter 11**

**JAMES DONDERO’S OBJECTION TO FIFTH AMENDED PLAN OF
REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.**

James Dondero (“Respondent”), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this objection (the “Objection”) to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the “Plan”).¹

In support thereof, Respondent respectfully represents as follows:

PRELIMINARY STATEMENT

1. On October 16, 2019, Highland Capital Management, L.P. (“Highland” or the “Debtor”) initiated a Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware. The Chapter 11 Case was subsequently transferred to this Court. The case was

¹ Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Plan.



commenced with the expectation that Highland would emerge from Chapter 11 as a going concern. However, during the case and leading up to the confirmation hearing on the Plan, Highland's assets have been liquidated at below value prices. Under the Plan, Highland's assets will continue to be liquidated for less than optimal prices, with a view to ultimately terminating Highland's existence.

2. Confirmation of the Plan should be denied due to numerous deficiencies and improprieties. The problems with the Plan as drafted include, but are not limited to, exculpation and injunction provisions that extend far beyond permissible limits, a lack of transparency following confirmation, inappropriate post-confirmation jurisdictional terms, and the wrongfully obtained votes of certain affiliates of HarbourVest Partners, LLC (collectively, "HarbourVest"). The Plan severs Respondent's rights and fails to comply with the Bankruptcy Code and applicable case law. Therefore, confirmation of the Plan should be denied.

OBJECTION

I. Both the Exculpation and Injunction Sections Violate Fifth Circuit Precedent.

3. The proposed exculpatory and injunction provisions are simply impermissible. Both contravene established case law in the Fifth Circuit regarding the proper boundaries of such provisions and merit denial of Plan confirmation.

4. First, Article IX.D proposes to exculpate each and every "Exculpated Party" for all post-petition liability relating to the Debtor's bankruptcy case. The term "Exculpated Party" includes not just the Debtor but also, among others, the Debtor's Employees, the Independent Directors, the CEO/CRO, and the Related Persons of such parties. These exculpations in favor of the Exculpated Parties are prohibited under Fifth Circuit precedent. *See, e.g., In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *Dropbox Inc. v. Thru Inc.*, Case No. 17-1958-G, 2018 U.S. Dist.

LEXIS 179769 * 66-68 (N.D. Tex. Oct. 19, 2018) (finding that the scope of an exculpation clause provided insulation to nondebtor third parties in contravention of Fifth Circuit law).

5. In *Pacific Lumber*, the Fifth Circuit made clear that section 524(e) prohibits the exoneration of nondebtors such as a debtor's management and professionals, but excluding official committees and their members acting within the scope of their official duties, from negligence during the course of their participation in the bankruptcy. The Fifth Circuit in *Pacific Lumber* stated: "[T]he essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose." *Pacific Lumber*, 584 F.2d at 252. Despite these clear limits, the exculpation provisions in the Plan go far beyond what is permissible through the Bankruptcy Code's intended "fresh start" to encompass virtually all acts or omissions taken in connection with the Debtor's bankruptcy case by a wide range of parties, thus effectively exculpating an unknown number of individuals.

6. Second, Article IX.F creates a channeling injunction with respect to certain "Protected Parties." The injunction requires Bankruptcy Court approval to pursue any claims related to the Debtor brought by any entity, including claims arising from a Protected Party's post-confirmation conduct. Much like the overbroad definition of "Exculpated Parties", the definition for "Protected Parties" includes a wide swath of individuals and entities beyond simply the Debtor. As a result, the channeling injunction would bring into the Bankruptcy Court all claims against such Exculpated Parties by any party who happens to have a claim or interest in the Debtor. The proposed injunction is effectively a non-consensual third-party release, which is expressly prohibited. *See Dropbox*, 2018 U.S. Dist. LEXIS 179769 * at 65 (disallowing similar injunction). Moreover, the Fifth Circuit has held that a permanent injunction cannot be justified under the broad

equity powers of Bankruptcy Code section 105 “if it effectively discharges a nondebtor.” *Feld v. Zale Corporation (In re Zale Corporation)*, 62 F.3d 746, 760 (5th Cir. 1995) (overturning permanent injunction effectively discharging a nondebtor because such an injunction violates section 524 of the Bankruptcy Code, which was designed only to discharge the debtor, not nondebtor parties).

7. Furthermore, the channeling injunction in Article IX.F limits the jurisdiction to hear claims against Protected Parties to only the Bankruptcy Court. In doing so, the Plan would improperly disregard parties’ rights to bring claims even in courts with exclusive jurisdiction and would ignore those courts with specialized jurisdiction to hear certain types of cases. Respondent therefore objects to isolating (and potentially even providing) jurisdiction of any and all claims against Protected Parties in the Bankruptcy Court through this channeling injunction.

8. In addition, the proposed injunction in Article IX.F is impermissibly vague and broad and, as noted, applies to post-confirmation conduct and claims.

9. FED. R. BANKR. P. 3016(c) requires that, “[i]f a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.” The Debtor fails to provide such “specific and conspicuous language” about the proposed injunction here. The Plan instead issues a blanket prohibition on entities from:

- (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or the property of any of the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, or order against the Debtor, the

Independent Directors, the Reorganized Debtor, or the Claimant Trust or the property of any of the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust, . . . ; and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

Plan at IX.F. Much like the overbroad exculpation and channeling injunction provisions, this vague and potentially limitless injunction is improper. As a result, the Plan should not be confirmed.

II. The Plan Fails to Meet Section 1129(a)(7) due to Lack of Appropriate Sale Procedures for Post-Confirmation Operations.

10. The Plan envisions the liquidation of the Debtor's assets by the Reorganized Debtor and the Claimant Trust. This wind down, however, is subject to no oversight or predetermined procedures to ensure that the process is both value-maximizing and transparent. This is critically important because, during the course of the Debtor's bankruptcy case, Respondent would allege on information and belief that the Debtor has sold a number of assets of significant value outside the ordinary course of the Debtor's business as it was conducted prepetition without notice to parties in interest or a complete marketing plan.

11. The proposed Plan's lack of appropriate marketing and the resulting dampening of competitive bidding requirements for the Reorganized Debtor's assets indicates that the Debtor's creditors and equity holders could receive a higher recovery from the liquidation of the Debtor under Chapter 7 of the Bankruptcy Code in which sales procedures are governed by the Bankruptcy Court to ensure maximization of value through auction or other market-testing means. As it is, for the Debtor to meet its burden to establish all elements of 11 U.S.C. § 1129, specifically including the best interest test of section 1129(a)(7), the Debtor must detail why the proposed liquidation process will test the market as fully as would be the case in Chapter 7.

12. Moreover, Respondent believes that notice and an opportunity for other potential bidders to come forward will not only provide transparency to the process but also will result in

competitive bidding, increasing the value received by the beneficiaries of the Debtor's liquidation. An asset sale without transparency, on the other hand, will presumptively be done without comprehensive market exposure. Courts have long recognized the need for competitive bidding when approving sales. *In re Muscongon Bay Company*, 597 F.2d 11 (1st Cir. 1979); *In re Alves*, 52 B.R. 353 (Bankr. D. R.I. 1985); *In re Dartmouth Audio Inc.*, 42 B.R. 871, 874 (Bankr. D. N.H. 1984). Competitive bidding yields higher offers and thus benefits the estate. The objective is "to maximize the bidding, not to restrict it." *In re The Ohio Corrugating Company*, 59 B.R. 11, 13 (Bankr. N.D. Ohio 1985) (quoting *In re Beck Industries Inc.*, 605 F.2d 624, 637 (2d Cir. 1979)). Additionally, because the Plan states that equity will receive some recovery under the Plan—Article III.F states that there are no Classes deemed to reject the Plan or being excluded from recovery—equity holders as well as all creditors should receive, *inter alia*, notice and an opportunity to be heard on all significant liquidations and other transactions performed by the Reorganized Debtor.

III. Post-Confirmation Jurisdiction under the Plan is Improper.

13. The various jurisdictional provisions of the Plan are overbroad and mandate that the Bankruptcy Court hear any matter involving the Debtor or its operations post-Effective Date. First, as noted above, the injunction with respect to "Protected Parties" requires that "the Bankruptcy Court will have sole jurisdiction to adjudicate any such claim for which approval of the Bankruptcy Court to commence or pursue has been granted." Plan at Art. IX.F. There is no legal basis for barring recourse to other courts with exclusive jurisdiction—possibly providing the Bankruptcy Court with jurisdiction it does not legally have, especially post-confirmation. *See, e.g., Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001) ("After a debtor's reorganization plan has been confirmed, the debtor's estate, and

thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.”). Second, the Bankruptcy Court’s jurisdiction should not encompass claims and causes of action arising from the Reorganized Debtor’s post-confirmation operations.

IV. The Subordination Provisions are Improper.

14. The elimination of vacant Classes pursuant to Article IV.I would potentially eliminate certain Classes on the Effective Date and any recovery for such Classes, including Class 9 for Subordinated Claims (assuming the HarbourVest claim in Class 9 is disallowed), despite the later re-allocation of claims into such eliminated Classes.

15. The Plan contemplates subordination of Claims and Equity Interests yet provides no mechanism, hearing requirement, or deadlines for such subordination. Instead, the Debtor reserves in Article III.J the right to subordinate any Claim and the Claimant’s resulting Plan treatment apparently without hearing.

V. Any Acceptance of the Plan by HarbourVest Should be Disallowed.

16. HarbourVest agreed to accept the Plan pursuant to the settlement with the Debtor submitted to the Court pursuant to FED. R. BANK. P. 9019. If that settlement is approved by the Court, HarbourVest will have, under the Plan, a Class 8 claim of \$45 million and a Class 9 claim of \$35 million. Respondent would allege on information and belief that the Debtor’s CEO/CRO has stated on multiple occasions that HarbourVest has no valid claim against the Debtor and that its dispute with the Debtor could be settled for \$5 million or less.

17. By including in the settlement agreement the requirement that HarbourVest vote both its Class 8 and Class 9 claim to accept the Plan, the settlement agreement, on its face, reflects the exchange of HarbourVest’s acceptance of the Plan for the vastly inflated claims agreed to by

the Debtor. In other words, the Debtor *purchased* HarbourVest's acceptance. This constitutes a violation of Bankruptcy Code section 1129(a)(3) in that HarbourVest's acceptance and the payment for it were not in good faith.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Bankruptcy Court enter an order (i) denying confirmation of the Plan, and (ii) granting Respondent such other and further relief to which he may be justly entitled.

Dated: January 5, 2021

Respectfully submitted,

/s/ D. Michael Lynn
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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 5, 2021, a true and correct copy of the foregoing document was served via the Bankruptcy 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/ J. Robertson Clarke
J. Robertson Clarke

EXHIBIT 4

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Attorneys for The Dugaboy Investment Trust and Get Good Trust

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

IN RE: * Chapter 11
*
* Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P. *
*
Debtor *

**OBJECTION TO CONFIRMATION OF THE
DEBTOR’S FIFTH AMENDED PLAN OF REORGANIZATION**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The Dugaboy Investment Trust and Get Good Trust (jointly, “Movants”), submit this Objection for the purpose of objecting to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. 1472] (the “Plan”) submitted by Highland Capital Management, L.P. (“Debtor”). The Dugaboy Investment Trust is an equity owner of the Debtor and has filed proofs of claim. See Claim Numbers 131 and 177. The Get Good Trust has filed proofs of claim in this case. See Claim Numbers 120, 128 and 129. If the Claims¹ filed by Movants are allowed,

¹ Capitalized terms not defined in this Objection are taken from the Plan and shall have the meanings given to them in the Plan.



Claimants possess claims in Class 7 or 8. The Dugaboy Investment Trust is a member of Class 11 of the Plan.

Movants assert that the Plan does not meet the requirements contained in the Bankruptcy Code, Rules, and applicable case law to be confirmed.

The Plan Violates 11 U.S.C. § 1129(a)(1)

In order to confirm a plan, the plan must meet the requirements set forth in 11 U.S.C. §§ 1122, 1123 and 1129. The Plan proposed by the Debtor fails to meet the requirements set forth in the Bankruptcy Code and, as such, confirmation of the Plan must be denied. 11 USC § 1129(a) (1) requires that the Plan comply with the applicable provisions of this title. The cases interpreting this section have held that a plan must meet the requirements of 11 U.S.C. §§ 1122 and 1123. See *In re Star Ambulance Service*, 540 B.R. 251, 260 (N.D.Tex. 2015); *In re Save Our Springs*, 632 F.3d 168 174 5th Cir. 2011); *In Re Counsel of Unit Owners of 100 Harborview Drive Condo*, 572 B.R. 131, 137-139 (Bankr.D.Md. 2017).

The Plan Contains an Impermissible Claim Subordination Provision

Article III.J of the Plan contains the following provision:

Under section 510 of the Bankruptcy Code, upon written notice, the Debtor the Reorganized Debtor, and the Claimant Trustee reserve the right to re-classify, or seek to subordinate, any Claim. . . .

The section gives the named parties the discretion upon “notice” to either subordinate a Claim or re-characterize a Claim whether or not a legal basis exists to either re-characterize the Claim or subordinate it. The term “notice” is nowhere defined, and any time the Bankruptcy Code uses the term notice, it is always accompanied by the words “and a hearing”. 11 U.S.C. §§ 1112, 707 and 554 are examples of Bankruptcy Code sections that require both notice and a hearing prior to a party obtaining the relief sought in a pleading. Nowhere in the Bankruptcy

Code can a debtor obtain relief without affording the parties affected by the requested relief an opportunity for a hearing.

Under Bankruptcy Rule 7001(8), the subordination of a claim, as a general rule, requires the filing of an adversary proceeding. However, an exception to the rule is that a subordination of a claim can occur through a Plan. The Plan provision, as written, allows the designated parties the ability to subordinate a claim or re-characterize a claim merely by sending a letter.

The Plan, Plan Supplements and Disclosure Statement do not identify any specific Claim for which subordination is sought. Rather, in the recent Plan Supplement that was filed on January 4th (Dkt. No. 1656), retained claims are lumped in with all other possible claims and a laundry list of possible targets. (See Plan Supplement Dkt. No. 1656-1 Exhibit L.) Notwithstanding the conflicting 5th circuit case law concerning the necessary designation for the retention of claims (See *In re SI Restructuring*, 714 F.3d 860 (5th Cir. 2013) and *In re Texas Wyoming Drilling*, 647 F.3d 547, 549 and 551 (5th Cir 2011) and *In re United Operating, LLC*, 540 F.3d 351 (5th Cir. 2008), the cases do require some notice to the creditor of the potential for the subordination of such creditor's claim. Bankruptcy Rule 7001 (8) cannot be read to allow a complex "equitable subordination claim" that requires evidence and findings consistent with *In Re Mobile Steel*, 563 F.2d 692 (5th Cir. 1977) to occur with only written notice immediately prior to a confirmation hearing. The provision, as written, does not provide any party subject to the so-called notice with due process and violates 11 U.S.C. § 1129(a)(1).

The Plan is Not Final and Contains an Impermissible Plan Modification Provision

In addition to the Plan, the Debtor must file a Plan Supplement which will include various documents that will 1) govern the operations of the Highland Claimant Trust and the

Litigation Trust, 2) identify retained causes of action; and 3) list the executory contracts and leases that will be assumed by the Debtor and Plan Documents.

The problem with the Plan Supplement is that, as of the writing of this Objection and possibly even after the hearing on the confirmation of the Debtor's Plan, parties in interest will not have seen the documents that will become an essential part of the Plan. Article IV.J on page 36 of the Plan states:

The Debtor and the Committee are currently working to finalize the forms of certain of the Plan Documents to be filed with the Plan Supplement. To the extent that the Debtor and the Committee cannot agree as to the form and content of such Plan Documents, they intend to submit the issue to non-binding mediation pursuant to the Order Directing Mediation entered on August 3, 2020 [D.I. 912].

It is clear that no requirement exists in the Plan that the Plan Documents be finalized prior to hearing on the confirmation of the Debtor's Plan so that creditors can object if any terms of the Plan Documents filed in the Plan Supplement adversely impact a creditor's rights or are inconsistent with the Bankruptcy Code and Rules.

The Plan contains a provision allowing modification of the Plan. It is not clear from the language of the modification section the extent of judicial oversight that exists with respect to a Plan modification and whether this Court will have the ability to determine if the proposed plan modification is material or an immaterial. Article XII.B (p. 55) of the Plan provides that the Debtor reserves the right in accordance with the Bankruptcy Code and Rules to amend or modify the Plan prior to the entry of the Confirmation Order with the "consent" of the Committee. The provision does not require compliance with 11 U.S.C. § 1127(a) which specifically provides that the proposed modification prior to confirmation must meet the requirements of 11 U.S.C. §1122 and 11 U.S.C. §1123. In contrast to the Plan provision concerning modification prior the entry of the Confirmation Order, Article XII.B of the Plan does recognize that any modification after the entry of the Confirmation Order must meet the requirements set forth in 11 U.S.C. §§

1127(b). From a textual point of view, modifications of the Plan both before and after the entry of the Confirmation Order must meet the requirements of 11 U.S.C. §§ 1122 and 1123.

The Plan violates 11 U.S.C. § 1129(a)(7)

Under 11 U.S.C. § 1129(a)(7), in order for a plan to be confirmed, each creditor as of the effective date of the plan will receive or retain under the plan on account of claim or interest an amount that is not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7.

While the Debtor's Plan is a liquidation plan, creditors from a valuation point of view are receiving an amount less than they would receive if the Debtor were liquidated under chapter 7. The amount received by creditors under the Debtor's Plan cannot be viewed solely in the dollars they receive but, rather, the amount actually received must be discounted by two provisions in the Debtor's Plan that reduce the present value of the creditors' recovery under the Plan. The two discounting factors are the following provisions in the Highland Claimant Trust:

- a) The Reorganized Debtor has no affirmative obligation to report any activity or results to the holders of beneficial interests in the Claimant Trust or potential holders of beneficial interests; and
- b) The holders of beneficial interests in the Claimant Trust are required to agree to a standard of liability for the Claimant Trustee that only allows claims against the Claimant Trustee for acts that constitute "fraud, willful misconduct or gross negligence" (See Article 8 of the Highland Claimant Trust). A notable omission from the standard of liability is a breach of fiduciary duty. This omission is contrary to the statement contained in the Plan "In all circumstances, the Claimant Trustee shall act in the best interests of the Claimant Trust Beneficiaries and with the same fiduciary duty as a Chapter 7 trustee." (See Plan Page 28)

- c) A Chapter 7 trustee, if it attempted to sell assets, would have to obtain Court authority for the sale and would provide Notice to creditors of the sale. Under the Plan no such requirement exists.

The Plan And Related Documentation Provide For Impermissible Non-debtor Exculpation, Releases and Injunctions That Are Not Allowed Under Applicable 5th Circuit Case Law

A. Exculpation and Releases

Article IX of the Plan contains extensive exculpation and release provisions that far exceed those allowed in the Fifth Circuit.

Article IX.C (the “Exculpation Clause”) exculpates each “Exculpated Party” from, *inter alia*, any liability for conduct occurring **on** or after the Petition Date in connection with or arising out of the filing and administration of the case, the funding, consummation and implementation of the Plan, and any negotiations, transactions and documents pertaining to same that could be asserted in their own name or on behalf of any holder of a claim or interest excluding acts constituting bad faith, fraud, gross negligence, criminal misconduct or willful misconduct.

The term “Exculpated Parties” is defined² in Article I.B.61 of the Plan to include:

1. The Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the “Managed Funds,” which is defined in Article I.B.83 of the Plan to include Highland Multi-Strategy Credit Fund, L.P., Highland Restoration Capital Partners, L.P., and any other investment vehicle managed by the Debtor pursuant to the executory contracts assumed under the Plan;
2. Strand Advisors, Inc., the Debtor’s general partner (“Strand”);

² The definition of “Exculpated Parties” includes references to numerous other defined terms that also are defined in Article I.B, some of which are summarized here. For the sake of brevity, the definition of each defined term contained in the definition of Exculpated Parties is not reproduced here *verbatim*.

3. John S. Dubel, James P. Seery, Jr. and Russell Nelms, the independent directors of Strand appointed on January 9, 2020, and any additional or replacement directors appointed between then and the effective date of the Plan (collectively, the “Independent Directors”);
4. The Official Committee of Unsecured Creditors appointed in the case (the “Committee”);
5. The members of the Committee in their official capacities;
6. Professionals retained by the Debtor and the Committee in the case (the “Professionals”);
7. James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer (the “CEO/CRO”); and
8. “Related Persons” of the Independent Directors, the Committee, the members of the Committee, the Professionals and the CEO/CRO, which is defined to include, *inter alia*, predecessors, successors, assigns, officers, directors, employees, managers, attorneys, consultants, subsidiaries thereof.

The definition does expressly exclude from the definition certain named individuals and entities.

In addition to Article IX of the Plan, the Claimant Trust Agreement [Dkt. 1656-2, Exhibit M] for which approval is sought as part of the Plan confirmation, also provides in Section 8.1 for a reduced standard of care by the parties described therein as the Claimant Trustee, the Delaware Trustee, and the Oversight Board, any individual member thereof, by limiting their liability to that for fraud, willful misconduct, or gross negligence.³

³ With respect to the Claimant Trustee, this appears to contradict Plan Article IV.B.5 (p. 28), which provides: “In all circumstances, the Claimant Trustee shall act in the best interests of the Claimant Trust Beneficiaries and with the same fiduciary duties as a chapter 7 trustee.”

The scope of the Exculpation Clause is ambiguous because it does not specify a time frame to which the exculpation applies. Rather than stating that it applies for actions during a definite time period, such as occurring between the petition date and the effective date of the plan, it runs from the petition date through “implementation of the Plan.” The word “implementation” is not defined, which leaves the term subject to interpretation. Does it mean the execution of documents to be executed pursuant to the Plan or the actual implementation of the Plan through administration of assets and payment of claims? The ambiguity is exacerbated by the introduction to the Exculpation Clause, which provides for its effect “to the maximum extent permitted by applicable law”. Thus, one could expect that Debtor intends the Exculpation Clause to apply to actions of exculpated parties for actions taken far into the future.

Article IX.D (the “Release Clause”) provides that each Released Party is deemed released by the Debtor and the Estate, including the trusts created by the Plan (the Claimant Trust and Litigation Sub-Trust) release each Released Party from, *inter alia*, any and all Causes of Action that the Debtor or its estate could legally assert, except for obligations of the party under the Plan certain other agreements, confidentiality and noncompetition agreements, avoidance actions, or acts constituting bad faith, fraud, gross negligence, criminal misconduct or willful misconduct.⁴

The term “Released Parties” is defined in Article I.B.111 of the Plan to include:

1. The Independent Directors
2. Strand, solely from the date of the appointment of the Independent Directors through the effective date of the Plan;
3. The CEO/CRO;
4. The Committee;
5. The members of the Committee;

⁴ There are some additional limitations specific to “Senior Employees.”

6. The Professionals; and
7. The “Employees,” which is defined as the employees of the Debtor set forth in the plan supplement.

The term “Causes of Action” is an 18 line definition in Article I.B.19 to include just about any type of cause of action, whether arising before or after the commencement of the bankruptcy case.

The Release Clause applies to causes of action having no relationship to the case. The Release Clause also waives claims of the newly created Claimant Trust and Litigation Sub-Trust “existing or hereafter arising,” which means that these entities, which have conducted no business as of the confirmation of the Plan, are releasing future, unknown claims against the Released Parties, such as a future negligent breach of fiduciary duty claim.

The Exculpation Clause, the Release Clause and the Claimant Trust Agreement clearly bestow protection from liability upon numerous non-debtor parties. Some of the parties covered by the Exculpation Clause as Exculpated Parties, namely Managed Funds Highland Multi-Strategy Credit Fund, L.P. and Highland Restoration Capital Partners, L.P., and possibly by the use of “catch-all phrasing, SSPI Holdings, Inc., recently were argued to be outside the scope of this Court’s oversight but for an agreement reached by the Debtor with the Committee allowing for some notice protocols. *See* Debtor’s Response to Mr. James Dondero’s Motion For Entry of An Order Requiring Notice And Hearing For Future Estate Transactions Occurring Outside The Ordinary Course Of Business [Dkt. 1546]¶ 12

The Fifth Circuit decision in *In re Pacific Lumber Co.* 584 F.3d 229 (5th Cir. 2009) is dispositive. In that case, the plan proposed to release the plan proponents and post-reorganization owners of the reorganized debtor, the two new entities created by the plan, and

the creditor's committee (and their personnel) from liability—other than for willfulness and gross negligence—related to proposing, implementing and administering the plan. *Pacific*, 584 F.3d at 251. This language is similar to the language of the Exculpation Clause. The *Pacific* court cited the principle of 11 U.S.C. § 524(e), which states that “discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt.” *Id.* The court noted that: “We see little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization.” *Pacific*, 584 F.3d at 252. It went on to cite other Fifth Circuit authority establishing that 11 U.S.C. 524(e) only releases the debtor, not co-liable third parties, and that the cases seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions. *Pacific*, 584 F.3d at 252, citing *In re Coho Resources, Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. National Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993), *Feld v. Zale Corporation*, 62 F.3d 746 (5th Cir. 1995). Finally, the court stated:

There are no allegations in this record that either [plan proponents/owners of reorganized debtors] or their or the Debtors' officers or directors were jointly liable for any of [debtors'] pre-petition debt. They are not guarantors or sureties, nor are they insurers. Instead, the essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose.

Pacific, 584 F.3d at 252-253.

The *Pacific* court struck down all of the non-debtor releases except those in favor of the creditor's committee and its members. The rationale for allowing the exculpation of the creditor's committee and its members is that the law effectively grants them qualified immunity for actions within the scope of their duties. *Pacific*, 584 F.3d at 253. The court also noted that the creditor's committee and its members were the only disinterested volunteers among those among the parties sought to be released, and reasoned that it would be extremely difficult to find

members to serve on the committee if they can be sued by persons unhappy with the committee's performance or the outcome of the case. *Id.*

The Fifth Circuit noted the continuing viability of the rule of *Pacific* in *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1059 (5th Cir. 2012) (“ . . . a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law. Indeed, this court has explicitly prohibited such relief,” citing *Pacific*.) Lower courts from within the Fifth Circuit have strictly followed the precedent and struck down various plan clauses dealing with releases and exculpation. See *In re Thru, Inc.*, 2018 WL 5113124, *22 (D.C.N.D.Tex 2018), affirmed 782 Fed.Appx. 339 (5th Cir. 2019) (exculpation provision and injunction); *In re CJ Holding Co.*, 597 B.R. 597, 608 (S.D. Tex. 2019) (“The Fifth Circuit has concluded that a bankruptcy court may not confirm a plan that provides “non-consensual non-debtor releases.”); *In re National Truck Funding LLC*, 588 B.R. 175, 177 (Bankr. S.D. Miss. 2018) (“At hearing, the parties agreed that the Release and Exculpation . . . of the Plan . . . will be further amended by language protecting only the Official Committee of Unsecured Creditors and its representatives, as the Court has previously approved.”); *In re LMCHH PCP LLC*, 2017 WL 4408162, at *16 (Bankr. E.D. La. Oct. 2, 2017) (“The modification [to the plan] filed was done to ensure that the exculpation provision complied with [*Pacific*] which held that a plan could not exculpate outside of the Debtors, the Official Unsecured Creditors Committee, and those who act for them, where ‘the essential function of the exculpation clause . . . is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy.’”); *In re Patriot Place, Ltd.*, 486 B.R. 773, 823–24 (Bankr. W.D. Tex. 2013) (Non-debtor releases and exculpation clauses struck down as violative of Fifth Circuit precedent and render the plan unconfirmable.).

All parties exculpated and released other than the Debtor, the Reorganized Debtor, the Committee and its members should be removed from the Plan and the Claimant Trust Agreement, or the Plan is not confirmable.

B. Injunction Provisions

Article IX.F of the Plan contains extensive injunction provisions (the “Injunction Provisions”) that far exceed those allowed in the Fifth Circuit. Although not broken down into sections, the Article contains multiple separate and distinct provisions, as follows:

1. The first paragraph enjoins claimants and equity holders from interfering with plan implementation of consummation;
2. The second paragraph **permanently** enjoins entities with claims or equity interests and their related persons from, with respect to such interests, *inter alia*, commencing actions, enforcing judgments, creating or enforcing encumbrances, setting off against or affecting the Debtor, the Independent Directors, the Reorganized Debtor created by the Plan or the Claimant Trust created by the Plan, except as otherwise provided by the Plan or other order of this Court;
3. The third paragraph extends the injunctions of the Article to any successors of the Debtor, the Reorganized Debtor and the Claimant Trust and their respective property and interests in property; and
4. The fourth paragraph provides that no “Entity⁵” may commence or pursue a claim or cause of action against a “Protected Party”⁶ that arose from or is related to the

⁵ Defined as any “entity” as defined in 11 U.S.C. § 101(15) and also includes any “Person” or any other entity.

⁶ The Plan does not define the term “Protected Party.” It defines “Protected Parties” as follows:

“*Protected Parties*” means, collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the Claimant Trust Oversight Committee (in their official capacities), (xiii) New GP LLC, (xiv) the

bankruptcy case, the negotiation of the Plan, the administration of the Plan, the wind down of the business, the administration of the Claimant Trust, or transactions in furtherance of the foregoing, without this Court first finding that the claim or cause of action represents a colorable claim of bad faith, criminal misconduct, fraud or gross negligence against the Protected Party, and specifically authorizes such Entity to bring a claim against the Protected Party.⁷ It further provides that this Court has the sole jurisdiction to adjudicate any such claim for which approval to pursue the claim has been granted.

Even the most cursory reading of the language of Article IX.F, especially the fourth paragraph, reveals that it goes farther than the exculpation and release provisions in terms of the parties protected by the permanent injunctions.

Although the Court in *Pacific* did not appear to expressly deal with an injunction, as noted above the court concluded that its own cases “. . . seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.” *Pacific*, 584 F.3d at 252. In addition, the Fifth Circuit in *Vitro*, *supra*, construed *Pacific* as denying a non-debtor permanent injunction, wherein it cited *Pacific* and added: “(discharge of debtor’s debt does not affect liability of other entities on such debt and denying non-debtor release and permanent injunction.)” *Vitro*, 701 F.3d at 1059. The logic for applying the same principle to both releases/exculpations and injunctions is simple to understand—if a non-debtor cannot be released from claims but

Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), NexBank, SSB (and any of its subsidiaries), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Protected Party.”

⁷ The provision is expressly limited as to Strand and Employees to the period from the date of appointment to the effective date of the Plan.

claimants can be enjoined by the bankruptcy court from prosecuting them against the non-debtor, the exclusion of a release *ab initio* or the striking of a release from a plan is meaningless. For example, the fourth paragraph effectively releases from negligence claims a broad category of persons and entities not entitled to exculpation or releases under *Pacific*, because the paragraph only allows an aggrieved party to proceed after this court has determined that their allegations represent a colorable claim of bad faith, criminal misconduct, willful misconduct, fraud or gross negligence. As noted by the Fifth Circuit in *Zale, supra*, “Accordingly, we must overturn a § 105 injunction if it effectively discharges a nondebtor.” *Zale*, 62 F.3d at 760, citing *In re Vitek*, 51 F.3d 530, 536, n. 27, as follows: “(‘[N]on-debtor property thus should not ordinarily be shielded by the powers of the bankruptcy court.’)” *Id.* See also *In re Thru, Inc.*, 2018 WL 5113124, *21-22 (striking down a plan injunction that “would effectively discharge numerous non-debtor third parties”).

All parties protected by the Injunction Provisions other than the Debtor, the Reorganized Debtor, the Committee and its members should be removed or the Plan is not confirmable.

C. The Claims Released Do Not Meet the Few Exceptions Allowing Release or Injunctions in Favor of Third Parties

There are a few situations where it may be *possible* to argue that third party releases are permissible within the Fifth Circuit, but none are applicable here. The *Pacific* court distinguished one set of cases cited by the plan proponents by saying that they concerned global settlements of mass claims. *Pacific*, 584 F.3d at 252. Another has cited *Pacific* for the proposition that, absent a **meaningful** contribution by the released party, the release would probably be invalid under *Pacific*. *In re Texas Rangers Baseball Partners*, 431 B.R. 706, 717 FN 29 (Bankr. N.D. Tex. 2010); See also *Zale*, 62 F.3d at 762 (holding that one plan provision temporarily enjoining certain contract claims was valid as an unusual circumstance because it

involved a settlement providing substantial consideration being paid into to the estate). Another referred to a narrowly tailored release of the type found in § 363(f) sales of property free and clear of liens. *In re Patriot Place, Ltd.*, 486 B.R. 773, 821-822 (Bankr. W.D. Tex. 2013). Such releases and injunctions are entered to ensure that the purchaser of the debtor's property (as well as the debtor's property being sold) is insulated from claims that creditors might have against the debtor and the property being sold by the debtor to the purchaser. *Id.*

The court in *Zale* indicated that a **temporary** injunction **may** be proper when unusual circumstances exist. *Zale*, 62 F.3d at 761. These conditions are when the non-debtor and the debtor party enjoy such an identity of interests that the suit against the non-debtor is essentially a suit against the debtor and when the-third party action will have an adverse impact upon the debtor's ability to accomplish reorganization. *Id.* Even in such cases, neither of which is applicable here, an injunction would not be permanent, but would only delay the actions.

None of the foregoing exceptions are applicable in the instant case.

D. Jurisdiction

Even if the Bankruptcy Code were to permit some exculpation, releases and injunctions protecting non-debtor parties, this Court does not have the power to retain exclusive, indefinite, post-confirmation jurisdiction to determine whether actions against Protected Parties may proceed or, thereafter, to adjudicate claims pertaining thereto.

The fourth paragraph of the Injunction Provisions prohibits the commencement of certain actions against any Protected Party with respect to claims or causes of action that arose from or are related to the case, administration of the case, the wind down of the business of the Debtor or Reorganized Debtor, and the administration of the Claimant Trust. It also channels claims by requiring that any such claims or causes of action be first brought to this Court to determine that

the claims are outside the scope of protection granted a Protected Party, and to obtain an express authorization from this Court allowing the action to proceed. It then provides that this Court has sole jurisdiction to adjudicate the claim. Because the Reorganized Debtor and the Claimant Trust have engaged in no activity as of the confirmation of the Plan, this provision clearly is intended to extend to unknown, future conduct by Protected Parties in addition to pre-confirmation Protected Parties.

As noted by the Fifth Circuit in *Bank of Louisiana v. Craig's Stores of Texas, Inc. (In re Craig's Stores)*, 266 F.3d 388, 389 (5th Cir. 2001), bankruptcy court jurisdiction does not last forever. Under 28 U.S.C. § 1334, a federal district court has original jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” *In re Superior Air Parts, Inc.*, 516 B.R. 85, 92 (Bankr.N.D.Tex. 2014). The district court is authorized under 28 U.S.C. § 157 to refer to the bankruptcy court “any or all proceedings arising under title 11 or arising in or related to a case under title 11.” *Id.* By virtue of an order adopted on August 3, 1984, this Court has jurisdiction over any or all proceedings arising under title 11 or arising in or related to a case under title 11. *Id.*

“Arising Under” jurisdiction involves causes of action “created or determined by a statutory provision of title 11.” *Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 96 (5th Cir. 1987); *Superior*, 516 B.R. at 93. Nothing involved in the exculpations, releases or injunctions on non-debtor parties involves such a cause of action. By their nature, negligence claims and intentional tort claims arise by operation of law generally applicable to all persons and entities regardless of whether or not they are in bankruptcy. They could exist totally outside a bankruptcy context.

“Arising in” jurisdiction involves those actions “not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” *Wood*, 825 F.2d at 97; *Faulkner v. Eagle View Capital Mgmt. (In re Heritage Org., LLC)*, 454 B.R. 353, 360 (Bankr.N.D.Tex. 2011); *Superior*, 516 B.R. at 94-95. The example given the by the *Wood* court is “‘administrative’ matters that arise *only* in bankruptcy cases.” *Wood*, 825 F.2d at 97 (emphasis supplied by the court). Again, negligence claims and intentional torts against non-debtors obviously do not meet these criteria.

The final category, “related to” jurisdiction, involves the issue of “‘whether the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.’” *Wood*, 825 F.2d at 93, citing *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984) (emphasis supplied by the court). Because it is obvious that the non-debtor claims being released, exculpated and enjoined do not “arise under” or “arise in” a bankruptcy case, the only possibly arguable basis for jurisdiction is “related to” jurisdiction. The fourth paragraph of the Injunction Provisions contemplates application to any claim or cause of action “that arose from or is related” to the case.

Initially, it should be noted that there simply is no way that even a massive judgment against the non-debtors could have any impact whatsoever on the estate. Considering that there will be no **estate** being administered **in bankruptcy** post-confirmation, it is inconceivable how releases of non-debtor parties could possibly impact the administration of a now defunct bankruptcy estate of the Debtor. The court in *Craig’s* appeared to recognize this principle when it adopted the view that confirmation of a plan changes bankruptcy court jurisdiction. *Craig’s*, 266 F.3d at 390. Expansive bankruptcy court jurisdiction is no longer “required to facilitate ‘administration’ of the debtor’s estate, for there is no estate left to reorganize.” *Id.*

In *Craig's*, the Fifth Circuit was dealing with a fact pattern that differs from the instant case in two ways. First, the case involved a dispute between the aggrieved party and the reorganized debtor, not totally non-debtor parties. Second, it only partially involved the fact pattern of the instant case, because it only dealt with claims characterized as post-confirmation rather than the mix of pre- and post-confirmation claims against the non-debtor parties protected by the Exculpation Clause, Release Clause and Injunction Provisions. The case involved a pre-confirmation contract that had been assumed, and a post-confirmation dispute involving state law for damages that at least partially arose post-confirmation.⁸ The court held that there was no jurisdiction over a claim that “principally dealt with post-confirmation relations between the parties.” *Craig's*, 266 F.3d at 390.

The later Fifth Circuit case of *Newby v. Enron Corp. (In re Enron Corp. Securities)*, 535 F.3d 325 (5th Cir. 2008) also involved the issue of post-confirmation jurisdiction.⁹ The court summarized the *Craig's* decision as one dealing with the post-confirmation relations between the parties, where there was no antagonism between the parties as of the date of the reorganization, and no facts or law deriving from the plan were necessary to the claim. *Enron*, 535 F.3d at 335.

Under the general principles of *Craig's*, there should be not “related to” jurisdiction involving the claims involved in this case, which purely involve non-debtor parties and non-bankruptcy related claims with no potential impact upon the pre- or post-confirmation estates.

⁸ The facts are not totally clear. They indicate that the plan was confirmed in December 1994, and that the claims for damages arose in 1994 and 1995. *Craig's*, 266 F.3d at 389. Therefore, at least the 1995 claims arose post-confirmation.

⁹ The *Enron* case involved lawsuits against non-debtors that had been removed prior to the commencement of the case, that were dismissed with prejudice after the confirmation of the plan. *Enron*, 535 F.3d at 333. The plaintiffs alleged that there was no jurisdiction to dismiss the case because “related to” jurisdiction had ceased after the plan was confirmed. 535 F.3d at 334. However, the parties did not dispute whether the federal courts had “related to” bankruptcy jurisdiction over the cases at the time of removal, so the court framed the question as whether the court, after confirming Enron’s plan, maintained “related to” jurisdiction. 535 F.3d at 334-335. Therefore, the case stands for the proposition of whether “related to” jurisdiction, once conferred, continues post-confirmation. 535 F.3d at 335-336.

This is especially true with respect to post-confirmation future releases of non-debtor parties involved with as yet uncreated entities.

The case of *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594 (2011), decided after *Wood, Craig's* and *Enron*, adds additional jurisdictional barriers to confirmation of a Plan containing the language of Article IX.(C), (D) and (F). In *Stern*, Pierce had filed a proof of claim in Marshall's bankruptcy proceedings, alleging a right to recover damages as a result of alleged defamation on the part of Marshall. *Stern*, 131 S.Ct. at 2601. Marshall filed a counterclaim against Pierce alleging tortious interference with a gift that Marshall had expected to receive from her husband, who was Pierce's father. *Id.* The claim was classified by the Supreme Court as a common law tort claim. *Id.* The Supreme Court found that Pierce had consented to resolution of the counterclaim by the Bankruptcy Court. 131 S.Ct. at 2606. After being cast in judgment by the Bankruptcy Court in the amount of over \$425 Million, Pierce argued that the Bankruptcy Court did not have jurisdiction over the counterclaim. 131 S.Ct. at 2601. The Supreme Court agreed with Pierce, holding that Article III of the U.S. Constitution did not permit the Bankruptcy Court to enter a final judgement on Marshall's counterclaim. 131 S.Ct. at 2608.

Some claims involved in the instant case are simple tort claims against non-debtors. They occupy the same category as the defamation suit in *Stern*. Movants are entitled to an actual adjudication of their claims, which would mean an adjudication by a state court or an Article III federal court of competent jurisdiction and venue. This Court's submission of a report and recommendation on confirmation to the District Court would not constitute an actual adjudication. Because the Plan provision at issue provides that this Court will **actually adjudicate** the claims, it runs afoul of *Stern* on its face. Similarly, the provision literally would

preclude Movants from seeking to withdraw the reference to have the case actually decided by an Article III court. Because this Court could not adjudicate the case, the Plan's attempt to grant to this Court sole jurisdiction to adjudicate the claims renders the Plan nonconfirmable.

Even if jurisdiction *could* exist for the purpose of determining whether a claim could go forward against a Protected Party, it does not follow that this Court would have jurisdiction to adjudicate the claim. At the point at which this Court determines that a claim could proceed, the action no longer involves any interpretation of either bankruptcy law or the Plan, nor could it have any impact upon the pre- or post-confirmation estate.¹⁰

The Plan Prohibits Claimants From Asserting Rights Under The Plan Rendering the Plan Not Confirmable

Aside from protecting parties not entitled to protection, the Exculpation, Release Injunction Provisions contain provisions that far exceed the scope permitted by bankruptcy law.

The second paragraph of the Injunction Provisions is broad enough to permanently preclude claimants from pursuing their rights under the Plan against the Reorganized Debtor and the Claimant Trust because it precludes any attempt to enforce rights, many of which are created pursuant to the Plan, and the third paragraph of the Injunction Provisions goes even farther by extending the injunctions to any successors of the Reorganized Debtor and the Claimant Trust. Under the Plan, the Class 2 claimant is to be given a new promissory in treatment for its claim, the Class 3 claimants have the option to retain collateral, and Class 5 claims are reinstated. If the Reorganized Debtor defaults under any of its obligations, the Injunction Provisions literally prevent any attempt to enforce their rights under the Plan.

¹⁰ Movants are aware of *In re Pilgrim's Pride*, 2010 WL 200000 (Bankr.,N.D.Tex 2010) and *In re Camp Arrowhead, Ltd.*, (Bankr.W.D.Tex 2011). Movants believe that these cases blatantly disregard the letter and spirit of *Pacific* and are, therefore, wrongfully decided. In addition, they were decided before *Stern v. Marshall*.

The best way to demonstrate this issue is to cite a different plan. Although the injunction in *In re Thru, Inc., supra*, was struck down on the basis that it impermissibly released third parties, the injunction contained language that the second paragraph in the instant case is missing. It starts out:

Except as otherwise expressly provided in this Plan or in the Confirmation Order **and except in connection with the enforcement of the terms of this Plan (including the payment of Distributions hereunder) or any documents provided for or contemplated in this Plan**, all entities . . . are permanently enjoined from. . . .

Thru, 2018 WL 5113124, *21

Compare this language to the second paragraph of the Injunction Provisions, which provides:

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Entities . . . are permanently enjoined. . . .

The Plan literally would require a claimant to come back to this Court for an order if the Reorganized Debtor or the Plan-created trusts default. This goes against the concept espoused by the Fifth Circuit in *Craig's*, indicating that confirmation allows the debtor to go about its business without further supervision or approval, but also without the protection of the bankruptcy court. *Craig's*, 266 F.3d at 390, citing *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991).

The Plan Contains a DeFacto Channeling Injunction

As noted earlier, paragraph 4 of the Injunction Provisions in the Plan provide that no Entity may commence or pursue a claim or cause of action against a Protected Party without this Court:

(i) first determining, after notice, that such claim or cause of action represents a colorable claim of bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Entity to bring such claim against any such Protected Party;

Plan, Article IX.F, fourth unnumbered paragraph.

Thereafter, the Plan provides that this Court retains sole jurisdiction to adjudicate the claim. *Id.*

The above provisions have the effect of channeling all post-petition claims against the Reorganized Debtor, the Creditor Trust and others into the Bankruptcy Court to determine whether a claim can be asserted and then as the forum with the “exclusive jurisdiction” to adjudicate the claim. The provisions are not authorized under the Bankruptcy Code.

Congress, when it enacted 11 U.S.C. § 524(g), provided a limited channeling injunction for asbestos and in some mass tort cases. Section 524(g) was not created to shield parties that are liquidating a debtor and its reach does not extend to garden variety unsecured creditors or serve as a barrier to claims that arose after the Effective Date of the Plan. The impact of Section 524(g) is to address pre-petition claims and future claims arising out of pre-petition activity where the claims have yet to manifest.

In addition, 11 USC 524 § (g) is only applicable to a Debtor that obtains a discharge pursuant to 11 USC § 1141. The Debtor in its approved Disclosure Statement [See DKT 1473, pp. 8-9] classifies the Debtor’s post confirmation activities as one of “wind down” of the Managed Funds as well as the monetization of the balance of the Reorganized Debtor Assets. In addition, the Claimant Trust formed pursuant to the Plan is a “liquidation trust“ [See DKT 1656-2 section 2.2], which makes the Plan a Plan that “ liquidates all or substantially all of the property of the estate”. Pursuant to 11 U.S.C. § 1141(d)(3), a Debtor whose Plan is none that liquidates all or substantially all of the property of the estate is not eligible for a discharge. 11 U.S.C. § 524(g) cannot authorize any channeling injunction for the Debtor in its Plan.

Conclusion

For the reasons set forth herein, confirmation of the Plan must be denied.

January 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 5th day of January, 2021, a copy of the above and foregoing *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
)	
Debtor.	)	(Jointly Administered)
)	
)	

**OBJECTION TO CONFIRMATION OF FIFTH AMENDED PLAN OF
 REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.**



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Highland Capital Management Fund Advisors, L.P., and NexPoint Advisors, L.P. (each, an “**Advisor**,” and collectively, the “**Advisors**”), Highland Funds I and its series Highland Healthcare Opportunities Fund, Highland/iBoxx Senior Loan ETF, Highland Opportunistic Credit Fund, and Highland Merger Arbitrage Fund, Highland Funds II and its series Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Fixed Income Fund, and Highland Total Return Fund, NexPoint Capital, Inc., NexPoint Strategic Opportunities Fund, Highland Income Fund, Highland Global Allocation Fund, NexPoint Real Estate Strategies Fund, and NexPoint Latin America Opportunities Fund (each, a “**Fund**,” and collectively, the “**Funds**,” and together with the Advisors, the “**Funds and Advisors**” or “**Objectors**”), by and through their undersigned counsel, hereby submit this objection (the “**Objection**”) to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Dkt. No. 1472], together with that certain Plan Supplement [Dkt. No. 1648] filed December 30, 2020 (the “**Fifth Amended Plan**”).¹ In support of the Objection, the Funds² and Advisors respectfully submit to the Court as follows:

SUMMARY OF OBJECTION

The Debtor owes strict statutory and contractual fiduciary obligations to manage the billions of dollars of other peoples’ money that it manages. No actual or hypothetical conflict of interest is allowed. Yet, the Fifth Amended Plan, by purporting to assume various agreements pursuant to which the Debtor manages portfolios of assets, places the interests of the Debtor’s creditors ahead of the interests of the beneficial interest holders in those portfolios,

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

² The Funds are investment companies and a business development company registered under the Investment Company Act of 1940 as open-end or “mutual” funds, closed end funds or a business development company. None of the Funds are private or hedge funds.

thereby representing a clear conflict of interest and breach of fiduciary duty in violation of the Advisers Act (defined below) and the 1940 Act (defined below).

This is because the Plan provides for the assumption of numerous management agreements in connection with, among other investments, interests in collateralized loan obligations (“CLOs”) owned in part by the Funds and/or Advisors, together with other investors. In some cases, either the Funds, the Advisors or these entities in conjunction with other objecting creditor(s) own or manage a majority of the remaining beneficial interests in such CLOs. To be clear, the CLO -- not the Funds nor the Advisors nor the Debtor -- is the issuer of these interests. Nevertheless, it is the Funds and Advisors who hold the beneficial and economic interests and who, pursuant to the underlying agreements, in many instances have the ability to control who the servicer or manager of the portfolios is. However, the Plan reveals that the Debtor intends to dismiss its investment management employees by the end of January 2021 and to employ a subagent to perform its current portfolio manager/servicer role. The Debtor intends to effectively wind-down and liquidate the CLOs’ assets within two years—an arbitrary proposition having nothing to do with what is in the best interests of the CLOs. The Debtor also intends to strip the Funds and the Advisors of their contractual and statutory rights, and to improperly insulate itself from potential future liabilities that it may incur on account of its portfolio management.

The Plan cannot be confirmed so long as it provides for the assumption of these agreements. First, these agreements cannot be assigned under the Advisers Act or the 1940 Act, meaning that they cannot be assumed pursuant to section 365(c) of the Bankruptcy Code. Second, these agreements cannot be assumed under section 365(b) of the Bankruptcy Code because the Debtor cannot adequately assure its future performance under the agreements.

Third, these agreements cannot be assumed if the Plan purports to change their provisions or relieve the Debtor from its fiduciary obligations and resulting potential liabilities. Fourth, the Plan is not feasible and is illusory so long as it depends on future income from these non-assumable agreements. Fifth, the Plan fails to comply with applicable law by seeking to relieve the Debtor of the strict duties imposed on it by the Advisers Act and 1940 Act. Indeed, the Plan is an invitation for future litigation against the Debtor for future breaches by the Debtor of its contractual obligations and violations by the Debtor of federal law.

The Plan is not merely a disagreement between the Debtor, on the one hand, and the Funds and Advisers, on the other hand, as to how to manage the CLOs. The Plan instead represents an attempt by the Debtor to strip beneficial interest holders of their contractual and statutory rights, to improperly insulate itself against its future actions and liabilities, to avoid the dictates of the Advisers Act, and to use assets that it manages—assets that do not belong to the Debtor—to benefit the Debtor’s creditors at the expense of the actual owners of those assets. It is one thing for the Debtor to liquidate and to seek to repay its creditors, but it is another thing entirely for the Debtor to do this on the backs, and at the expense, of those investors whose interests the Debtor is charged with serving first.

For these and other reasons argued below, the Objectors object to the confirmation of the Plan.

The purported contract assumption is also illusory in that the Debtor’s plan is premised upon the liquidation of assets in which the Debtor has no interest and which a majority of the beneficial owners has expressed, and continue to express, a desire for a different portfolio management strategy than the one the Debtor intends to continue to employ. The contracts the Debtor proposes to assume contain provisions requiring the maximization of the return to or

preservation of the value of the collateral for the preference shareholders; these parties prefer that the assets not be liquidated, but maximized or preserved. Moreover, the Advisers Act³ requires the Debtor to comply with the portfolio management contracts for the protection of the investors in the Funds, CLOs and other products. The Debtor's purported assumption of these agreements, while other provisions of the Fifth Amended Plan make clear key provisions of the assumed contracts will be ignored and rejected in this context, is a similar form of "cherry picking" that section 365 does not countenance.⁴

BACKGROUND

A. General Background on Funds and Advisors

1. Each Advisor is registered with the U.S. Securities and Exchange Commission ("SEC") as an investment adviser under the Investment Advisers Act of 1940, as amended, 15 U.S.C. § 80b-1 *et. seq.* (the "Advisers Act").

2. Each of the Funds is a registered investment company or business development company under the Investment Company Act of 1940, as amended, 15 U.S.C. § 80a-1, *et. seq.* (the "1940 Act") and is advised by one of the Advisors.

3. As an investment company or business development company, each Fund is managed by an independent board of trustees subject to 1940 Act requirements. That board determines and contracts with one of the Advisors for each Fund. As is typical for nearly all

³ The Advisers Act and the 1940 Act (defined in numbered paragraph 2 below) are two separate acts, both adopted in 1940, and provide the essential statutory and regulatory structure for the Debtor's business, as well as the Advisors and the Funds, to operate legally and transparently for the benefit of the public.

⁴ The Funds and Advisors are aware that the Court has heard and rejected a form of this argument in a different context. By raising the point here, we mean no disrespect to the Court or the prior ruling. However, we contend that the issue is appropriately joined in connection with confirmation of a plan containing proposed contract assumptions that simply are not contract assumptions, fairly construed. Moreover, at the time of the Motion that was denied, only the Funds and Advisors took a position on the issues; now, other parties, on information and belief, will object or have objected on a similar basis.

investment companies, the Funds do not have employees. Instead, pursuant to the 1940 Act, each Fund's board oversees the Advisor and the Advisor, acting pursuant to the advisory agreements, provides the services necessary to the Fund's operations.⁵ The Funds are each managed by one of the two Advisors. The Advisors have some employees, but they also rely heavily on the Debtor to provide a variety of services. Further, certain individuals employed or affiliated with the Debtor also hold roles for the Advisors and/or the Funds, and some of these roles are fiduciary in nature (the "**Fiduciaries**"). The Fiduciaries are privy to confidential commercial information about the Funds and Advisors, including data relating to the Funds' investment holdings and investment strategies.

B. Shared Services and Payroll Reimbursement Agreements with the Debtor

4. Each Advisor is party with the Debtor to a shared services agreement. Specifically, NexPoint Advisors, L.P. ("**NexPoint**") and the Debtor are parties to an Amended and Restated Shared Services Agreement dated January 1, 2018 (as amended, the "**NexPoint SSA**"), and Highland Capital Management Fund Advisors, L.P. ("**HCMFA**") and the Debtor are parties to a Second Amended and Restated Shared Services Agreement dated February 8, 2013 (as amended, the "**HCMFA SSA**," and collectively with the NexPoint SSA, the "**Shared Services Agreements**").⁶

5. Under the Shared Services Agreements, the Debtor provides a variety of services, including operational, financial and accounting, human resources, information technology, legal, tax, and compliance services, to the Advisors. As part of its provision of

⁵ Each of the Funds' respective boards meets quarterly and, consistent with statutory requirements, each is advised by independent counsel.

⁶ Copies of the Shared Services Agreements and the Payroll Reimbursement Agreements (as defined below) are attached to the proofs of claim filed by the Advisors at Claim Nos. 95, 104, 108 and 119.

services, the Debtor maintains books and records (the “**Books and Records**”) on behalf of the Advisors.

6. Under the HCMFA SSA, the costs of the Debtor’s services are allocated on a percentage of use basis. The Debtor submits quarterly expense statements to HCMFA to reconcile amounts due to the Debtor. In addition, with respect to certain taxes related to the Shared Services, the Debtor collects those taxes from HCMFA on the same basis as with the Debtor’s other customers. To the extent of a related tax refund, the Debtor is obligated to submit the refund to HCMFA.

7. Under the NexPoint SSA, NexPoint pays the Debtor a fixed monthly fee for the provision of services.

8. The Advisors and the Debtor are also parties to separate payroll reimbursement agreements (as amended, the “**Payroll Reimbursement Agreements**”). The Payroll Reimbursement Agreements address the splitting of costs for certain employees that are “dual employees” of the Debtor and an Advisor and who provide advice to funds, such as the Funds, advised by the Advisors. The Payroll Reimbursement Agreements provide for the subject Advisor to reimburse the Debtor at a set cost.

9. The Advisors also participate in the Debtor’s self-insured healthcare plan (the “**Self-Insured Plan**”), which provides employee healthcare coverage. Depending on the contributions made and the claims submitted to the Self-Insured Plan at any given time, an Advisor may be owed money by, or owe additional contributions to, the Self-Insured Plan.

10. The Plan proposes to reject those executory contracts [Fifth Am. Plan, Dkt. No. 1472 at p. 37] that are not otherwise listed for assumption in a plan supplement. The Debtor has filed its Plan Supplement listing executory contracts to be assumed [Dkt. No. 1648], which

Plan Supplement does not include the foregoing executory contracts. Accordingly, it appears that the Plan proposes to reject the Shared Services Agreements, the Payroll Reimbursement Agreements, and the Self-Insured Plan. The Advisors will therefore have potentially sizable rejection damages claims, on account of which they are preparing to file corresponding proofs of claim.

C. The CLOs

11. The Funds also have economic interests in certain collateralized loan obligations (the “CLOs”) (the Fifth Amended Plan refers to the CLOs as “Issuers”), for which the Debtor serves as portfolio manager.

12. The CLOs are Aberdeen Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Jasper CLO Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd., Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC,⁷ and Westchester CLO, Ltd.

13. The CLOs are securitization vehicles that were formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preferred shares, which are intended to be repaid from proceeds of the subject CLO’s pool of debt obligations. The notes issued by the CLOs are paid according to a contractual priority of payments, or waterfall, with the value remaining in the CLO after the notes are fully paid flowing to the holders of the preferred shares.

14. The CLOs were created many years ago. Most of the CLOs have, at this point, paid off all the tranches of notes or all but the last tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preferred

⁷ The portfolio management agreements with Loan Funding VII, LLC is not proposed to be assumed.

shares.

15. Further, such ownerships represent in many cases the total remaining outstanding interests in such CLOs, the noteholders otherwise having been paid. In others, the remaining noteholders represent a small percentage only of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco represent a majority of the investors in the CLOs as follows:

- a. CLOs in which NexPoint or HCMFA manage owners of a majority of the preference shares: Stratford CLO, Ltd. 69.05%, Grayson CLO, Ltd. 60.47% and Greenbriar CLO, Ltd. 53.44%.
- b. CLOs in which a combination of NexPoint and HCMFA managed funds and CLO Holdco hold all, a supermajority or majority of preference shares: Liberty CLO, Ltd. 70.43%, Stratford CLO, Ltd. 69.05%⁸, Aberdeen Loan Funding, Ltd. 64.58%, Grayson CLO, Ltd. 61.65%*, Westchester CLO, Ltd. 58.13%, Rockwall CDO, Ltd. 55.75%, Brentwood CLO, Ltd. 55.74%, Greenbriar CLO, Ltd. 53.44%*

16. The issuer of each CLO has separately contracted with the Debtor for the Debtor to serve as the CLO's portfolio manager or servicer (the "**Servicing Agreements**").⁹ In this capacity, the Debtor is responsible for, among other things, making decisions to buy or sell the CLOs' assets in accordance with the indenture and its obligations under the Servicing Agreements. Although the Servicing Agreements vary, they generally impose a duty on the

⁸ CLOs marked with an asterisk (*) appear in the foregoing list as well.

⁹ The title given to the Debtor by the CLOs varies from CLO to CLO based on the relevant agreements, but the Debtor has the same general rights and obligations for each CLO. In this Objection, the Funds and Advisors have used the term "portfolio manager" when referring to the Debtor's role for each CLO regardless of the precise title in the underlying documents.

Debtor when acting as portfolio manager to maximize the value of the CLOs' assets for the benefit of the CLOs' noteholders and preferred shareholders. In particular, the Servicing Agreements contain language providing for the maximization or preservation of value for the benefit of the preference shares as shown in the following examples:

In performing its duties hereunder, the Portfolio Manager shall seek to maximize the value of the Collateral for the benefit of the Noteholders and the Holders of the Preference Shares taking into account the investment criteria and limitations set forth herein and in the Indenture and the Portfolio Manager shall use reasonable efforts to manage the Collateral in such a way that will (i) permit a timely performance of all payment obligations by the Issuer under the Indenture and (ii) subject to such objective, maximize the return to the Holders of the Preference Shares; provided, that the Portfolio Manager shall not be responsible if such objectives are not achieved so long as the Portfolio Manager performs its duties under this Agreement in the manner provided for herein, and provided, further, that there shall be no recourse to the Portfolio Manager with respect to the Notes or the Preference Shares.

Liberty Portfolio Management Agreement, Sec. 2(b) containing language above.

In performing its duties hereunder, the Servicer shall seek to preserve the value of the Collateral for the benefit of the Holders of the Securities taking into account the Collateral criteria and limitations set forth herein and in the Indenture and the Servicer shall use reasonable efforts to select and service the Collateral in such a way that will permit a timely performance of all payment obligations by the Issuer under the Indenture; provided, that the Servicer shall not be responsible if such objectives are not achieved so long as the Servicer performs its duties under this Agreement in the manner provided for herein, and provided, further, that there shall be no recourse to the Servicer with respect to the Notes or the Preference Shares. The Servicer and the Issuer shall take such other action, and furnish such certificates, opinions and other documents, as may be reasonably requested by the other party hereto in order to effectuate the purposes of this Agreement and to facilitate compliance with applicable laws and regulations and the terms of this Agreement.

Aberdeen Servicing Agreement, Sec. 2(b).

17. Moreover, each of the Servicing Agreements contain express language that the portfolio manager’s obligations thereunder are for the benefit of and “shall be enforceable at the instance of the Issuer, the Trustee, on behalf of the Noteholders, or the requisite percentage of Noteholders or Holders of Preference Shares, as applicable, as provided in the Indenture of the Preference Share Paying Agency Agreement, as applicable.” Servicing Agreement Sec. 9.

18. The Servicing Agreements also generally allow the holders of preference shares to remove the portfolio manager for cause, while their affirmative consent is required to an assignment of the agreements. Cause includes the anticipated “ipso facto” provisions related to insolvency and bankruptcy, but cause is not so limited and includes material breach of the Servicing Agreement which would clearly include the failure to maximize value or the failure to preserve collateral. Servicing Agreement, Sec. 14. However, certain Servicing Agreements provide for a certain percentage of holders of preference shares to remove the portfolio manager without cause. *See, e.g.*, Gleneagles CLO , Ltd., Portfolio Management Agreement, Sec. 12(c).

E. The Fifth Amended Plan and Disclosure Statement

19. On November 24, 2020, the Debtor filed the Fifth Amended Plan and the Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Dkt. No. 1473] (the “**Disclosure Statement**”).

20. The Fifth Amended Plan provides for the transfer of the majority of the Debtor's assets to a Claimant Trust that will be established for the benefit of the Claimant Trust Beneficiaries. The Debtor's rights to manage investment vehicles managed by the Debtor pursuant to executory contracts that are assumed pursuant to the Fifth Amended Plan, defined as the "Managed Funds," are to remain with the Reorganized Debtor, which, in turn, is to be managed by New GP LLC, a wholly-owned subsidiary of the Claimant Trust. The Disclosure Statement states that "[t]his structure will allow for continuity in the Managed Funds and an orderly and efficient monetization of the Debtor's Assets." Dkt. No. 1473 at 11. Ultimately, however, the Claimant Trust and the Reorganized Debtor will "sell, liquidate, or otherwise monetize all Claimant Trust Assets and Reorganized Debtor Assets." *Id.* More specifically, the Reorganized Debtor will manage the wind down of the Managed Funds in addition to any other remaining Assets. Moreover, the Financial Projections attached as Exhibit C to the Disclosure Statement make clear that, assuming confirmation of the Plan in its current form, the Debtor intends to liquidate its remaining assets and the assets within the Managed Funds over the next two years, concluding in December 2022.

21. The Disclosure Statement further states that the Debtor does not anticipate either the Reorganized Debtor or the Claimant Trust assuming or assuming and assigning the contracts between the Debtor and certain of its Related Entities¹⁰ pursuant to which the Debtor provides shared services and sub-advisory services relating to such Related Entities. Dkt. No. 1473 at 42. Accordingly, it appears that the Debtor's intent is to reject the Shared Services Agreements, the Payroll Reimbursement Agreements, and the Self-Insured Plan.

¹⁰ Footnote 10 to the Disclosure Statement clarifies that the Debtor does not consider any of the Issuers to be a Related Entity.

22. With respect to the Shared Services Agreements, the Disclosure Statement provides that the cost of staffing to fulfil the agreements has historically resulted in a net loss to the Debtor and is not beneficial to the estate. The Disclosure Statement further states that the agreements contain anti-assignment provisions which it believes to be enforceable under section 365(c) of the Bankruptcy Code, and moreover, are terminable at will by either party. In light of these considerations, the Debtor apparently does not believe that the agreements may be assumed or assumed and assigned, and even if they could, there would not be any corresponding benefit to the estate. Notwithstanding the foregoing, the Disclosure Statement indicates that the Debtor is still assessing whether to assume and assign the agreements with a Related Entity. Dkt. No. 1473 at 42.

23. The Disclosure Statement also discusses the Debtor's role as portfolio manager for the CLOs (which the Disclosure Statement defines as "Issuers") in Article II(U) (pg. 32). After explaining the Debtor's role and noting some proofs of claim filed by the CLOs, the Disclosure Statement states as follows:

The Issuers have taken the position that the rejection of the Portfolio Management Agreements (including any ancillary documents) would result in material rejection damages and have encouraged the Debtor to assume such agreements. Nonetheless, the Issuers and the Debtor are working in good faith to address any outstanding issues regarding such assumption. The Portfolio Management Agreements may be assumed either pursuant to the Plan or by separate motion filed with the Bankruptcy Court.

The Debtor is still assessing its options with respect to the Portfolio Management Agreements, including whether to assume the Portfolio Management Agreements.

24. The Debtor's Supplement to the Plan, filed on December 30, 2020 at Dkt. No. 1648, indicates that the Debtor intends to assume the Servicing Agreements with all of the CLOs except Loan Funding VII, LLC. *See* Dkt. No. 1648, Sched. A.

OBJECTION

A. *The Debtor Cannot Assume the Servicing Agreements Pursuant to Section 365(c)(1) of the Bankruptcy Code*

25. The Objectors object to the assumption of the Servicing Agreements for the fundamental reason that the Debtor will not manage the CLOs' assets appropriately in order to maximize value for the CLOs and the Objectors, but will instead breach its fiduciary duties by managing a winding-down those CLOs and assets in order to provide a recovery for its creditors, in what is an obvious and irreconcilable conflict of interest.

26. As explained below, the Debtor and the Servicing Agreements which it seeks to assume are subject to the Advisers Act. As the Supreme Court has repeatedly held, it is a fundamental purpose of the Advisers Act to impose strict fiduciary duties on investment advisors and to “eliminate conflicts of interest between the investment adviser and the clients.” *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 191 (1963). This extends to any “conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.” *Id.* “[T]he Act’s legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.” *Transamerica Mort. Advisors v. Lewis*, 444 U.S. 11, 17 (1979).

27. Under the Plan, the Debtor would be owned by its creditors. The Debtor and the Claimant Trust would be managed by a person holding fiduciary duties to the Debtor’s creditors. The Debtor would manage and presumably wind-down and liquidate the assets of the CLOs within a span of two years, not for the benefit of the CLOs and their beneficial interest holders, but for the benefit of the Debtor’s creditors. And, it would do this without employees or resources, or by impermissibly delegating its duties to yet a different party—something that it is not permitted to do under applicable law and the governing contracts. In sum, the Debtor

would manage the CLOs and their assets for the benefit of the Debtor's creditors, which it is fundamentally impossible to do without simultaneously violating the Debtor's strict fiduciary duties to others and which represents a clear conflict of interest under the Advisers Act.

28. This inescapable conclusion is precisely why the Bankruptcy Code prohibits an assumption of personal service contracts like the Servicing Agreements. The Bankruptcy Code provides that:

The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c)(1).

29. The first question is whether “applicable law” excuses the counterparties to the Servicing Agreements from accepting performance from the Debtor. In this respect, both the Advisers Act and the 1940 Act represent “applicable law” that provides for precisely that.

30. The Advisers Act governs “investment advisors.” The Advisers Act defines an investment advisor as:

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

15 U.S.C. § 80b-2(a)(11).

31. There is no question that the Debtor receives compensation under the Servicing Agreements. The only question is whether, under the Servicing Agreements, and in connection

with managing the investments and securities of the CLOs, the Debtor satisfies the remaining element(s). Case law confirms that, in providing investment services and investment management under the Servicing Agreements, is acting as an “investment advisor” under the Advisers Act. The Second Circuit authoritatively considered and decided the issue of whether a portfolio manager is an investment advisor in *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977). The case concerned general partners who managed various investments on behalf of limited partners. *See id.* at 866. Regarding whether the general partners were investment advisors on account of managing the investments, the court concluded that they were “on two independent grounds”:

First, the monthly reports which contained the alleged fraudulent representations were reports which provided investment advice to the limited partners. The general partners’ compensation depended in part upon the firm’s net profits and capital gains. These in turn were affected by the size of the total funds under their control. The monthly reports were an integral part of the general partners’ business of managing the limited partners’ funds. In deciding whether or not to withdraw their funds from the pool, the limited partners necessarily relied heavily on the reports they received from the general partners.

Second, wholly aside from the monthly reports, we believe that the general partners as persons who managed the funds of others for compensation are ‘investment advisers’ within the meaning of the statute. This is borne out by the plain language of Section 202(a)(11) and its related provisions, by evidence of legislative intent and by the broad remedial purposes of the Act.

Id. at 870. Thus, by virtue of managing the underlying investments and related activities, the general partners were providing investment advice and were therefore investment advisors subject to the Advisers Act.

32. The court in *SEC v. Smith*, 1995 U.S. Dist. LEXIS 22352 (E.D. Mich. 1995), considered a similar issue. In that case, the SEC sought summary judgment that the defendant was an investment adviser under the Advisers Act. The defendant argued that he was not an investment adviser merely by virtue of managing a portfolio of accounts on behalf of third

parties. *See id.* at *12-*13. Specifically, the defendant argued that he was not giving investment advice, but that he was instead “a professional trustee who exercises sole discretionary control over trust investments. . . I am the trustee. I have absolute full power and authority to make all buy, hold and sell decisions. And, therefore, I am the one that receives information and research and I make the decisions.” *Id.* at *13. In other words, because he had sole discretion and control over how to manage the invested assets, he was not giving “advice” within the meaning of the Advisers Act. The court rejected this argument: “Smith is clearly an investment advisor under the Advisers Act.” *Id.* at *15.

33. The court in *SEC v. Saltzman*, 127 F. Supp. 2d 660 (E.D. Pa. 2000) reached the same conclusion with respect to a portfolio manager:

Saltzman maintained exclusive control over the investment portfolio, brokerage accounts, and bank account of Saltzman Partners, L.P. He made all investment decisions for the portfolio. As the Act intended to embrace those who wield power over their clients’ money, as Saltzman did over the investments of the limited partners, the facts alleged qualify Saltzman as an investment adviser.

Id. at 669. Therefore, the Debtor, by virtue of managing the CLO assets, and even though it has the sole control and authority over that management, is providing investment advice and is therefore an investment advisor with respect to the Servicing Agreement.

34. More particularly, the Servicing Agreements, because they provide for investment advice, are “Investment Advisory Contracts” under the Advisers Act. This is further confirmed by the language of the Advisers Act with respect to the definition of Investment Advisory Contract:

any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person other than an investment company registered under title I of this Act.

15 U.S.C. § 80b-5(d) (emphasis added). Managing the investments of others is of course

precisely what the Debtor does under the Servicing Agreements.

35. There should therefore be no question that the Servicing Agreements are “investment advisory contracts” subject to the Advisers Act. Should there be any doubt, the Servicing Agreements in multiple places reference the Advisers Act and subject the agreements to the requirements of the Advisers Act.

36. The Advisers Act prohibits an assignment of an investment advisory contract without consent. The Advisers Act defines “assignment” as including “any direct or indirect transfer or hypothecation of an investment advisory contract.” 15 U.S.C. § 80b-2(a)(1). With respect to an assignment, the Advisers Act provides as follows:

No investment adviser registered or required to be registered with the Commission shall enter into, extend, or renew any investment advisory contract, or in any way perform any investment advisory contract entered into, extended, or renewed on or after the effective date of this title, if such contract—

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

15 U.S.C. § 80b-5(a)(2).

37. Each of the Servicing Agreements contain substantially similar provisions related to any assignment:

any assignment of this Agreement to any Person, in whole or in part, by the Servicer shall be deemed null and void unless (i) such assignment is consented to in writing by the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares.

38. Accordingly, the Advisers Act represents “applicable law” under section 365(c)(1) that excuses the counterparty to an investment advisory contract from accepting performance from an assignee. As such, because the agreement cannot be assigned, it cannot

be assumed by the Debtor without consent.

39. It is true that courts in this District construe section 365(c)(1) such that, where the applicable law is merely a general prohibition on assignment, the section does not prevent an assumption. *See, e.g., In re Lil' Things*, 220 B.R. 583, 590-91 (Bankr. N.D. Tex. 1998). Here, however, the Advisers Act is not a general law that would prohibit an assignment; it is a very specific law, applicable to a very narrow set of persons, and one which prohibits only the assignment of an investment advisory agreement.

40. Even so, this District recognizes that section 365(c)(1) becomes paramount “where the identity of the party rendering performance under the contract is material to the contract, and the contract is non-delegable under applicable non-bankruptcy law.” *Id.* at 591. This is certainly true where, as here, a party has contracted with someone to manage that party’s property and investments: that is a fiduciary relationship of the highest trust where the identity of the person providing the services is absolutely paramount. The Fifth Circuit recognized this fundamental principle the highly analogous situation of an attorney retention agreement: the contract was not assumable under otherwise applicable law because the contract was a highly personal one involving elements of trust, legal, and ethical considerations. *See In re Tonry*, 724 F.2d 467, 468-69 (5th Cir. 1984).

41. In *In re Mirant Corp.*, 303 B.R. 319 (Bankr. N.D. Tex. 2003), this Court concluded that the debtor-in-possession may assume a contract even if section 365(c) would prevent a trustee from being able to assume the contract. In large part, the Court construed the addition, in 1984, of the term “debtor-in-possession” into the statute as evidence that Congress intended for a debtor-in-possession to be able to assume its contracts even if section 365(c) would otherwise prohibit a trustee from assuming the contract. *See id.* at 333. “The specific

use of the words ‘the debtor or the debtor in possession’ leads the court to conclude that a contract to be performed by a debtor or debtor in possession (as opposed to a trustee) is subject to assumption whether or not applicable law limits its assignability. *Id.* However, the Fifth Circuit has not adopted this view and the logic of *In re Mirant Corp.* is not correct.

42. The statute begins by providing that the “trustee may not assume or assign any executory contract . . .” 11 U.S.C. § 365(c)(1). That “trustee” must include a debtor-in-possession, for it is the same “trustee” as in section 365(a) which provides that a “trustee . . . may assume or reject any executory contract.” *Id.* at § 365(a). Thus, the section 365(c)(1) prohibition on a trustee must also extend to a “debtor-in-possession,” unless the Court concludes that the use of the word “trustee” in the same statute means two different things. Rather, what *In re Mirant Corp.* was referring to was the following language in section 365(c)(1):

applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

Id. at § 365(c)(1).

43. The addition of the term “debtor-in-possession” to this statute does not change the result; *i.e.* it does not mean that a debtor-in-possession, unlike a trustee, may assume, but not assign, its own contracts. The question is whether applicable law excuses a party from accepting performance from an entity other than the debtor-in-possession. The Debtor is a debtor-in-possession and, if the counterparty is excused by applicable law from accepting performance from anyone else, then the contract may not be assumed by the Debtor. *In re Mirant Corp.* was simply wrong in concluding that the 1984 amendment somehow excepted a debtor-in-possession’s assumption of its own contracts from the operation of section 365(c)(1).

44. The Fifth Circuit’s opinion in *Strumpf v. McGee (In re O’Connor)*, 258 F.3d 392

(5th Cir. 2001) is on point. That opinion was rendered after the 1984 amendment at issue in *Mirant*, and that opinion concerned a Chapter 11 debtor. The question was whether a non-assignable partnership agreement could be assumed under section 365(c)(1). The Fifth Circuit held that “the agreement was *not* assumable under § 365(c)(1).” *Id.* at 402 (emphasis in original). And, as here, the confirmed plan provided for a postconfirmation liquidating trust. *See id.* at 396. The only difference was that, in *In re O’Connor*, a Chapter 11 trustee proposed the confirmed plan. This difference does not matter because the Fifth Circuit held that the agreement itself was not assumable; not that one person may assume it while a second not. *See id.* at 402 and 404 (twice holding that the “agreement is *not* assumable” (emphasis in original)).¹¹ Only one person may assume an executory contract, and that person is the trustee, even if the debtor-in-possession is exercising the powers of a trustee. Thus, if the contract itself is not assumable, then it is not assumable period. This difference also does not matter because the identity of the plan proponent is immaterial: the question is still whether it is the debtor-in-possession, or the estate, that can assume the executory contract.

45. The Debtor will respond that the Fifth Circuit, in *In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006), rejected the so-called “hypothetical test” and adopted instead the “actual test” regarding the assignment of an executory contract or lease. In *Mirant*, the issue concerned section 365(e)(2) of the Bankruptcy Code and whether an *ipso facto* clause was enforceable against a debtor-in-possession because the executory contract was not assignable. The

¹¹ In *Strumpf*, the Fifth Circuit held that, because the agreement was not assumable, it passed through the Chapter 11 unaffected. However, *Strumpf* itself concluded that this “pass-through” principle does not apply in a liquidating plan, as further confirmed by *In re Tex. Rangers Baseball Partners*, 521 B.R. 134,183 (Bankr. N.D. Tex. 2014). Even if the agreements could pass through unaffected to the reorganized debtor, even though it is liquidating, the Plan cannot limit the ability to terminate the agreements in the future based on the change in control and other facts that are present. Otherwise, the agreements would be affected by the Plan, meaning that they would have to first be assumed, as recognized in *Strumpf* by holding that a plan effect on the executory contract means that it cannot pass through bankruptcy unaffected. *Strumpf*, 258 F.3d at 405.

“hypothetical test” required a court to review whether a hypothetical assignment was prohibited by applicable law; if it was, then the *ipso facto* clause could be enforced even though no assignment was proposed. *See id.* at 246-47. The Fifth Circuit rejected this approach and instead applied the “actual test,” which looked at whether an assignment was actually being proposed. *See id.* at 249-50. The Debtor will argue that this same logic should apply to section 365(c)(1) such that, when no actual assignment is being proposed, the section is not implicated.

46. *Mirant* and its logic, however, do not apply to section 365(c)(1). First, and most obviously, the Fifth Circuit stated that “[a]lthough this Circuit has addressed § 365(c)(1), we have yet to address § 365(e),” and then it cited to its *In re O’Connor* and *In re Braniff Airways* precedent. *See id.* at 248-49. The circuit, in analysing this prior precedent, noted that it was the contract itself that was not assumable (“declaring the contract unassumable,” *id.*) and reaffirmed the holdings of both prior opinions notwithstanding the change in the language of section 365(c)(1). Thus, and having been afforded the opportunity to revisit its prior precedent or to find that the added “debtor-in-possession” language to section 365(c)(1) compelled a different result, the circuit instead reaffirmed its prior precedent holding that the contract itself was not assumable. More precisely, the “actual test” cannot apply to section 365(c)(1) because that section provides that a trustee may not “assume or assign” an executory contract. If the test were an actual one, *i.e.* whether an actual assignment was being proposed, then the section would simply provide that the trustee may not “assume and assign” the executory contract. But, in preventing an assumption even without a proposed assignment, section 365(c)(1) necessarily applies the “hypothetical test” such that, even though no assignment is proposed, if an assignment is prohibited then so is an assumption.

47. Thus, were the Fifth Circuit presented with the precise issue with respect to

section 365(c)(1), to the extent it was not in *In re O'Connor*, the Objectors submit that the Fifth Circuit would join its sister circuits in concluding that, so long as even a hypothetical assignment would be prohibited, so too is an assumption, whether by a trustee, debtor, or debtor-in-possession. See *In re Catapult Entertainment*, 165 F.3d 747, 750 (9th Cir. 1999) (“a debtor in possession may not assume an executory contract . . . if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party”); *In re James Cable Partners L.P.*, 27 F.3d 534, 537 (11th Cir. 1994); (holding that debtor-in-possession may not assume executory contract under section 365(c)(1) notwithstanding that no assignment was proposed); *In re Catron*, 1994 U.S. App. LEXIS 14585 (4th Cir. 1994) (affirming holding that “agreement was the type of executory contract that could not be assumed by Catron, a debtor-in-possession, absent consent of the nondebtor parties as required by § 365(c)(1)(B)”); *In re West Electronics Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (“the relevant inquiry is not whether [applicable law] would preclude an assignment from West as a debtor to West as a debtor in possession, but whether it would foreclose an assignment by West to another defense contractor”);¹² but see *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997).

48. The result may not be to the liking of the Debtor and, in other circumstances, the result may be harsh on a debtor-in-possession. But this case aptly demonstrates why the section

¹² In fact, as recognized in *West*, the addition of the term “debtor-in-possession” into section 365(c)(1) demonstrates Congress’s intent to prevent a debtor-in-possession from assuming its own personal services contracts:

We think that by including the words "or the debtor in possession" in 11 U.S.C. § 365(c)(1) Congress anticipated an argument like the one here made and wanted that section to reflect its judgment that in the context of the assumption and assignment of executory contracts, a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities.

In re West Electronics, 852 F.2d at 83.

exists and why the result is fair. Many innocent parties have entrusted billions of dollars of their property to the Debtor to manage, for their benefit. Now, the Debtor wants to manage that property for the benefit of its creditors, and with insufficient experience, resources, and employees at that. This is not a case where the debtor is a person, who holds investment management contracts. That person is the same before, during, and after a Chapter 11 case. But here the Debtor is the same entity in name only: no reasonable fund would contract with the postconfirmation Debtor here to manage a penny, let alone life savings and the investments of many. That is the whole point of why personal services contracts cannot be assumed without consent.

49. Moreover, the Court should not permit the Debtor to place form over substance, especially when the rights of innocent, third party funds and investors are concerned. While technically the post-confirmation Debtor will still be the same corporate shell, it will have been gutted of everything that made the Debtor the Debtor. It is in substance and in every real and practical consideration an assignment of the contracts. Indeed, it appears that the only reason why the Debtor will even maintain a corporate existence after confirmation is an attempt to obviate the prohibition on assumption under section 365(c)(1), as all other property of the Debtor is transferred to the Claimant Trust. On this point, the Plan expressly provides that the “Reorganized Debtor may, in its discretion, also utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees.” Plan at p. 32-33. If the intent of this provision is to provide services required by the Servicing Agreements, then this is a blatant violation of the Servicing Agreements’ and the Advisers Act’s anti-assignment and anti-delegation provisions. In other words, this admission in the Plan may well be precisely the type of assignment, or subsequent assignment, that would be prohibited by section 365(c)(1) regardless of any

discussion between the “hypothetical test” and the “actual test.”

50. Separate and apart from the above discussion, and understand that there is uncertainty in the law as to the interplay between sections 365(f) and 365(c)(1), it is clear that a “personal services contract” falls squarely within the protection of section 365(c)(1). As the Fifth Circuit has held, a personal services contract is subject to section 365(c)(1): “Congress’ enactment of § 365(c) was to preserve the pre-Code rule that ‘applicable law’ precluding assignment of personal service contracts is operative in bankruptcy.” *In re Braniff Airways Inc.*, 700 F.2d 935, 943 (5th Cir. 1983). A personal services contract is one which “involves a matter of personal trust and confidence between the original contracting parties.” *In re Grove Rich Realty Corp.*, 200 B.R. 502, 510 (Bankr. E.D.N.Y. 1996). “A personal services contract has been defined as a contract which contemplates the performance of personal services involving the exercise of special knowledge, judgment, taste, skill, or ability.” *In re Wofford*, 608 B.R. 494, 496 (Bankr. E.D. Tex. 2019) (internal quotation omitted).

It is well settled that when an executory contract is of such a nature as to be based upon personal services or skills, or upon personal trust or confidence, the debtor-in-possession or trustee is unable to assume or assign the rights of the bankrupt in such contract.

In re Grove Rich Realty Corp., 200 B.R. 502, 510 (Bankr. E.D.N.Y. 1996) (emphasis added).

51. The Service Agreements are clearly personal service contracts: the Debtor’s position is one of trust and that of a fiduciary, the Debtor’s performance requires personal confidence and high skill and knowledge, the agreements provide that the Debtor’s duties are not delegable, and no person entrusting another with managing billions of dollars in assets would want the underlying contract to be assumable by a trustee or a liquidating debtor. Indeed, the Supreme Court has recognized the “personalized character of the services of investment advisors.” *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 191 (1963). This Court

has characterized financial advisory and brokerage contracts as personal services contracts. *See In re Consolidated Capital Equities Corp.*, 157 B.R. 280, 283 (Bankr. N.D. Tex. 1993). Other courts have held that the Investors Act imposes a trust relationship. *See e.g. In re Peterson*, 96 B.R. 314, 323 (Bankr. D. Colo. 1988). The strict fiduciary and anti-assignment provisions of the Advisor Act and the 1940 Act further confirm Congress' strong view that these contracts are in the nature of personal service contracts.

52. Even if the Court is inclined to adopt the "actual test" under section 365(c)(1) such that an assumption is possible where there is no assignment, and recognizing that section 365(c)(1) is broader in application than to only personal services contracts, the law overwhelmingly confirms that a personal services contract is not assumable in the first instance. *See, e.g., In re Braniff Airways Inc.*, 700 F.2d 935, 943 (5th Cir. 1983).

53. The final issue concerning section 365(c)(1) is consent. Assuming that the CLOs do not object to the assumption of the Servicing Agreements, the statute requires affirmative consent to the assumption. The statute prohibits the assumption if "such party does not consent to such assumption." 11 U.S.C. § 365(c)(1)(B). The plain meaning of this language is that consent is required, as opposed to merely the absence of an objection. In *Strumpf v. McGee (In re O'Connor)*, 258 F.3d 392 (5th Cir. 2001), the issue concerned an executory contract that was neither expressly assumed nor assigned under a Chapter 11 plan. The Fifth Circuit held that the contract was not assumable under section 365(c)(1) and concluded that the counterparty "did not consent" to an assumption. *See id.* at 402. If the absence of an objection was all that was required, then the Fifth Circuit would not have so held. In fact, the Fifth Circuit expressly rejected the argument that the "Appellees consented to the assumption by failing to object to the Plan." *Id.* at 400. This is in line with the case law, which requires affirmative, or actual,

consent to the assumption. See *In re Allentown Ambassadors Inc.*, 361 B.R. 422, 448 n. 60 (Bankr. E.D. Pa. 2007).

54. Finally, there is the issue of the Objectors' standing to make the foregoing arguments. The Objectors have standing for at least four reasons. First, as creditors and parties in interest,¹³ they have the right to object to the Plan. 11 U.S.C. § 1109(b). Insofar as it is the Fifth Amended Plan that provides for assumption of the Servicing Agreements, the Objectors may object to said assumption, especially because assumption of the Servicing Agreements and future performance thereunder affect the feasibility of the Plan as a whole. Second, the Objectors have standing and the right to object to confirmation of the Fifth Amended Plan under sections 1129(a)(1), (a)(2), and (a)(3) of the Bankruptcy Code. Insofar as the Fifth Amended Plan and the Debtor propose to impermissibly assume the Servicing Agreements in violation of the law, the Objectors may object to such assumption on those bases. Third, in several of the Servicing Agreements, the Objectors have the right to remove the Debtor or to control who the servicer under the agreements is. They have similar rights under the Indentures with respect to assignment or modification of the Servicing Agreements. Insofar as the Fifth Amended Plan purports to limit or to take those rights away from them, and to change their rights, the Objectors have standing to object to their rights being limited or eliminated. Likewise, under the 1940 Act, an investment adviser must be approved by a majority of the voting securities, and the Servicing Agreements cannot continue in effect for more than two years without the consent of either the CLOs' boards of directors or a majority of the outstanding voting securities--i.e., the Objectors. 15 U.S.C. § 80a-15(a)(2). Insofar as the Fifth Amended Plan purports to limit the

¹³ "The term 'party in interest' is not defined in the Bankruptcy Code." *Khan v. Xenon Health, LLC (In re Xenon Anesthesia of Tex., PLLC)*, 698 Fed. Appx. 793, 794 (5th Cir. 2017) (quoting *In re Megrelis*, No. 13-35704-H3-7, 2014 Bankr. LEXIS 3905, at *2 (Bankr. S.D. Tex. Sept. 12, 2014)). "It generally 'means anyone who has a legally protected interest that could be affected by the bankruptcy case.'" *Id.*

Objectors' right to withhold their consent or influence the CLOs' boards of directors, the Objectors have standing to challenge any modification of those rights. Fourth, in several of the Servicing Agreements, it is not just the CLO that must approve an assignment, but also the Objectors. The Objectors have similar rights under the Indentures. Insofar as the test under section 365(c)(1) is a hypothetical assignment, and the Objectors have the right to approve or not approve that assignment under applicable law and the agreements, that right should extend to consent under section 365(c)(1)(B) as well, as the CLOs' consent is not possible without a concurring consent by the Objectors.

55. The Fifth Amended Plan does not comply with section 1129(a)(1) of the Bankruptcy Code because it violates a fundamental principal of contract assumption under section 365 of the Bankruptcy Code. Contracts must be assumed or rejected; there is no such thing as a partial assumption. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) (“Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere*--the debtor accepts both the obligations and the benefits of the executory contract.”); *In re Rigg*, 198 B.R. 681, 685 (Bankr. N.D. Tex. 1996) (“An executory contract cannot be rejected in part and assumed in part; the debtor must assume both the benefits and the burdens on the contract.”).

56. The Fifth Amended Plan contravenes established law with respect to the proposed treatment of the CLOs and the Debtor's obligations under the portfolio management agreements.

57. First, the Fifth Amended Plan reveals that the Debtor, while claiming to assume the various Servicing Agreements, also intends to deprive the counterparties to those agreements from exercising their rights to change management.

58. Under the Servicing Agreements at issue, either a majority, or in some cases, a supermajority of owners may initiate a change in management. See attached Exhibit A.

59. The Debtor's Plan makes clear, however, that it intends to engage a subagent to perform the management and servicing function and, implicitly to deprive the CLOs as issuers from exercising contractual rights with respect to making a change in management.

60. Second, the Debtor's duties under the Servicing Agreements, which themselves have been adopted under the Advisers Act, subject to Rule 206(4)-8 thereunder as noted below, are owed to, and provide the rights of, the preference shareholders under the portfolio management agreements. The Debtor's proposed liquidation of Managed Assets (which it does not own) is contrary to the performance of its contractual and statutory duties under the portfolio management agreements.

61. The preference shareholders, as the only remaining owners of the Managed Assets of many of the CLOs, contend that the Debtor's (i) sales of Managed Assets and (ii) continued management of the Managed Assets, notwithstanding the Debtor's stated intention to wind down and liquidate all assets, violates the provisions of Section 2(b) of the portfolio management agreements.

62. These violations are detrimental to the counterparties to the assumed contracts because:

- a. liquidation sales of Managed Assets the Debtor does not own are unlikely to maximize the value of the Managed Assets when compared to the long term investment horizon of the beneficial owners of the Managed Assets;
- b. liquidation sales of Managed Assets are likely to subtract value when duress sales occur based on the short term horizon and liquidation

strategy of the Debtor;

- c. the Debtor has announced the termination of its personnel, resulting in loss of knowledgeable portfolio managers; and
- d. any potential consultant engaged by the Debtor in the absence of its terminated personnel will be subservient to the Debtor's short-term objective of liquidation in violation of the assumed contracts and applicable securities law.

63. Manifestly, where the investors in a pooled vehicle state to the manager both that their objectives and desires differ from those of the portfolio manager, and that the portfolio manager's actions are contrary to the manager's duties to maximize returns for the benefit of the investors established under the agreement, that portfolio manager is not acting reasonably under or in accordance with its agreement. The owners of the Managed Assets, in requisite majority or supermajority,¹⁴ have expressly requested that the Managed Assets not be liquidated as contemplated by the Debtor's business plan. In that context, the Debtor is unreasonably acting contrary to the required contractual objective and therefore statutory obligation to maximize value for the preference shareholders. In implementing the Fifth Amended Plan, the Debtor is likely to violate its duty of reasonableness under Section 2(b) under these circumstances, because the Debtor is not "perform[ing] its duties under [the] Agreement in the manner provided for" in the Agreement.

64. As the Debtor is an investment management firm familiar with established securities laws, the Fifth Amended Plan's violations of such laws is blatant and should not be permitted.

¹⁴ Objectors acknowledge that they do not hold a majority in all of the CLOs, for example, Jasper.

65. Based upon the Fifth Amended Plan’s attempt to assume contracts partially, and not fully, the Court should find that the Fifth Amended Plan fails to satisfy section 1129(a)(1) of the Bankruptcy Code and cannot be confirmed

66. Moreover, as discussed below, with respect to the injunction and release provisions of the Fifth Amended Plan, the Plan purports to release the Debtor from its contractual and statutory obligations with respect to the Servicing Agreements. As explained above, those agreements require the Debtor to preserve and to maximize the value of the CLOs assets, for the benefit of the CLOs and the holders of beneficial interests in them. The Advisers Act requires the same. The Fifth Amended Plan purports to enjoin parties from “taking any actions to interfere with the implementation or consummation of this Plan.” Plan at p. 50. This is an unprecedented, overbroad injunction that does not comport with fundamental due process, as what “interference,” “implementation,” or “consummation” mean is not specified. Are the Objectors to be enjoined from enforcing future rights under the Servicing Agreements even if the Debtor commits future malfeasance?

67. The Fifth Amended Plan likewise enjoins all creditors and other parties, and their “Related Persons” (who may not even have notice of the injunction) from “commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor, the Independent Directors, the Reorganized Debtor.” Plan at p. 51. Read literally, this means that the Objectors and the CLOs will not be able to assert any claims, or seek any relief, against the Debtor or Reorganized Debtor for any present or future actionable wrongs under the Servicing Agreements and the Advisers Act. Again, so broad an injunction, not limited in time, is unprecedented, legally impermissible, violates due

process, and seeks to strip parties of their contractual and Advisers Act rights—even as the Debtor purports to assume the Servicing Agreements which, as is black letter law, means that the Debtor is requiring to provide full future performance (and suffer potential future obligations and liabilities).

68. The balance of the Plan injunction is equally fatally defective. If there are future obligations and defaults, and even if there are present ones, under the Servicing Agreements and applicable law, affected parties have to have the right to seek legal redress, enforce awards and injunctions, and assert setoff rights. On this last basis in particular, if there are setoff rights under the CLOs or other agreements, those rights cannot be permanently enjoined. And, the same injunction applies to any “successors” of the Debtor and its property interests, meaning that, if the Debtor assigns or delegates its duties under the Servicing Agreements, some future and unknown party may claim protections under these injunctions without any protection to the Objectors or the CLOs.

69. The Plan’s channeling injunction is similarly improper and defective, at least with respect to post-confirmation actions. *See* Plan at p. 51. That injunction requires *anyone* with any complaint against a “Protected Party” that is “related to the Chapter 11 Case,” or to the “wind down of the business of the Debtor or the Reorganized Debtor,” to first seek relief from this Court, including by proving that a colourable claim exists and obtaining leave. The same section then purports to grant “sole jurisdiction” to this Court to “adjudicate” any such dispute. Read literally, this means that the Objectors and the CLOs will have to first seek leave from this Court before enforcing any right under the Servicing Agreements and the Advisers Act, which is unprecedented and is incompatible with respect to the assumption of those agreements for post-assumption claims, and then this Court would adjudicate the claims. This

Court will have no jurisdiction to adjudicate such post-confirmation claims, however, and the channeling injunction is an impermissible attempt to confer such jurisdiction where none exists.

70. All of the foregoing affects, limits, and eviscerates future rights under the assumed Servicing Agreements—something that defeats the whole purpose of an assumption of an executory contract and that contradicts the established law that an executory contract, and its future obligations, must be assumed *in toto*.

B. Other objections to the Fifth Amended Plan

The Debtor's Fifth Amended Plan is objectionable for other reasons as well. Those Objections are discussed briefly below. The Funds and Advisors reserve the right to object upon any appropriate basis under Sections 1129(a) and (b) and other applicable provisions of the Bankruptcy Code. The Funds and Advisors also reserve the right to join in and support the objections asserted by other parties at the Confirmation Hearing.

Section 1129(a)(5)

71. In order to be confirmed, the Debtor must satisfy the following non-waiveable requirements:

- (i) the proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
- (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy.

11 U.S.C. § 1129(a)(5).

72. This is of particular importance here, where the Debtor proposes to manage billions of dollars of other entities' assets, and ties in as well to section 362(b)'s requirement of

demonstrating adequate assurance of future performance. Yet, the Debtor fails completely with respect to even an attempt to satisfy these requirements.

73. In this respect, the sole disclosure in the Plan and Disclosure Statement with respect to who will manage these billions of dollars in assets is as follows:

Subject to and consistent with the terms of the Reorganized Limited Partnership Agreement, the Reorganized Debtor shall be managed by its general partner, New GP LLC. The initial officers and employees of the Reorganized Debtor shall be selected by the Claimant Trustee. The Reorganized Debtor may, in its discretion, also utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees.

Plan at p. 32-33.

74. Neither the identity nor the compensation of the people who will control and manage the Reorganized Debtor is provided, much less as to who may be a Sub-Servicer. While Mr. Seery is disclosed as the Claimant Trustee who will be responsible for “winding down the Reorganized Debtor’s business operations,” this is insufficient. All the more so because, without additional disclosures and facts, not only can adequate assurance of future performance not be proven, but the Debtor cannot prove that the employment and compensation of these unnamed officers and managers of the Reorganized Debtor is “is consistent with the interests of creditors and equity security holders and with public policy.” Public policy in particular, given the dictates of the Advisers Act, is implicated.

Accordingly, the Plan is fatally defective with respect to section 1129(a)(5) and cannot be confirmed on that basis alone.

The Fifth Amended Plan is not feasible

75. Section 1129(a)(11) requires that confirmation of a plan not be likely to be followed by liquidation or the need for further reorganization. “Establishing a likelihood that a plan itself will be successful is a question of feasibility.” *In re Dernick*, Case No. 18-32417,

2020 WL 6833833, at *17 (Bankr. S.D. Tex. Nov. 20, 2020). Feasibility contemplates whether the plan is workable and offers a reasonable assurance of success. *Id.*; see also *In re Frascella Enters., Inc.*, 360 B.R. 435, 453 (Bankr. E.D. Pa. 2007). “An obvious illegality . . . exposes the plan on feasibility grounds.” *In re Food City*, 110 B.R. at 813 n. 12; see also *In re McGinnis*, 453 B.R. at 773 (chapter 13 plan premised on illegal activity could not be confirmed); *In re Frascella*, 360 B.R. at 445, 456 (citing *Food City*, 110 B.R. at 812 n. 10) (debtor failed to establish plan was feasible where it rested on questionable legal basis).

76. As discussed above, the proposed treatment with respect to the portfolio management agreements and the CLOs contravenes section 365 of the Bankruptcy Code and the Adviser Act. This illegality hampers the feasibility of the Fifth Amended Plan, and accordingly, the Court should find that it is not feasible and deny confirmation.

The Debtor’s proposed assumption of the Servicing Agreements is improper under section 365 because there is no adequate assurance of future performance

77. Under section 365(b) of the Bankruptcy Code, an executory contract may only be assumed if the Debtor “provides adequate assurance of future performance under such contract[.]” 11 U.S.C. § 365(b)(1)(C).

78. Although the Fifth Amended Plan provides for the assumption of the Servicing Agreements with many of the CLOs, it does not offer any assurance with respect to the Debtor’s ability to perform under such agreements. Indeed, given the Debtor’s plan to wind down and liquidate its remaining assets, and in light of the contractual and statutory breaches discussed above, the Debtor cannot possibly provide such assurance. Furthermore, it is uncertain whether sufficient employees will be retained by the Debtor to fulfil its obligations under the portfolio management agreements, even its most significant duties are delegated to a Sub-Advisor. Accordingly, assumption is improper and must be disallowed under section 365(b).

79. Equally important, the Debtor's failure to offer or provide adequate assurance is intensified because the purported assumption is, in reality, a *sub rosa* assumption and *assignment* to an as yet unnamed third party. This unidentified third party has also not offered adequate assurance of future performance as required in the context of such assignments.

The Release and Exculpation Provisions of the Fifth Amended Plan are overly broad and extend beyond the Effective Date

80. In the Fifth Circuit, permanent injunctions against nondebtors are not permissible. *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995). In fact, and quite to the contrary, the case law “seem[s] broadly to foreclose non-consensual non-debtor releases and permanent injunctions.” *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009). Such permanent injunctions would “improperly insulate nondebtors in violation of section 524(e),” and “without any countervailing justification of debtor protection.” *Id.* at 760 (quoting *Landsing Diversified Props. v. First Nat’l Bank & Trust Co. (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 601-02 (10th Cir. 1990)); *see also In re Pac. Lumber*, 584 F.2d at 252 (noting that costs that the released parties might incur defending against suits are unlikely to swamp such parties or the reorganization).

81. Indeed, courts within this District have found that injunctions and release provisions substantively identical to that proposed in Fifth Amended Plan, and which purport to release causes of action against non-debtor third parties, violate Fifth Circuit precedent and are impermissible. *Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, Civil Action No. 3:17-CV-1958-G, 2018 WL 5113124, at *21 (N.D. Tex. Oct. 19, 2018) (finding that bankruptcy court erred by approving injunction that would have effectively discharged non-debtor third parties); *In re Pac. Lumber*, 584 F.3d at 251-53 (striking release provision purporting to release non-

debtor third parties from liability relating to the proposal, implementation, and administration of the plan).

82. The injunction contained in Article XI.F of the Fifth Amended Plan is almost identical to that struck down in *In re Thru*. Like the injunction provision in *In re Thru*, the Debtor's proposed injunction would bar the Debtor's creditors "from pursuing causes of action against a number of non-debtor third parties, if those causes of action relate to the creditors' claims against the debtor." 2018 WL 5113124, at *21. The Fifth Amended Plan purports to release creditors' claims against not only the Debtor, but also the Independent Directors. Dkt. No. 1472 at 56-57. Not only that, but the Fifth Amended Plan purports to release creditors' claims stemming from the bankruptcy case, as well as the negotiation, administration and implementation of the Plan, as against many of the specific third parties that the courts in this Circuit have found to be impermissible, including, but not limited to, employees, officers and directors, and professionals retained by the Debtor, among others. *Id.*; *In re Thru*, 2018 WL 5113124, at *21 (concluding it was "clearly erroneous" for the bankruptcy court to approve an injunction covering causes of action against such parties); *In re Pac. Lumber*, 584 F.3d at 252-53.

83. Furthermore, the exculpation provision contained in Article XI.C of the Fifth Amended Plan is incompatible with Fifth Circuit precedent, as explained by the court in *In re Thru*. The court in *In re Thru* found that it was clear error for the bankruptcy court to approve an exculpation provision that exculpated non-debtor third parties, including the debtor's employees, officers, directors, advisors, affiliates and professionals, from liability in connection with formulating, implementing, and consummating the plan of reorganization. 2018 WL 5113124, at *22. The exculpation provision in the Fifth Amended Plan provides the "same

insulation” as the impermissible provision in the *In re Thru* plan, and as such, it cannot be approved. *See also In re Pac. Lumber*, 584 F.3d at 252 (“We see little equitable [sic] about protecting the released non-debtors from negligence suits arising out of the reorganization.”).

84. In sum, the Fifth Amended Plan impermissibly seeks to exculpate certain non-debtor third parties from a broad array of claims relating to such entities’ pre- and post-petition conduct. The Funds and Advisors submit there is no authority that would permit such broad exculpatory and/or injunctive language in favor of third parties.

The Fifth Amended Plan appears to eliminate the right of setoff

85. The Funds and Advisors object to the extent that the Plan purports to divest them of their rights of setoff against the Debtor.

The Fifth Amended Plan violates section 365(d)(2) by impermissibly allowing the Debtor to assume or reject executory contracts and unexpired leases after confirmation

86. Section 365(d)(2) of the Bankruptcy Code provides that, in a case under chapter 11, the debtor may assume or reject an executory contract or unexpired lease “at any time *before confirmation of a plan*” 11 U.S.C. § 365(d)(2) (emphasis added).

87. Notwithstanding this clear language, the Fifth Amended Plan authorizes the Debtor to amend the Plan Supplement by adding or removing a contract or lease from the list of contracts to be assumed, or assign an Executory Contract or Unexpired Lease, at any time up until the Effective Date. Dkt. No. 1472 at 43. Further, the Disclosure Statement indicates that the Debtor is still evaluating whether to assume and assign the Shared Services Agreements. This is contrary to the explicit language of the Bankruptcy Code.

88. Accordingly, the Advisors object to the Fifth Amended Plan to the extent that it purports to reserve the Debtor’s right and ability to assume or assume and assign the Shared

Services Agreements or the Payroll Reimbursement Agreements post-confirmation. Furthermore, the Funds object to the Fifth Amended Plan to the extent it purports to reserve the Debtor's right and ability to alter the proposed treatment of the Servicing Agreements.

The Debtor is not entitled to a discharge

89. Although section 1141(d) of the Bankruptcy Code discharges a debtor from most pre-confirmation debt, it expressly does not discharge a debtor if:

- (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
- (B) the debtor does not engage in business after consummation of the plan; and
- (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. § 1141(d)(3).

90. Here, the Plan provides for liquidation of all of the Debtor's property over a period of time. Although the Debtor may technically continue business for a brief period of time, its ultimate goal is liquidation. Further, the Debtor would be denied a discharge under section 727(a)(1) because it is not an individual. Accordingly, the Court should find that the Debtor is not entitled to a discharge under section 1141 of the Bankruptcy Code.

The Fifth Amended Plan may violate the absolute priority rule

91. Section 1129(b)(2)(B)(ii) provides that the holder of any claim or interest that is junior to the claims of unsecured creditors may not retain any property unless general unsecured creditors are paid in full. 11 U.S.C. § 1129(b)(2)(B)(ii). The "absolute priority rule is a bedrock principle of chapter 11 practice." *In re Texas Star Refreshments, LLC*, 494 B.R. 684, 703 (Bankr. N.D. Tex. 2013). "Under this rule, unsecured creditors stand ahead of investors in the receiving line and their claims must be satisfied before any investment loss is compensated." *In re SeaQuest Diving, LP*, 579 F.3d 411, 420 n.5 (5th Cir. 2009) (comparing subordination

under section 510 to absolute priority rule) (quoting *In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002)).

92. In the event the unsecured creditor classes (Class 7 and 8) vote against the Fifth Amended Plan, the absolute priority rule prohibits the retention of equity in the Reorganized Debtor by existing equity holders in the absence of a new investment and opportunity for competitive bidding for that investment opportunity.

CONCLUSION

93. For the reasons set forth above, the Funds and Advisors respectfully request that the Court deny confirmation of the Fifth Amended Plan and grant such other and further relief as the Court deems just and proper.

Dated: January 5, 2020

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Highland Healthcare Opportunities Fund,
Highland/iBoxx Senior Loan ETF,
Highland Opportunistic Credit Fund, and
Highland Merger Arbitrage Fund,
Highland Funds II and its series Highland
Small-Cap Equity Fund, Highland Socially
Responsible Equity Fund, Highland Fixed
Income Fund, and Highland Total Return
Fund, NexPoint Capital, Inc., NexPoint
Strategic Opportunities Fund, Highland
Income Fund, Highland Global Allocation
Fund, and NexPoint Real Estate Strategies
Fund, and NexPoint Latin America
Opportunities Fund*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 5th day of January, 2021, and in addition to electronic service on parties entitled to notice thereon through the Court's ECF system, the undersigned caused the foregoing document to be served, by U.S. first class mail, postage prepaid, on the following:

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Office of the United States Trustee
U.S. Department of Justice, Region 6: Northern District of Texas
1100 Commerce Street, Room 976
Dallas, TX 75242

and, on the same day, by e-mail, on the following:

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/s/ Davor Rukavina
Davor Rukavina

Highland Capital Management Fund Advisors, L.P.

CLOs Review

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
Aberdeen Loan Funding, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Shares Paying Agency Agreement. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Trustee, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	Majority of Voting Preference Share Holders. SA § 14.
Brentwood CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Share Paying Agency Agreement. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	Majority of Voting Preference Share Holders. SA § 14.

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
Eastland CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Share Paying Agency Agreement. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	Majority of Voting Preference Share Holders. SA § 14.
Gleneagles CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Portfolio Management Agreement of Portfolio Manager, as provided in the Indenture or Preference Share Paying Agency Agreement. PMA § 9.	The Portfolio Manager must seek to maximize the value of the Collateral for the benefit of the Preference Shares holders. PMA § 2(b).	Removal without cause permitted by 66 2/3% of Preference Shares Holders (excluding Preference Shares held by the Portfolio Manager and affiliates, or for which they have discretionary voting authority) directing the Issuer, upon 90 days' notice. PMA § 12(c). The Portfolio Manager may avoid removal by purchasing all Preference Shares voting for removal (and Preference Shares not voting for removal but seeking to sell) at the Buy-out Amount (i.e., 12% IRR since the Closing Date). PMA § 12(c). For cause removal may be effected in connection with the Portfolio Manager	66 2/3% of Preference Shares Holders. PMA § 12(c).

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
			breaching the portfolio management agreement by not maximizing the value of the Collateral. PMA § 2(b).	
Grayson CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Share Paying Agency Agreement. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	Majority of Voting Preference Share Holders. SA § 14.
Greenbriar CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture. SA § 9. The Indenture references a Preference Shares Paying Agency Agreement. Indenture § 1.1 (Definitions-- Preference Share Documents).	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Trustee, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	Majority of Voting Preference Share Holders. SA § 14.

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
Jasper CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Portfolio Management Agreement of Portfolio Manager, as provided in the Indenture or Preference Share Paying Agency Agreement. PMA § 9.	The Portfolio Manager must seek to maximize the value of the Collateral for the benefit of the Preference Shares holders. PMA § 2(b).	<p>Removal without cause permitted by 66 2/3% of Preference Shares Holders (excluding Preference Shares held by the Portfolio Manager and affiliates, or for which they have discretionary voting authority) directing the Issuer, upon 90 days' notice. PMA § 12(a).</p> <p>The Portfolio Manager may avoid removal by purchasing all Preference Shares voting for removal (and Preference Shares not voting for removal but seeking to sell) at the Buy-out Amount (i.e., 15% IRR since the Closing Date). PMA § 12(a).</p> <p>For cause removal may be effected in connection with the Portfolio Manager breaching the portfolio management agreement by not maximizing the value of the Collateral. PMA § 2(b).</p>	66 2/3% of Preference Shares Holders. PMA § 12(a).
Liberty CLO, Ltd.	Requisite percentage of Class E Certificates Holders may enforce obligations under Portfolio Management Agreement of Portfolio Manager, as provided in the Indenture or Class E	The Portfolio Manager must seek to maximize the value of the Collateral for the benefit of the Class E Certificates holders. PMA § 2(b).	Removal without cause permitted by 66 2/3% of Class E Certificates Holders (excluding Class E Certificates held by the Portfolio Manager and affiliates, or for which they have discretionary voting authority) directing the Issuer, upon 90 days' notice. PMA § 12(c).	66 2/3% of Class E Certificates Holders. PMA § 12(c).

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
	<p>Certificates Paying Agency Agreement. PMA § 9.</p>		<p>The Portfolio Manager may avoid removal by purchasing all Class E Certificates voting for removal (and Class E Certificates not voting for removal but seeking to sell) at the Buy-out Amount (i.e., 12% IRR since the Closing Date). PMA § 12(c).</p> <p>For cause removal may be effected in connection with the Portfolio Manager breaching the portfolio management agreement by not maximizing the value of the Collateral. PMA § 2(b).</p>	
<p>Red River CLO, Ltd.</p>	<p>Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Share Paying Agency Agreement. SA § 9.</p>	<p>The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).</p>	<p>No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).</p>	<p>Majority of Voting Preference Share Holders. SA § 14.</p>

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
Rockwall CDO Ltd.	Requisite percentage of Preferred Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by 66 2/3% of Preferred Shares Holders (excluding Preferred Shares held by the Servicer and affiliates, or for which they have discretionary voting authority, but HFP may vote Preferred Shares it owns up to the Original HFP Share Amount) directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	66 2/3% of Voting Preference Share Holders. SA § 14.
Rockwall CDO II Ltd.	Requisite percentage of Preferred Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture. SA § 9.	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by 66 2/3% of Preferred Shares Holders (excluding Preferred Shares held by the Servicer and affiliates, or for which they have discretionary voting authority, but HFP may vote Preferred Shares it owns up to the Original HFP Share Amount) directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).	66 2/3% of Voting Preference Share Holders. SA § 14.

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
Southfork CLO, Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Portfolio Management Agreement of Portfolio Manager, as provided in the Indenture or Preference Share Paying Agency Agreement. PMA § 9.	The Portfolio Manager must seek to maximize the value of the Collateral for the benefit of the Preference Shares holders. PMA § 2(b).	<p>Removal without cause permitted by 63% of Preference Shares Holders (excluding Preference Shares held by the Portfolio Manager and affiliates, or for which they have discretionary voting authority) directing the Issuer, upon 90 days' notice. PMA § 12(c).</p> <p>The Portfolio Manager may avoid removal by purchasing all Preference Shares voting for removal (and Preference Shares not voting for removal but seeking to sell) at the Buy-out Amount (i.e., 12% IRR since the Closing Date). PMA § 12(c).</p> <p>For cause removal may be effected upon the Portfolio Manager authorizing or filing a voluntary petition in connection with the Portfolio Manager breaching the portfolio management agreement by not maximizing the value of the Collateral. PMA § 2(b).</p>	63% of Preference Shares Holders. PMA § 12(c).
Stratford CLO Ltd.	Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of	The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).	No removal without cause. Removal for cause permitted by 66 2/3% of Preference Shares Holders (excluding Preference Shares held by the Servicer	66 2/3% of Preference Shares Holders. SA § 14.

CLO	Enforcement Rights	Obligation Regarding Collateral	Removal Rights	Requisite Threshold For Removal Rights
	<p>Servicer, as provided in the Indenture. SA § 9. The Indenture references a Preference Shares Paying Agency Agreement. Indenture § 1.1 (Definitions-- Preference Share Documents).</p>		<p>and affiliates, or for which they have discretionary voting authority, but HFP may vote Preference Shares it owns up to the Original HFP Share Amount) directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).</p>	
<p>Valhalla CLO, Ltd.</p>	<p>[No Preference Shares or Class E Certificates.]</p>	<p>[No Preference Shares or Class E Certificates.]</p>	<p>[No Preference Shares or Class E Certificates.]</p>	
<p>Westchester CLO, Ltd.</p>	<p>Requisite percentage of Preference Shares Holders may enforce obligations under Servicing Agreement of Servicer, as provided in the Indenture or Preference Share Paying Agency Agreement. SA § 9.</p>	<p>The Servicer must seek to preserve the value of the Collateral for the benefit of the securities holders. SA § 2(b).</p>	<p>No removal without cause. Removal for cause permitted by Majority of Voting Preference Shares Holders directing the Issuer, upon 10 days' notice. SA § 14. For cause removal may be effected in connection with the Servicer breaching the servicing agreement by not preserving the value of the Collateral. SA § 2(b).</p>	<p>Majority of Voting Preference Share Holders. SA § 14.</p>

EXHIBIT 6

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COUNSEL FOR NEXPOINT REAL ESTATE PARTNERS, LLC
f/k/a HCRE PARTNERS, LLC

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Case No.: 19-34054-sgj11
	§	
Debtor.	§	

**NEXPOINT REAL ESTATE PARTNERS LLC'S OBJECTION
TO DEBTOR'S FIFTH AMENDED PLAN OF REORGANIZATION**

NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("NREP") files this Objection to the Debtor's Fifth Amended Plan of Reorganization (the "Objection") and respectfully states as follows:

I. INTRODUCTION

1. On November 24, 2020, the Debtor filed the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1472] and Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1473] (the "Disclosure Statement"). On November 13, 2020, the Debtor filed its Initial Plan Supplement [Docket No. 1389], on December 18, 2020, the Debtor filed its Second Plan Supplement [Docket No. 1606] and on January 4, 2021, the Debtor filed its Third Plan Supplement [Docket No. 1656]



(together with the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., the “Fifth Amended Plan”).

2. The hearing on confirmation of the Fifth Amended Plan is scheduled for January 13, 2021 at 9:30 a.m. (the “Confirmation Hearing”) and the deadline to file any objections to confirmation of the Fifth Amended Plan is January 5, 2021. *See* Docket No. 1476.

3. The Fifth Amended Plan provides for the transfer of the majority of the Debtor’s assets to a Claimant Trust that will be established for the benefit of the Claimant Trust Beneficiaries. However, ultimately, the Claimant Trust and the Reorganized Debtor will “sell, liquidate, or otherwise monetize all Claimant Trust Assets and Reorganized Debtor Assets.” *See* Disclosure Statement, p. 11. Based on the Financial Projections attached as Exhibit C to the Disclosure Statement, the Debtor intends to liquidate its remaining assets and the assets within the Managed Funds over the next two years, concluding in December 2022.

4. NREP filed a proof of claim in this case. *See* Claim Number 146. The Debtor has objected to NREP’s claim. If NREP’s claim is allowed, NREP possesses a claim in Class 7 or Class 8 under the Fifth Amended Plan.

5. The Fifth Amended Plan also contains provisions to subordinate unidentified claims, a seemingly unfettered ability to set-off claims, and extremely broad exculpation, injunction, and release provisions, all of which fail to comply with the Bankruptcy Code. For the reasons set forth in detail below, NREP respectfully requests the Court deny confirmation of the Fifth Amended Plan.

II. OBJECTIONS

6. A debtor in bankruptcy bears the burden of proving every element of Bankruptcy Code Section 1129(a) by a preponderance of the evidence in order to attain confirmation of its

plan. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160 (5th Cir. 1993); *In re Barnes*, 309 B.R. 888, 895 (Bankr. N.D. Tex. 2004) (citing *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997)). In addition, a court has a mandatory duty to determine whether a plan has met all the requirements for confirmation, whether specifically raised by dissenting parties in interest or not. *Williams v. Hibernia Nat'l Bank*, 850 F.2d 250, 253 (5th Cir. 1988). The Debtor in this case is unable to meet its burden for confirmation.

A. The Fifth Amended Plan provides for the improper subordination of unidentified claims.

7. The Fifth Amended Plan provides for a class of subordinated claims, which claims may be subordinated to the general unsecured claims or both the general unsecured claims and convenience class. The Fifth Amended Plan then provides that

Under section 510 of the Bankruptcy Code, upon written notice, the Debtor, the Reorganized Debtor, and the Claimant Trustee reserve the right to re-classify, or to seek to subordinate, any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan that becomes a subordinated Claim at any time shall be modified to reflect such subordination.

See Fifth Amended Plan, Article III(J).

8. In the Fifth Circuit, equitable subordination is appropriate when (i) the claimant engaged in inequitable conduct; (ii) the misconduct resulted in harm to the debtor's other creditors or conferred an unfair advantage on the claimant; and (iii) equitable subordination is not inconsistent with the Bankruptcy Code. *See In re Life Partners Holdings, Inc.*, 926 F.3d 103, 121 (5th Cir. 2019). Further, a claim should only be subordinated to the extent necessary to offset the harm which the creditors have suffered as a result of the inequitable conduct. *Id.*

9. However, section 510 of the Bankruptcy Code only allows equitable subordination of claims "after notice and a hearing." 11 U.S.C. § 510(c). Equitable subordination generally

requires an adversary proceeding and while it may be satisfied through a chapter 11 plan, the debtor must at least satisfy its burden of demonstrating such claim should be subordinated under equitable subordination principles. Fed. R. Bankr. P. 7001(8).

10. Here, the Fifth Amended Plan does not provide for the subordination of any specific claims but, instead, provides for a procedure to subordinate claims that fails to comply with the statutory requirements under section 510 of the Bankruptcy Code or applicable case law. The Fifth Amended Plan provides no notice of the potential targets of such subordination, the basis upon which such subordination of claims may be justified, or any evidence supporting equitable subordination principles. Nor does the Fifth Amended Plan provide any means for due process, adequate notice, or opportunity to oppose such unidentified subordinations. Instead, the Fifth Amended Plan attempts to provide a means by which the Debtor, Reorganized Debtor, and Claimant Trustee can escape the “notice and hearing” requirements of section 510. This does not comply with the provisions of the Bankruptcy Code. As a result, the Fifth Amended Plan fails to satisfy 1129(a)(1) and confirmation should be denied.

B. The Fifth Amended Plan provides for the improper set-off of unidentified claims against the Debtor.

11. Similarly, the Fifth Amended Plan also provides the Distribution Agent unfettered set-off rights in violation of section 553 of the Bankruptcy Code. The Fifth Amended Plan provides that:

The Distribution Agent may, to the extent permitted under applicable law, set off against any Allowed Claim and any distributions to be made pursuant to this Plan on account of such Allowed Claim, the claims, rights and causes of action of any nature that the Debtor, the Reorganized Debtor, or the Distribution Agent may hold against the Holder of such Allowed Claim.... Any Holder of an Allowed Claim subject to such setoff reserves the right to challenge any such setoff in the Bankruptcy Court or any other court with jurisdiction with respect to such challenge.

See Fifth Amended Plan, Article VI(M). Thus, under the Fifth Amended Plan, the Distribution Agent may setoff the distribution amount on account of any Allowed Claim, without otherwise providing notice to the Holder of such Allowed Claim and without providing any support for or evidence that such setoff is justified. Instead, after the Distribution Agent arbitrarily determines a setoff is appropriate, the Holder of the Allowed Claim must initiate a proceeding challenging such setoff and seeking its full distribution under the Fifth Amended Plan. In addition, under the Fifth Amended Plan, the Distribution may setoff a pre-petition Allowed Claim on account of not only pre-petition claims but also post-petition claims of the Reorganized Debtor and/or Distribution Agent.

12. However, setoff is only available in bankruptcy when the opposing obligations arise on the same side of the bankruptcy date—*i.e.*, both had arisen prior to the petition date or both subsequent to the petition date. *In re Thomas*, 529 B.R. 628, 637 n.2 (Bankr. W.D. Pa. 2015); *In re Univ. Med. Center*, 973 F.2d 1065, 1079 (3d Cir. 1992). A creditor's pre-petition claims against the debtor cannot be set off against post-petition debts owed to the debtor. *In re Univ. Med. Center*, 973 F.2d at 1079. In addition, the burden of proof is on the party asserting the right to setoff. *In re Garden Ridge Corp.*, 338 B.R. 627, 632 (Bankr. D. Del. 2006). The party seeking to enforce a setoff right must establish (i) it has a right to setoff under nonbankruptcy law; and (ii) this right should be preserved in bankruptcy under section 553. *Id.*

13. Here, contrary to the provisions in section 553 of the Bankruptcy Code, the Fifth Amended Plan attempts to both expand the right to setoff by allowing post-petition claims be setoff against pre-petition Allowed Claims and transfer the burden of proof to the Holder of such Allowed Claim, requiring such Holder disprove the Distribution Agent's right to setoff. This does not

comply with the provisions of the Bankruptcy Code. As a result, the Fifth Amended Plan fails to satisfy 1129(a)(1) and confirmation should be denied.

C. The Fifth Amended Plan provides for improper and overly broad injunctions, releases and exculpation.

14. In addition, the Fifth Amended Plan provides for broad releases and permanent injunctions against nondebtors. *See* Article IX(F). However, permanent injunctions against nondebtors are not permissible in the Fifth Circuit because such a permanent injunction would “improperly insulate nondebtors in violation of section 524(e)...without any countervailing justification of debtor protection.” *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760-61 (5th Cir. 1995) (quoting *Landsing Diversified Props. v. First Nat’l Bank & Trust Co. (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 601-02 (10th Cir. 1990)). Contrary to such prohibition, the Fifth Amended Plan seeks to exculpate certain “Exculpated Parties” and “Protected Parties” from a broad array of claims relating to such entities’ post-petition conduct and would bar creditors from pursuing claims against various non-debtor parties if such claims relate to their claims against the Debtor. In addition, the language purports to release creditors’ claims arising not only from the bankruptcy case but also the administration and implementation of the Fifth Amended Plan and the period of time covered by the release and exculpation provisions extend beyond the effective date and purport to cover post-effective date conduct. Neither the Bankruptcy Code nor applicable case law permits such broad exculpatory and/or injunctive language in favor of third parties. *See In re Zale Corp.*, 62 F.3d at 761, *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252-253 (5th Cir. 2009). The injunction, release, and exculpation provisions in the Fifth Amended Plan do not comply with section 524(e) of the Bankruptcy Code or applicable case law and the Court should deny confirmation.

D. Reservation of Rights

15. NREP reserves the right to amend or supplement this Objection to add any appropriate basis under Sections 1129(a) and (b) and other applicable provisions of the Bankruptcy Code. In addition, NREP reserves the right to join in and support the objections asserted by other parties at the Confirmation Hearing.

III. CONCLUSION

For these reasons, the NREP respectfully requests that the Court deny confirmation of the Fifth Amended Plan and grant NREP such other relief at law or in equity to which it may be entitled.

Respectfully submitted,

/s/ Lauren K. Drawhorn

Jason M. Rudd

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COUNSEL FOR NEXPOINT REAL ESTATE

PARTNERS, LLC F/K/A HCRE PARTNERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, a true and correct copy of the foregoing Joinder was served via the Court's CM/ECF system upon counsel for the Debtor and all other parties requesting or consenting to such service in this bankruptcy case.

/s/ Lauren K. Drawhorn

Lauren K. Drawhorn

EXHIBIT 7

Hearing continued (RE: related document(s)[1808] Modified chapter 11 plan filed by Debtor Highland Capital Management, L.P. (RE: related document(s)[1472] Chapter 11 plan.) Continued Confirmation hearing to be held on 2/3/2021 at 09:30 AM at Dallas Judge Jernigan Ctrm. (Edmond, Michael)



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Appx. 0175

EXHIBIT 8

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

	)	Case No. 19-34054-sgj-11
In Re:	)	Chapter 11
)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	Wednesday, February 3, 2021
	)	9:30 a.m. Docket
Debtor.)	
	)	CONFIRMATION HEARING [1808]
	)	AGREED MOTION TO ASSUME [1624]
)	
	)	<i>Continued from 02/02/2021</i>
)	

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

WEBEX APPEARANCES:

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transcript produced by transcription service.

1 DALLAS, TEXAS - FEBRUARY 3, 2021 - 9:38 A.M.

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

5 THE COURT: Good morning. Please be seated. All
6 right. We are ready for Day Two of the confirmation hearing
7 in Highland Capital Management, LP, Case No. 19-34054. I'll
8 just make sure we've got the key parties at the moment. Do we
9 have Mr. Pomerantz, Mr. Morris, for the Debtor team?

10 MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff
11 Pomerantz for the Debtors.

12 MR. MORRIS: And I'm here as well, Your Honor.

13 THE COURT: All right. Good.

14 All right. For our objecting parties, do we have Mr.
15 Taylor and your crew for Mr. Dondero?

16 MR. TAYLOR: Yes, Your Honor.

17 THE COURT: Good morning.

18 All right. For Dugaboy Trust and Get Good Trust, do we
19 have Mr. Draper? (No response.) All right. I do see Mr.
20 Draper. I didn't hear an appearance. You must be on mute.

21 MR. DRAPER: I'm present, --

22 THE COURT: Okay.

23 MR. DRAPER: -- Your Honor.

24 THE COURT: Okay. Good morning.

25 MR. DRAPER: I'm present, Your Honor.

1 THE COURT: Good morning. I heard you that time.
2 Thank you.

3 All right. And now for what I'll call the Funds and
4 Advisors Objectors, do we have Ms. Rukavina present?

5 MR. RUKAVINA: Yes, Your Honor. Good morning.

6 THE COURT: Good morning. All right. And I will
7 check. Do we have Mr. Clemente or your team there?

8 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
9 Clemente from Sidley Austin on behalf of the Committee.

10 THE COURT: All right. Ms. Drawhorn, do we have you
11 there for the NexPoint Real Estate Partners and related funds?

12 MS. DRAWHORN: Yes, Your Honor. Good morning.

13 THE COURT: Good morning. All right. Did I miss --
14 I think that captured all of our Objectors. Anyone who I've
15 missed?

16 All right. Well, when we recessed yesterday, Mr. Morris,
17 I think you were about to call your third witness; is that
18 correct?

19 MR. MORRIS: It is, Your Honor. But if I may, I'd
20 like to just address the objections to the remaining exhibits,
21 since I hope that won't take too long.

22 THE COURT: All right. You may.

23 MR. POMERANTZ: Actually, Your Honor, before we go
24 there, we filed the supplemental declaration of Patrick
25 Leatham, as we indicated we would do yesterday. We just

1 wanted to get confirmation again that nobody intends to cross-
2 examine him, so that he doesn't have to sit through the
3 festivities today.

4 THE COURT: All right. Well, I did see that you
5 filed that.

6 Does anyone anticipate wanting to cross-examine Mr.
7 Leatham, the balloting agent?

8 MR. RUKAVINA: Your Honor, I take it that that
9 declaration is part of the record. As long as the Court
10 confirms that, I do not intend to call the gentlemen.

11 THE COURT: All right. Well, I will take judicial
12 notice of it and make it part of the record. It appears at
13 Docket Entry No. 1887. Again, it was filed -- well, it was
14 actually filed early this morning, I think. So, all right.
15 So, with --

16 MR. MORRIS: And to avoid --

17 THE COURT: Go ahead.

18 MR. MORRIS: To -- I was just going to say, to avoid
19 any ambiguity, Your Honor, the Debtor respectfully moves that
20 document into the evidentiary record.

21 THE COURT: All right. The Court will --

22 (Interruption.)

23 THE COURT: Someone needs to put their phone on mute,
24 perhaps. Unless someone was intentionally speaking.

25 All right. So, I will grant that request. Docket Entry

1 No. 1887 will be part of the confirmation evidence of this
2 hearing.

3 (Debtor's Patrick Leatham Declaration at Docket 1887 is
4 received into evidence.)

5 THE COURT: All right. Anything else? There were
6 other exhibits I think you were going to talk about?

7 MR. MORRIS: Yeah. Let me just go through them one
8 at a time, if I may, Your Honor.

9 THE COURT: Okay.

10 MR. MORRIS: All right. So, I'm going to deal with
11 the transcripts that have been objected to one at a time. And
12 I'll just take them in order. The first one can be found at
13 Exhibit B. It is on Docket No. 1822.

14 THE COURT: Okay.

15 MR. MORRIS: Exhibit B is the deposition transcript
16 from the December 16, 2020 hearing on the Advisor and the
17 Funds' motion for an order restricting the Debtor from
18 engaging in certain CLO-related transactions.

19 During that hearing, the Court heard the testimony of
20 Dustin Norris. Mr. Norris is an executive vice president for
21 each of the Funds and each of the Advisors.

22 We would be offering the transcript for the limited
23 purposes of establishing Mr. Dondero's ownership and control
24 over the Advisors.

25 Mr. Norris also gave some pretty substantial testimony

1 concerning the so-called independent board of the Funds.

2 And as a general matter, Your Honor, to the extent that
3 the objection is on hearsay grounds, the transcript -- at
4 least the portions relating to Mr. Norris's testimony --
5 simply are not hearsay under Evidentiary Rule 801(d)(2).
6 These are statements of an opposing party, and I think we fall
7 well within that.

8 So, we would respectfully request that the Court admit
9 into the record the transcript from December 16th, at least
10 the portions of which are Mr. Norris's testimony.

11 THE COURT: All right. And, again, these appear at
12 -- I think I heard you say B and then E. Is that correct?

13 MR. MORRIS: Just B. Just B at the moment. B as in
14 boy.

15 THE COURT: Okay. Just B at the moment?

16 All right. Any objections to that?

17 MR. RUKAVINA: Your Honor, I had objected, but now
18 that it's offered for that limited purpose, I withdraw my
19 objection.

20 THE COURT: All right. Then B -- I'm sorry. Was
21 there anyone else speaking?

22 B will be admitted. And, again, it appears at Docket
23 Entry 1822.

24 (Debtor's Exhibit B, Docket Entry 1822, is received into
25 evidence.)

1 MR. MORRIS: Okay. Next, the next transcript can be
2 found at Exhibit 6R, and that's Docket 1866. Exhibit 6R is
3 the transcript of the January 9, 2020 hearing where the Court
4 approved the corporate governance settlement. We think that
5 that transcript is highly relevant, Your Honor, because it
6 reflects not only Mr. Dondero's notice and active
7 participation in the consummation of the corporate governance
8 agreement, but it also reflects the Court and the parties'
9 views and expectations that were established at that time,
10 such that if anybody contends that there's any ambiguity about
11 any aspect of the order, I believe that that would be the best
12 evidence to resolve any such disputes.

13 So, for the purpose of establishing Mr. Dondero's notice,
14 Mr. Dondero's participation, and the parties' discussions and
15 expectations with regard to every aspect of the corporate
16 governance settlement, including Mr. Dondero's stipulation,
17 the order that emerged from it, and the term sheet, we think
18 that that's properly into evidence.

19 THE COURT: Any objection?

20 All right. 6R will be admitted. Again, at Docket Entry
21 1822.

22 (Debtor's Exhibit 6R, Docket Entry 1822, is received into
23 evidence.)

24 MR. MORRIS: Next, Your Honor, we've got Exhibits 6S
25 as in Sam and 6T as in Thomas. They're companions. And they

1 can be found at Docket 1866. And those are the transcripts.
2 The first one is from the October 27th disclosure statement
3 hearing, and the second one actually is from the Patrick
4 Daugherty, I believe, lift stay motion.

5 I'll deal with the first one first, Your Honor. We
6 believe that the transcript of the October 27th hearing goes
7 to the good faith nature of the Debtor's proposed plan. It
8 shows that the Debtor and the Committee were not always
9 aligned on every interest. It shows that the Committee, in
10 fact, strenuously objected to certain aspects of the then-
11 proposed plan by the Debtors. And we just think it goes to
12 the heart of the good faith argument.

13 The transcript for the 28th, we would propose to offer for
14 the limited purpose of the commentary that you offered at the
15 end of that hearing, where Your Honor made it clear that
16 employee releases would not be -- would not likely be
17 acceptable to the Court unless there was some consideration
18 paid.

19 And it was really, frankly, Your Honor's comments that
20 helped spur the Committee and the Debtor to discuss over the
21 next few weeks the resolution of the issues concerning the
22 employee releases.

23 So we're not offering Exhibit 6T for anything having to do
24 with Mr. Daugherty or his claim, but just the latter portion
25 relating to the discussion about the employee releases. And,

1 with that, we'd move those transcripts into evidence.

2 THE COURT: Any objection?

3 MR. RUKAVINA: Your Honor, yes, I do object. 6S is
4 hearsay, and under Rule 804(b)(1) it's admissible only if the
5 witnesses are unavailable to be called. There's been no
6 suggestion that they're not.

7 As far as 6T, what Your Honor says is not hearsay, so as
8 long as it's just what Your Honor was saying, I do not object
9 to 6T. I object to the balance of it.

10 THE COURT: Okay. What about that objection on 6S?

11 MR. MORRIS: Yeah. One second, Your Honor. I would
12 go to the residual exception to the hearsay rule under 807.
13 807 specifically applies if the statement being offered is
14 supported by sufficient guarantees of trustworthiness and it's
15 more probative on the point -- and the point here is simply to
16 help buttress the Debtor's good faith argument -- and it's
17 more probative on the point than any other evidence. And I'm
18 not sure what better evidence there would be than an on-the-
19 record discussion between the Debtor and the Committee as to
20 the disputes they were having on the disclosure statement.

21 THE COURT: All right. I'm going to overrule the
22 objection and accept that 807 exception as being valid here.
23 So, I am admitting both 6S and 6T. And for the record, I
24 think you said they appeared at 1866. They actually appear at
25 1822.

1 MR. MORRIS: Okay, Your Honor. I am corrected. It
2 is 6S and 6T, and they are indeed at 1822. Forgive me.

3 THE COURT: Okay.

4 (Debtor's Exhibits 6S and 6T, Docket Entry 1822, is
5 received into evidence.)

6 MR. MORRIS: The next transcript and the last one is
7 6U, which is also at 1822. 6U is the transcript from the
8 December 10th hearing on the Debtor's motion for a TRO against
9 Mr. Dondero. We believe the entirety of that transcript is
10 highly relevant, and it relates specifically to the Debtor's
11 request for the exculpation, gatekeeper, and injunction
12 provisions of their plan. And on that basis, we would offer
13 that into evidence.

14 THE COURT: Any objection?

15 MR. TAYLOR: Yes, Your Honor. This is Clay Taylor on
16 behalf of Mr. Dondero.

17 We do object, on the same basis that it is hearsay. There
18 has certainly been plenty of testimony before this Court and
19 on the record as to why the Debtor believes that its plan
20 provisions are appropriate and allowable, and there's no need
21 to allow hearsay in for that. All of the witnesses were
22 available to be called by the Debtor. The Debtor is in the
23 midst of its case and can call whoever else it needs to call
24 to get these into evidence or to get those docs into evidence.
25 And therefore, we don't believe that any residual exception

1 should apply.

2 THE COURT: Mr. Morris, your response?

3 MR. MORRIS: First, Your Honor, any statements made
4 by or on behalf of Mr. Dondero would not be hearsay under
5 801(d)(2).

6 And secondly, there is no other evidence of the Debtor's
7 motion of the -- of the argument that was had. There is no
8 other evidence, let alone better evidence, than the transcript
9 itself. And I believe 807 is certainly the best rule to
10 capture that.

11 It is a statement that's supported by sufficient
12 guarantees of trustworthiness. Again, these are the litigants
13 appearing before Your Honor. It may not be sworn testimony,
14 but I would hope that everybody is doing their best to comply
15 with the guarantee of trustworthiness in that regard, putting
16 aside advocacy.

17 And it is more probative on the point for which we're
18 offering -- and that is on the very issues of exculpation,
19 gatekeeper, and injunction -- than anything else we can offer
20 in that regard.

21 THE COURT: All right. I overrule the objection and
22 I will admit 6U. Okay.

23 (Debtor's Exhibit 6U, Docket Entry 1822, is received into
24 evidence.)

25 MR. MORRIS: All right. Going back to the top, Your

1 Honor, Companions Exhibit D as in David and E as in Edward,
2 which are at Docket 1822.

3 Exhibit D is an email string that relates to the Debtor's
4 communications with the Creditors' Committee concerning a
5 transaction known as SSP, which stands for Steel Products --
6 Structural and Steel Products. So that was an asset that the
7 Debtor was selling, trying to sell at a particular point in
8 time. And Exhibit E is a deck that the Debtor had prepared
9 for the benefit of the UCC.

10 And if we looked that those documents, Your Honor, you'd
11 see that the Debtor was properly following the protocols that
12 were put in place in connection with the January 9th corporate
13 governance settlement. And the Committee is being informed by
14 the Debtor of what the Debtor intends to do with that
15 particular asset.

16 And the reason that it's particularly relevant here, Your
17 Honor, is Dustin Norris had submitted a declaration in support
18 of their motion that was heard on September -- on December
19 16th. That declaration is an exhibit to what is Exhibit A on
20 Docket 1822. Exhibit A on the docket is the Advisor and the
21 Funds' motion. Okay? So, Exhibit A is the motion. Attached
22 to that Exhibit A is an exhibit, which is Mr. Norris's
23 declaration.

24 At Paragraph 9 of Mr. Norris's declaration, he takes issue
25 with the Debtor's process for the sale of that particular

1 asset.

2 And so, having admitted already into the record Mr.
3 Norris's declaration, we believe that these documents rebut
4 the statements made in Mr. Norris's declaration, and indeed,
5 were part of the transcript that has now already been admitted
6 into evidence. So we think the documents are needed because
7 they were exhibits during that hearing.

8 THE COURT: All right. Any objection?

9 MR. RUKAVINA: Your Honor, yes, I object based on
10 authenticity. This document has not been authenticated, nor
11 has the attachment. And on hearsay. And I don't think that
12 the Debtor can introduce one exhibit just to introduce another
13 to rebut the first.

14 THE COURT: Your response?

15 MR. MORRIS: You know, in all honesty, I wish that
16 the authenticity objection had been made yesterday and I might
17 have been able to deal with that.

18 These documents have already been admitted by the Court
19 against these very same parties. I think it would be a little
20 unfair for them now to exclude the document that they had no
21 objection to the first time around. They clearly relate to
22 Paragraph 9 of Mr. Norris's declaration, which was admitted
23 into evidence in this case without objection.

24 THE COURT: All right. I overrule the objection. D
25 and E are admitted.

1 (Debtor's Exhibits D and E, Docket Entry 1822, is received
2 into evidence.)

3 MR. MORRIS: Next, Your Honor, we have Exhibits 4D as
4 in David, 4E as in Edward, and 4G as in Gregory. And those
5 can all be found on Docket 1822. And to just cut to the
6 chase, Your Honor, these are the K&L Gates letter that were
7 sent in late December and my firm's responses to those
8 letters.

9 Those letters are being offered, again, to support --
10 well, the Debtor contends that, in the context of this case,
11 and at the time and under the circumstances, the letters
12 constituted interference and evinces a disregard for the
13 January 9th order, for Mr. Dondero's TRO, and for the Court's
14 comments at the December 16th hearing. And they go
15 specifically to the Debtor's request for the gatekeeper,
16 exculpation, and injunction provisions.

17 To the extent that those exhibits contain the letters that
18 were sent on behalf of the Funds and on behalf of the
19 Advisors, they would simply not be hearsay under 801(d)(2).
20 And to the extent the objection goes to my firm's response, I
21 think just as a matter of completeness the Court -- I won't
22 offer them for the truth of the matter asserted. I'll simply
23 offer the Pachulski responses at those exhibits for the
24 purpose of stating the Debtor's position, without regard to
25 the truth of the matter asserted.

1 THE COURT: All right. Any objection?

2 MR. RUKAVINA: Your Honor, with that understanding,
3 I'll withdraw my objection to these exhibits.

4 THE COURT: All right. So, 4D, 4E, and 4G are
5 admitted.

6 (Debtor's Exhibits 4D, 4E, and 4G, Docket Entry 1822, are
7 received into evidence.)

8 MR. MORRIS: Next, Your Honor, we've got Exhibit 5T
9 as in Thomas. That document can be found at Docket No. 1822.
10 Your Honor, that document is a schedule of a long list of
11 promissory notes that are owed to the Debtor by the Advisors,
12 Dugaboy, and Mr. Dondero. But I think that, upon reflection,
13 I'll withdraw that exhibit.

14 THE COURT: All right.

15 (Debtor's Exhibit 5T is withdrawn.)

16 MR. MORRIS: And then, finally, just one last one. I
17 think Mr. Rukavina objected to Exhibit 70 as in Oscar, which
18 can be found at Docket No. 1877. Exhibit 70 are the documents
19 that were admitted in the January 21st hearing, and I believe
20 that they all go -- they're being offered to support the
21 Debtor's application for the gatekeeper, exculpation, and
22 injunction provisions.

23 THE COURT: All right. 70 is being offered. Any
24 objection?

25 MR. RUKAVINA: Yes, Your Honor. I do object. Those

1 are exhibits from a separate adversary proceeding that has not
2 been concluded. In fact, my witness is still on the stand in
3 that.

4 And I'll note that that's another 20,000 pages that's very
5 duplicative of the current record, and we already are going to
6 have an unwieldy record. So I question why Mr. Norris -- why
7 Mr. Morris would even need this.

8 So that's my objection, Your Honor.

9 MR. MORRIS: You know what? That's a fair point,
10 Your Honor. And -- that is a fair point, and I guess what I'd
11 like to do is at some point this morning see if I can single
12 out documents that are not duplicative and come back to you
13 with very specific documents. I think that's a very fair
14 point.

15 THE COURT: All right.

16 MR. MORRIS: And with that, Your Honor, I think we've
17 now addressed every single document that the Debtor has
18 offered into evidence, and I believe, other than the
19 withdrawal of --

20 THE COURT: 5T.

21 MR. MORRIS: -- 5T --

22 THE COURT: Uh-huh.

23 MR. MORRIS: -- and the open question on 70, I
24 believe every single document at Docket 1822, 1866, and 1877
25 has been admitted. Do I have that right?

1 THE COURT: All right. Yes, because I did admit
2 yesterday 7F through 7Q, minus 7O, at 1877. So, yes, I agree
3 with what you just said.

4 MR. RUKAVINA: Your Honor, I apologize. And Mr.
5 Morris. I have that 5S -- or six -- that 5S and 6C, Legal
6 Entities List, have not been admitted. But if I'm wrong on
7 that, then I apologize.

8 THE COURT: Okay. 5S was part of 1866, which I
9 admitted entirely.

10 And what was the other thing?

11 MR. RUKAVINA: I'm counting letters, Your Honor.
12 One, two, three, four. 6D, Legal Entities List, Redacted.

13 THE COURT: Okay. 6B would have been --

14 MR. RUKAVINA: D, Your Honor, as in dog. I'm sorry.
15 6-dog.

16 THE COURT: Okay. 6D, yeah, that was part of 1822
17 that I admitted *en masse* yesterday.

18 MR. MORRIS: Yeah, I didn't hear an objection to that
19 one yesterday, and I agree, Your Honor. My records show that
20 it was already admitted.

21 MR. RUKAVINA: Then I apologize to the Court.

22 THE COURT: All right. Any --

23 MR. MORRIS: No worries. Let's get --

24 THE COURT: Any other housekeeping matters before we
25 go to the next witness?

1 MR. MORRIS: No, Your Honor. Not from the Debtor.

2 THE COURT: Anyone else?

3 All right. Well, let's hear from the next witness.

4 MR. MORRIS: All right, Your Honor. The Debtor calls
5 as its next and last witness Marc Tauber.

6 THE COURT: All right. Mr. --

7 MR. MORRIS: Mr. Tauber, if you're on the phone,
8 please identify yourself.

9 (No response.)

10 THE COURT: Mr. Tauber, we're not hearing you.
11 Perhaps you are on mute. Could you unmute your device?

12 (No response.)

13 THE COURT: All right. If it's a phone, you need to
14 hit *6.

15 Hmm. Any -- do you know which caller he is?

16 THE CLERK: I'm trying to find out.

17 THE COURT: All right. We've got well over a hundred
18 people, so we can't easily identify where he is at the moment.

19 All right. Mr. Tauber, Marc Tauber? This is Judge
20 Jernigan. We cannot hear you, so -- all right. Well, maybe
21 we can --

22 MR. MORRIS: Can we just take a three-minute break
23 and let me see if I can track him down?

24 THE COURT: Yes. Why don't you do that? So let's
25 take a three-minute break.

1 MR. MORRIS: Thank you, Your Honor.

2 THE COURT: Okay.

3 (A recess ensued from 10:02 a.m. until 10:04 a.m.)

4 MR. MORRIS: Your Honor, if we may, he'll be dialing
5 in in a moment. But I've been reminded that there is one more
6 exhibit. It's the exhibit I used on rebuttal yesterday with
7 Mr. Seery. There was the one document that was on the docket,
8 and that was the Debtor's omnibus reply to the plan
9 objections, where we looked at Paragraph 135, I believe. And
10 we would offer that into evidence for the purpose of just
11 establishing that the Debtor had given notice no later than
12 January 22nd of its agreement in principle to assume the CLO
13 management contracts.

14 And then the second exhibit that we had offered that I
15 think I suggested could be marked as Exhibit 10A was the email
16 string between my firm and counsel for the CLO Issuers where
17 they agreed to the agreement in principle for the Debtor's
18 assumption of the CLO management contracts.

19 And we would offer both of those documents into evidence
20 as well.

21 THE COURT: All right. Any objections?

22 All right. Well, I will admit them.

23 As far as this email string with the CLO Issuers that you
24 called 10A, does that appear on the docket? I remember you
25 putting it on the screen, but, if not, you'll need to file a

1 supplement to the record, a supplemental exhibit.

2 MR. MORRIS: We will, Your Honor. We'll do that for
3 both of those exhibits.

4 THE COURT: And then as -- okay, for both? Because I
5 -- I've read that reply, and I could reference the docket
6 number if we need to.

7 MR. MORRIS: We'll clean that up, Your Honor.

8 THE COURT: Okay.

9 (Debtor's Exhibit 10A is received into evidence.)

10 (Clerk advises Court re new caller.)

11 THE COURT: Oh, okay. Just a minute. I was looking
12 up something.

13 (Pause.)

14 THE COURT: All right. Well, you're going to file --
15 hmm, I really wanted to just reference where that reply brief
16 appears on the record. There were a heck of a lot of things
17 filed on January 22nd.

18 (Interruption.)

19 THE COURT: Okay. We'll --

20 MR. MORRIS: All right. We're just going to need one
21 more minute with Mr. Tauber. It's my fault, Your Honor.

22 THE COURT: Okay.

23 MR. MORRIS: I didn't send him easily-digestible
24 dial-in instructions. He'll be just a moment.

25 THE COURT: Okay.

1 (Court confers with Clerk regarding exhibit.)

2 THE COURT: Oh, it's at 1807? Okay. So, the reply
3 brief that we talked about Paragraph 35, that is at Docket No.
4 1807. Okay? All right.

5 (Debtor's Omnibus Reply to Plan Objections, Docket 1807,
6 is received into evidence.)

7 (Pause.)

8 MR. TAUBER: Hi. It's Marc Tauber.

9 THE COURT: All right.

10 MR. MORRIS: Excellent.

11 THE COURT: Mr. Tauber, this is Judge Jernigan. I
12 can hear you, but I can't see you. Do you have a video --

13 MR. TAUBER: Yeah, I don't know why it's not working.

14 THE COURT: Hmm.

15 MR. TAUBER: I'm on WebEx all day. Usually it works
16 no problem.

17 THE COURT: Okay. Well, do you want to give it
18 another try or two?

19 MR. TAUBER: Yeah. It looks like it's starting to
20 come up. It's all -- pictures, so --

21 THE COURT: Okay.

22 MR. TAUBER: -- hopefully you'll be able to see me in
23 a second.

24 THE COURT: Okay. The first thing I'm going to need
25 to do is swear you in, so we'll see if the video comes up here

1 in a minute.

2 MR. TAUBER: Okay.

3 THE COURT: Can you see us, Mr. Tauber?

4 MR. TAUBER: I can see four people. The rest are
5 just names still.

6 THE COURT: Okay.

7 MR. TAUBER: I can go out and try to come back in, if
8 you think that's --

9 THE COURT: I'm afraid of losing you. So, your
10 audio, is it on your phone or is it on --

11 MR. TAUBER: No.

12 THE COURT: -- a computer?

13 MR. TAUBER: On the computer. Yeah.

14 THE COURT: Okay. So you're coming through loud and
15 clear on your computer.

16 MR. TAUBER: Yeah. Like I said, we use WebEx for
17 work, so I have them on all day long without any issues,
18 typically.

19 THE COURT: Okay.

20 (Court confers with Clerk.)

21 THE COURT: Okay. Our court reporter thinks it's a
22 bandwidth issue on your end, so I don't --

23 MR. TAUBER: There's only two of us here at home on
24 the line right now, so I don't know why. It looks like it's
25 trying to come in, and then just keeps --

Tauber - Direct

25

1 THE COURT: I at least see your name on the screen
2 now, which I did not before.

3 MR. TAUBER: Yeah.

4 THE COURT: So hopefully we're going to -- ah. We
5 got you.

6 MR. TAUBER: There it is.

7 THE COURT: All right.

8 MR. TAUBER: Yeah.

9 MR. MORRIS: There we go.

10 MR. TAUBER: I might lose you, though. Give me one
11 second, because I have a thing saying the WebEx meeting has
12 stopped working. Let me close that.

13 THE COURT: Okay. We've still got you. Please raise
14 your right hand.

15 MR. TAUBER: Okay.

16 MARC TAUBER, DEBTOR'S WITNESS, SWORN

17 THE COURT: All right. Thank you. Mr. Morris?

18 MR. MORRIS: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. MORRIS:

21 Q Good morning, Mr. Tauber.

22 A Good morning.

23 Q I apologize for the delay in getting you the information.
24 Are you currently employed, sir?

25 A Yes, sir.

Tauber - Direct

26

1 Q By whom?

2 A Aon Financial Services.

3 Q And does Aon Financial Services provide insurance
4 brokerage services among its services?

5 A Yes.

6 Q And what position do you currently hold?

7 A Vice president.

8 Q How long have you been a vice president at Aon?

9 A Since October of 2019.

10 Q Can you just describe for the Court generally your
11 professional background?

12 A Sure. I spent about 20 years on Wall Street, working in a
13 variety of jobs, in research, trading, and as the COO of a
14 hedge fund. And then in 2010 I switched to the insurance
15 world. I was an underwriter for ten-plus years for Zurich and
16 QBE. And then in 2019 switched to the brokering side for Aon.

17 Q And what are your duties and responsibilities as a vice
18 president at Aon?

19 A Well, we're responsible or my team and I are responsible
20 for creating bespoke insurance programs, focusing on D&O and
21 E&O insurance for our insureds.

22 Q And what is, for the benefit of the record, what do you
23 mean by bespoke insurance program?

24 A Well, each client is different, so the programs and the
25 policies that we put in place might be off-the-shelf policies,

Tauber - Direct

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1 but we endorse and amend them as needed to meet the needs of
2 the individual client.

3 Q And during your work, both as an underwriter and now as a
4 broker, have you familiarized yourself with the market for D&O
5 and E&O insurance policies?

6 A Yes.

7 Q All right. Let's talk about the early part of this case.
8 Did there come a time in early 2020 when Aon was asked to
9 place insurance on behalf of the board of Strand Advisors?

10 A Yes.

11 Q Can you describe for the Court how that came about?

12 A Sure. One of our account executives, a man by the name of
13 Jim O'Neill, had a relationship with a man named John Dubel,
14 who was one of the appointees to serve on -- as a member of
15 Strand, which was being appointed, as we understood it, to be
16 the general partner of Highland Capital Management by the
17 Bankruptcy Court. And they -- we had done -- or, Jim and John
18 had a longstanding relationship. I had actually underwritten
19 an account for a previous appointment of John's when I was an
20 underwriter, so I had some familiarity with John as well, and
21 actually brokered a subsequent deal for John at Aon.

22 So I had, again, some familiarity with John, and we were,
23 you know, tasked with going out and finding a program for
24 Strand.

25 Q Can you describe what happened next? How did you go about

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1 accomplishing that task?

2 A So, there are a number of markets or insurance companies
3 that provide management liability insurance, which this was a
4 management liability-type policy. D&O is a synonym for
5 management liability, I guess you'd say. And we approached
6 the, I think, 14 or 15 markets that we knew to provide
7 insurance in this space and that would be willing to buy the
8 type of policy we were seeking and have interest in a risk
9 like this, which had a little hair on it. Obviously, there
10 was the Dondero involvement, as well as the bankruptcy.

11 Q As part of that process, did you and your firm put
12 together a package of information for prospective interested
13 parties?

14 A Yes.

15 Q Can you describe for the Court what was contained in the
16 package?

17 A Had the *C.V.s*, some relevant pleadings from the case,
18 court order. I'd have to go back and look exactly. But sort
19 of just general, you know, general information that was
20 available about the situation at hand and Strand's
21 appointment.

22 Q And the court order that you just mentioned, is that the
23 one that had that gatekeeper provision in it?

24 A Correct.

25 Q And can you explain to the Court why you and your team

Tauber - Direct

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1 decided to include the order with the gatekeeper provision in
2 the package that you were delivering to prospective carriers?

3 A Sure. In our initial conversations to discuss our
4 engagement, the gatekeeper function was explained to us by
5 John. And I'm not sure who else was on the initial call.
6 And, but it was explained to us that I guess Judge Jernigan
7 would sit as the gatekeeper between any potential claimant
8 against the insureds and, you know, would basically have to
9 approve any claim that would be made against (indecipherable),
10 which would thereby prevent any frivolous claims from
11 happening.

12 Q All right. Let's just talk for a moment. How did you and
13 your firm decide which underwriters to present the package to?

14 A Again, you know, I -- my background, or my Wall Street
15 background, obviously, sort of made me have a -- it was very
16 unique for the insurance world when I switched over, so I had
17 sort of risen to a certain level of expertise within the
18 space. And, you know, our team also is very experienced, and
19 decades of experience in the insurance world. So we're very
20 familiar with the markets that are willing to provide these
21 types of policies and the markets that would be likely to take
22 a look at a risk such as this.

23 Q Okay. You mentioned that there was -- I think your words
24 were a little hair on this, and one of the things you
25 mentioned was bankruptcy. How did the fact that Strand was

Tauber - Direct

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1 the general partner of a debtor in bankruptcy impact your
2 ability to solicit D&O insurance?

3 A Well, it's just not a plain vanilla situation, so people
4 are somewhat, you know, are -- I think -- so, the type of
5 insurance, D&O insurance, that we write is very different from
6 auto insurance, as an example. Auto insurance, people expect
7 there to be a certain amount of claims, and they expect the
8 premiums to cover the claims plus the expenses and then
9 provide them a reasonable profit on top of that.

10 Our insurance is really much more by binary. The
11 expectation for underwriters is that they will be completing
12 ignoring -- or, avoiding risk at all costs, wherever possible.
13 So anytime there is a situation that looks a little risky, so
14 the premium might be a little higher, the deductible might be
15 a little higher, but, again, the underwriters are really
16 making a bet that they will not have a claim. Because the
17 premiums pale in comparison to the limits that are available
18 to the policyholder.

19 Q And so --

20 A So, -- I'm sorry. What were you going to say?

21 Q I didn't mean to interrupt.

22 A Yeah.

23 Q Have you finished your answer?

24 A Sure.

25 Q Okay. So, were some of the 14 or 15 markets that you

Tauber - Direct

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1 contacted reluctant to underwrite because there was a
2 bankruptcy ongoing?

3 A Well, I think that probably -- I mean, there are certain
4 markets that we didn't go to in the beginning because they
5 would be very reluctant to write a risk that had that kind of
6 hair on it, based on our experience from dealing with them.
7 And, you know, I think the bankruptcy was certainly a little
8 bit of an issue. And then, obviously, as people did their
9 research and -- or if they weren't already familiar with
10 Highland and got to know, you know, got -- I will just say for
11 a simple Google search and learned a little bit about Mr.
12 Dondero, I think there was definitely some significant
13 reluctance to write this program.

14 Q Was the fact that the Debtor -- was the fact that the
15 Debtor is a partnership an issue that came up, in your -- in
16 your process?

17 A There are certainly some carriers who won't write what's
18 known as general partnership liability insurance. So, yes,
19 that is part of that. It was part of the limiting factor in
20 terms of who we went to.

21 Q Okay. And, finally, you mentioned Mr. Dondero. What role
22 did he play in your ability to obtain insurance for the Strand
23 board?

24 A Well, that's a very significant role. As, you know, as
25 mentioned, the underwriters are very risk-averse, so the

Tauber - Direct

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1 litigiousness of Mr. Dondero is a very strong red flag
2 prohibiting a number of people from writing the insurance at
3 all. And the ones that were writing, that were willing to
4 provide options, were looking for protections from Mr.
5 Dondero.

6 Q And what kind of protections were they looking for?

7 A Well, the gatekeeper function was a key factor. That was
8 really the only way we could even start a conversation with
9 any of the people that we were able to engage. And in
10 addition, they wanted a, you know, sort of a belts and
11 suspenders additional protection of having an exclusion
12 preventing any litigation brought by or on behalf of Mr.
13 Dondero.

14 Q Were you able to identify any carrier who was prepared to
15 underwrite D&O insurance for Strand without the gatekeeper
16 provision or without a Dondero exclusion?

17 A We were not.

18 Q Okay. Let's fast-forward now. Has your firm been
19 requested to obtain professional management insurance for the
20 contemplated post-confirmation debtor entities and individuals
21 associated with those entities?

22 A Yes.

23 Q Okay. So let's just talk about the entities first, the
24 Claimant Trust and the Litigation Trust. In response to that
25 request, have you and your team gone out into the marketplace

Tauber - Direct

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1 to try to find an underwriter willing to underwrite a policy
2 for those entities?

3 A Yes.

4 Q And have you been able to find any carrier who's willing
5 to provide coverage for the Claimant Trust and the Litigation
6 Trust?

7 A Yes.

8 Q And how many -- how many have expressed a willingness to
9 do that?

10 A Two.

11 Q And have those two carriers indicated that there would be
12 conditions to coverage for the entities?

13 A Both will require a -- the continuation of the gatekeeper
14 function, as well as a Dondero exclusion.

15 Q Okay. Have you also been tasked with the responsibility
16 of trying to find coverage for the individuals associated with
17 the Claimant Trust and the Litigation Trust, meaning the
18 Claimant Trustee, the Litigation Trustee, and the Oversight
19 Board?

20 A Yes. So we did it concurrently.

21 Q Okay. So, are the two firms that you just mentioned
22 willing to provide insurance for the individuals as well as
23 the entities?

24 A Correct. With the same stipulations.

25 Q They require -- they both require the gatekeeper and the

Tauber - Direct

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1 Dondero exclusion?

2 A That's correct.

3 Q Is there any other firm who has indicated a willingness to
4 consider providing D&O insurance for the individuals?

5 A There is one that is willing to do so, as long as the
6 gatekeeper function remains in place. They have indicated
7 that if the gatekeeper function was to be removed, that they
8 would then add a Dondero exclusion to their coverage.

9 Q So is there any insurance carrier that you're aware of who
10 is prepared to insure either the individuals or the entities
11 without a gatekeeper provision?

12 A No.

13 Q And that last company, I just want to make sure the record
14 is clear: If the gatekeeper provision is overturned on appeal
15 or is otherwise not effective, do you have an understanding as
16 to what happens to the insurance coverage?

17 A They will either add an exclusion for any claims brought
18 by or on behalf of Mr. Dondero or cancel the coverage
19 altogether.

20 MR. MORRIS: I have no further questions, Your Honor.

21 THE COURT: All right. Cross of this witness?

22 CROSS-EXAMINATION

23 BY MR. RUKAVINA:

24 Q Mr. Tauber, I'm a little confused. So, the insurance
25 that's being written now for the post-bankruptcy entities, did

Tauber - Cross

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1 I hear you say that there is one carrier that would give that
2 insurance subject to having a Dondero exclusion?

3 A So, first of all, there's nothing currently being written.
4 We have solicited quotes. So, just to make sure that that --
5 I want to make sure that's clear.

6 We have three carriers that are willing to provide varying
7 levels of coverage. All three will only do so with the
8 existence of the gatekeeper function continuing to be in
9 place. One of the three has -- two of those three will also
10 provide the coverage with -- even with the gatekeeper function
11 and the Dondero exclusion. The third one was not requiring a
12 Dondero exclusion unless the gatekeeper function goes away.

13 Q Okay. So the third one, you believe, will, whatever the
14 term is, write the insurance or provide the coverage without a
15 gatekeeper, as long as there is a strong Dondero exclusion?

16 A No. Their initial requirement is that the gatekeeper
17 function remains in place. That is their preferred option.
18 If the gatekeeper function is removed, then they will add a
19 Dondero exclusion in place of the gatekeeper exclusion. In
20 addition, that carrier is only willing to provide coverage for
21 the individuals, not for the entities.

22 Q Okay. Thank you.

23 MR. RUKAVINA: I'll pass the witness, Your Honor.

24 THE COURT: All right. Other cross?

25 MR. TAYLOR: Clay Taylor on behalf of Mr. Dondero.

1 THE COURT: Okay.

2 CROSS-EXAMINATION

3 BY MR. TAYLOR:

4 Q Good morning, Mr. Tauber.

5 A Good morning.

6 Q Are you generally familiar with placing D&O insurance at
7 distressed debt level private equity firms?

8 A I am familiar with it probably more from the underwriting
9 side, and I also worked at a fund that was distressed and had
10 to be liquidated, so I -- as the COO, so I have a fair amount
11 of familiarity, yes.

12 Q Okay. Before taking this to market for the first time for
13 the pre-confirmation policies that you have in place, did your
14 firm conduct any due diligence or analysis of comparing the
15 amount of litigation the Highland entities and Mr. Dondero
16 were involved in as compared to other comparable firms in the
17 marketplace? Say, you know, Apollo, Fortress, Cerberus, other
18 similar market participants?

19 A Well, it wouldn't really be our role as the broker.
20 That's the role of the underwriter.

21 Q Are you familiar if any of the underwriters undertook any
22 such analysis?

23 A I would assume that they did, since they all had concerns
24 about Mr. Dondero almost immediately.

25 Q Do you have any -- you didn't conduct any personal due

1 diligence on comparing the amount of litigation that the
2 Highland entities were involved in as compared to, say,
3 Fortress, do you?

4 A Well, again, that wouldn't really be my role as the
5 broker. But I will say that I used to write the primary
6 insurance for Fortress Investment Group when I was at Zurich.
7 So I'm extremely familiar with Fortress, to use your example,
8 and I would say that the level of litigation at Fortress was
9 much, just out of personal knowledge, was significantly less
10 than I had encountered or than I had read about at Highland.

11 Q That you have read about? Is that based upon a number of
12 cases where Fortress was a plaintiff as compared to Highland
13 was a plaintiff? Over what time period?

14 A Again, not my role. Not something that I've done. I'm
15 just generally familiar with Fortress and I'm generally
16 familiar with Highland.

17 Q All right. So you're generally familiar and you say that
18 -- you're telling me and this Court that Fortress is involved
19 in less litigation. Could you quantify that for me, please?

20 A No, but it's really irrelevant to the situation at hand.
21 The issue is not my feelings whatsoever. The issue is the
22 underwriters' feelings and their concern with Mr. Dondero, not
23 mine or anybody else's.

24 Q So, I appreciate your answer and thank you for that, but I
25 believe the question that was before you is, have you

Tauber - Cross

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1 quantitatively -- do you have any quantitative analysis by
2 which you can back up the statement that Fortress is less
3 litigious than Highland?

4 A I wouldn't even try, no.

5 Q Okay. Do you have any quantitative analysis for -- that
6 Cerberus is any less litigious than Highland?

7 A I don't have any real knowledge of Cerberus's
8 litigiousness.

9 Q Same question as to Apollo.

10 A Again, the Fortress, you just happened to mention
11 Fortress, which was a special case because I used to be their
12 primary underwriter. I don't have any specific -- I'm not a
13 claims attorney. I don't have any specific knowledge of the
14 level of litigiousness.

15 And, again, it's not up to me, my decision. It's the
16 underwriters' decision of whether or not they're willing to
17 write the coverage, not mine.

18 Q You mentioned that the -- when you took this out to
19 market, it had a little hair on it. Correct?

20 A Correct.

21 Q And you put together a package of materials that you sent
22 out to 14 or 15 market participants; is -- did I get that
23 correct?

24 A Yes.

25 Q And in that package, you had certain pleadings, including

Tauber - Cross

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1 the court order, correct?

2 A Yes. I believe that's correct.

3 Q And that was after your initial conversation with John and
4 -- where he pointed out the gatekeeper role. Correct?

5 A Correct.

6 Q And so when you went out to market, presumably you
7 highlighted the gatekeeper role to all the people you
8 solicited offers from because you thought it included less
9 risk, correct?

10 A It offered a level of protection that was not -- that's
11 not common. So it's, yes, it's a huge selling point for the
12 risk.

13 Q Okay. So, to be clear, you never went out to the market
14 to even see if you could get underwriting the first time
15 without the gatekeeper function; is that correct?

16 A Well, it's my job as a broker to present the risk in the
17 best possible light. So if we have a fact that makes the risk
18 a better write for the underwriters, we, of course, will
19 highlight it. So, no, I did not do that.

20 Q Okay. So, the quick answer to the question is no, you did
21 not go out and solicit any bids without the gatekeeper
22 function?

23 A Correct.

24 Q When you have approached the market for the post-
25 confirmation potential coverage, did you approach the same 14

Tauber - Cross

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1 or 15 parties that you did before?

2 A I don't have the two lists in front of me. They would
3 have been vastly similar, yes.

4 Q Okay. And so, again, all of the 14 or 15 parties or the
5 lists that you solicited were already familiar with the
6 gatekeeper function, correct?

7 A Yes.

8 Q And so therefore they already had that right; they're not
9 going to trade against themselves and therefore say that,
10 without it, we'll go ahead and write coverage. Correct?

11 A I -- I -- it'd be hard to answer that question. I don't
12 know.

13 Q Okay. Because you didn't try that, did you?

14 A I would have had no reason to, no.

15 Q Okay. So you don't know if a market exists without the
16 gatekeeper function because you haven't asked, have you?

17 A I guess that's fair, yeah.

18 MR. TAYLOR: I have no further questions.

19 THE COURT: All right. Any other Objectors with
20 cross-examination?

21 MR. DRAPER: I have no questions for the witness,
22 Your Honor.

23 THE COURT: All right. Anyone else? Mr. Morris,
24 redirect?

25 MR. MORRIS: Just one.

Tauber - Redirect

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REDIRECT EXAMINATION

BY MR. MORRIS:

Q One question, Mr. Tauber. Is there any -- do all underwriters -- any underwriters for Fortress require, as a condition to underwriting the D&O insurance, require a gatekeeping provision?

A In my, you know, 11, 12 years of experience in this industry, in this space, I have never seen that gatekeeper function be available, as an underwriter or as a broker. So, no.

MR. MORRIS: No further questions, Your Honor.

THE COURT: Any recross on that redirect?

All right. Well, Mr. Tauber, you are excused. We thank you for your testimony today. So you can log off.

THE WITNESS: Thank you.

THE COURT: Okay.

(The witness is excused.)

THE COURT: Mr. Morris, does the Debtor rest?

MR. MORRIS: The Debtor does rest, Your Honor.

THE COURT: All right. Well, what are we going to have from the Objectors as far as evidence?

MR. RUKAVINA: Your Honor, I will be very short. I will call Mr. Seery for less than ten minutes. I will call Mr. Post for less than ten minutes. I will have one exhibit. And I think that that's it for all the Objectors, unless I'm

1 mistaken, gentlemen.

2 MR. TAYLOR: Your Honor, I had one witness, Mr.
3 Sevilla, under subpoena to testify, and needed a brief moment
4 to discuss with my colleagues whether we're going to call him,
5 and if so, put him on notice that he would be coming up
6 probably about -- I don't know your schedule, Your Honor, but
7 probably, I'm guessing, either before lunch or after, and I
8 need to let him know that also.

9 So I do need a brief three to five minutes to confer with
10 my colleagues and some direction from the Court to, if we
11 decide to call him, as to when we would tell him to be
12 available.

13 THE COURT: All right. Well, before I get to that,
14 Mr. Draper, do you have any witnesses?

15 MR. DRAPER: I do not.

16 THE COURT: All right. Well, let's see. It's 10:34.
17 We're making good time this morning. If Seery is truly ten
18 minutes of direct, and Post is truly ten minutes of direct,
19 and I don't know how long the documentary exhibits are going
20 to take, it sounds to me like we are very likely to get to Mr.
21 Sevilla before a lunch break.

22 So if you want to -- you know, I don't know what that
23 involves, you sending text messages or making a quick phone
24 call. Do you need a five-minute break for that?

25 MR. TAYLOR: Yes, Your Honor. It involves a phone

1 call and an email. Just a confirmatory phone call just to
2 make sure that the guy -- just so you know who he is, he is
3 actually a Highland employee, but he's represented by separate
4 counsel, and so we do need to go through him just because
5 that's the right thing to do.

6 THE COURT: All right. Well, again, I mean, I never
7 know how long cross is going to take, but I'm guessing, you
8 know, we're going to get to him in an hour or so, if not
9 sooner, it sounds like. So, all right. So, do we need a
10 five-minute break?

11 MR. RUKAVINA: And Your Honor, it might make more
12 sense to make it a ten-minute break. I suspect that Mr.
13 Taylor will be able to release his witness if he and I will
14 just be able to talk. So I would ask the Court's indulgence
15 for a ten-minuter.

16 THE COURT: Okay. We'll take a ten-minute break.
17 We'll come back at 10:46 Central time.

18 THE CLERK: All rise.

19 (A recess ensued from 10:36 a.m. until 10:46 a.m.)

20 THE CLERK: All rise.

21 THE COURT: Please be seated. We're going back on
22 the record in the Highland confirmation hearing. Are the
23 Objectors ready to proceed?

24 MR. RUKAVINA: Your Honor, Davor Rukavina. We are.

25 THE COURT: All right. Well, Mr. Rukavina, are you

1 going to call your witnesses first?

2 MR. RUKAVINA: Yes, I will. Before that, if it might
3 help the Court and Mr. Morris: Mr. Morris, with respect to
4 that last exhibit, I do not object to the admission of any of
5 the exhibits that were admitted at that PI hearing.

6 But I do think, Your Honor, for the record, that -- and I
7 would ask Mr. Morris that he should refile those exhibits here
8 in this case, except for those that are duplicative. Because,
9 again, there's 10,000 pages of indentures, et cetera.

10 MR. MORRIS: Thank you very much, sir.

11 Your Honor, if that's acceptable to you, we'll do that as
12 soon as possible.

13 THE COURT: All right. And let me make sure the
14 record is clear. Are we talking about what you've described
15 as 70? I'm getting mixed up now. Am I --

16 MR. MORRIS: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. MORRIS: It's 70, which is the documents that
19 were introduced into evidence in the prior hearing. And Mr.
20 Rukavina is exactly right, that there is substantial overlap
21 between that and other documents that have already been
22 admitted in the record in this case. So we'll just file an
23 abridged version of Exhibit O that only includes non-
24 duplicative documents.

25 THE COURT: All right. So that will be admitted, and

Seery - Direct

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1 we'll look for your filed abridged version to show up on the
2 docket. 70.

3 (Debtor's Exhibit 70 is received into evidence as
4 specified.)

5 THE COURT: All right. What's next?

6 MR. RUKAVINA: Your Honor, Jim Seery, please. Mr.
7 James Seery.

8 THE COURT: All right. Mr. Seery, welcome back.
9 Please raise your right hand.

10 MR. SEERY: Can you -- can you hear me, Your Honor?

11 THE COURT: I can now.

12 JAMES P. SEERY, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

13 THE COURT: All right. Thank you.

14 Mr. Rukavina, go ahead.

15 DIRECT EXAMINATION

16 BY MR. RUKAVINA:

17 Q Mr. Seery, --

18 MR. RUKAVINA: Thank you.

19 BY MR. RUKAVINA:

20 Q Mr. Seery, good morning.

21 MR. RUKAVINA: Mr. Vasek, if you'll please pull up
22 the schedules.

23 What we have here, Your Honor, is Docket 247, the Debtor's
24 schedules. I'd ask the Court to take judicial notice of it.

25 THE COURT: All right. The Court will do so.

Seery - Direct

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1 BY MR. RUKAVINA:

2 Q Mr. Seery, are you familiar with these entities listed
3 here on the Debtor's schedules?

4 A Generally. Each one a little bit different.

5 Q Okay. Do you agree that the Debtor still owns equity
6 interests in these entities?

7 A I believe it does, yes.

8 Q Okay. Is it true that none of these entities are publicly
9 traded?

10 A I don't believe any of these are publicly-traded entities,
11 no.

12 Q Okay. And none of these, to your knowledge, are debtors
13 in this bankruptcy case, right?

14 A No. We only have one debtor in the case.

15 Q Okay. So, Highland Select Equity Fund, LP, the Debtor
16 owns more than 20 percent of the equity in that entity, right?

17 A I believe the Debtor owns the majority of that entity.
18 That is a fund with an on- and offshore feeder. And I, off
19 the top of my head, don't recall exactly how the allocations
20 of equity work. But I believe we do.

21 Q Does 67 percent refresh your memory? Are you prepared to
22 say that the Debtor owns 67 percent of that equity?

23 A I'm not prepared to say that, no.

24 Q Okay. Wright, Ltd. Does the Debtor own more than 20
25 percent of that equity?

Seery - Direct

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1 A There's about -- I don't recall. There's about at least
2 25 artist, designers, or designs. Wright, AMES, Hockney,
3 Rothco, all own in different places, and they all own in turn
4 some other thing. So I don't know what each of them, off the
5 top of my head, own. There's -- they're part of a myriad of
6 corporate structures here.

7 Q Strak, Ltd. Do you know whether the Debtor owns more than
8 20 percent of the equity of that entity?

9 A Stark? I don't know.

10 Q Okay. I don't know how to pronounce the next one. Eamis
11 (phonetic) Ltd. Do you know whether the Debtor owns more than
12 20 percent of that equity?

13 A Off the top of my head, I don't recall.

14 Q What about Maple Avenue Holdings, LLC?

15 A I believe, I don't know if it's directly or indirectly,
16 that we own a hundred percent of that entity. But I'm not
17 sure.

18 Q What about Highland Capital Management Korea, Ltd.?

19 A Effectively, Highland Capital Management is owned a
20 hundred percent.

21 Q What about Highland Capital Management Singapore Pte.
22 Ltd.?

23 A We are in the process of shutting it down, so I don't know
24 that -- what the equity percentages are. It's really just a
25 question -- it's -- it's dissolved save for a signature from a

Seery - Direct

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1 Singaporean.

2 Q Okay. But did the Debtor own more than 20 percent of that
3 entity?

4 A I don't know the specific allocations of equity ownership.

5 Q Okay. What about Pennant (phonetic) Management, LP? Do
6 you know whether the Debtor owns or owned more than 20 percent
7 of that entity?

8 A I don't recall, no.

9 MR. RUKAVINA: You can take that exhibit down, Mr.
10 Vasek.

11 BY MR. RUKAVINA:

12 Q Mr. Seery, very quick, are you familiar with Bankruptcy
13 Rule 2015.3?

14 A I am, yes.

15 Q Okay. Has the Debtor filed any Rule 2015.3 statements in
16 this case?

17 A I don't believe we have.

18 Q Okay.

19 MR. RUKAVINA: Thank you, Your Honor. I'll pass the
20 witness.

21 THE COURT: All right. Any other Objector
22 questioning? None from Mr. Taylor, none from Mr. Draper, none
23 from Ms. Drawhorn?

24 All right. Any cross -- any examination from you, Mr.
25 Morris?

Seery - Cross

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1 MR. MORRIS: Just one question.

2 THE COURT: Go ahead.

3 CROSS-EXAMINATION

4 BY MR. MORRIS:

5 Q Mr. Seery, do you know why the Debtor has not yet filed
6 the 2015.3 statement?

7 A I have a recollection of it, yes.

8 Q Can you just describe that for the Court?

9 A When we -- when we initially filed, when the Debtor filed
10 and it was transferred over, we started trying to get all the
11 various rules completed. There are, as the Court is aware, at
12 least a thousand and maybe more, more like three thousand,
13 entities in the total corporate structure.

14 We pushed our internal counsel to try to get that done,
15 and were never able to really get it completed. We did not
16 have -- we were told we didn't have separate consolidating
17 statements for every entity, and it would be difficult. And
18 just in the rush of things that happened from the first
19 quarter into the COVID into the year, we just didn't complete
20 that filing. There was no reason for it other than we didn't
21 get it done initially and I think it fell through the cracks.

22 MR. MORRIS: Nothing further, Your Honor.

23 THE COURT: All right. Anything further, Mr.
24 Rukavina?

25 REDIRECT EXAMINATION

Seery - Redirect

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1 BY MR. RUKAVINA:

2 Q Mr. Seery, I appreciate that answer. But you never sought
3 leave from the Bankruptcy Court to postpone the deadlines for
4 filing 2015.3, did you?

5 A No. If it hadn't fallen through the cracks, it would have
6 been something we recalled and we would have done something
7 with it. But, frankly, it just fell off the -- through the
8 cracks. We didn't deal with it.

9 Q Okay.

10 MR. RUKAVINA: Thank you, Your Honor. Thank you, Mr.
11 Seery.

12 THE COURT: All right. Any other Objector
13 examination?

14 Mr. Morris, anything further on that point?

15 MR. MORRIS: No, thank you, Your Honor. No further
16 questions.

17 THE COURT: All right. Mr. Seery, thank you. You're
18 excused once again from the witness stand.

19 (The witness is excused.)

20 THE COURT: Your next witness?

21 MR. SEERY: Thank you, Your Honor.

22 THE COURT: Uh-huh.

23 MR. RUKAVINA: Your Honor, I'll call Jason Post. Mr.
24 Post, if you're listening, which I believe you are, if you'll
25 please activate your camera.

Post - Direct

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1 THE COURT: Mr. Post, we do not see or hear you yet.

2 MR. RUKAVINA: Talk, Mr. Post, and I think it'll
3 focus on you.

4 MR. POST: Yes. Can you hear me now?

5 THE COURT: We can hear you. We cannot see you yet.
6 Could you say, "Testing, one, two; testing, one, two"?

7 MR. POST: Testing, one, two. Testing, one, two.

8 THE COURT: There you are. Okay. Please raise your
9 right hand.

10 JASON POST, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

11 THE COURT: All right. Thank you. You may proceed.

12 DIRECT EXAMINATION

13 BY MR. RUKAVINA:

14 Q Mr. Post, good morning. State your name for the record,
15 please.

16 A Robert Jason Post.

17 Q How are you employed?

18 A I'm employed by NexPoint Advisors, LP.

19 Q What is your title?

20 A Chief compliance officer.

21 Q Were you ever employed by the Debtor here?

22 A Yes.

23 Q Between when and when? Approximately?

24 A I believe it was July of '08 through October of 2020.

25 Q What was your last title while you were employed at the

Post - Direct

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1 Debtor?

2 A Still chief compliance officer. For the retail funds.

3 Q Okay. Very, very quickly, what does a chief compliance
4 officer do? Or what do you do?

5 A It's multiple things. Interaction with the regulators.

6 Adherence to prospectus and SAI limitations for the funds.

7 And then establishment of written policies and procedures to
8 prevent and detect violations of the federal securities laws
9 and then testing those on a frequent basis.

10 Q And I believe you mentioned you're the CCO for NexPoint
11 Advisors and Highland Capital Management Fund Advisors. Are
12 you also the CCO for any funds that they advise?

13 A Yes. For all the funds that they advise.

14 Q Okay. Does that include so-called retail funds?

15 A Yes. They're all retail funds.

16 Q What is a retail fund?

17 A It typically constitutes funds that are subject to the
18 Investment Company Act of 1940, such as open-end mutual funds,
19 closed-end funds, ETFs.

20 Q Obviously, you know who my clients are. Are any of my
21 clients so-called retail funds that you just described?

22 A Yes.

23 Q Name them, please.

24 A You've got NexPoint Capital, Inc., Highland Income Fund,
25 and NexPoint Strategic Opportunities Fund.

Post - Direct

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1 Q Do those three retail funds hold any voting preference
2 shares in the CLOs that the Debtor manages?

3 A Yes.

4 MR. RUKAVINA: Mr. Vasek, if you'll please pull up
5 Exhibit 2.

6 Your Honor, I believe I have a stipulation with Mr. Morris
7 that this exhibit can be admitted, so I'll move for its
8 admission.

9 MR. MORRIS: No objection, Your Honor.

10 THE COURT: All right. Exhibit 2 will be admitted.
11 And let's be clear. That appears at -- is it Docket No. --
12 let's see. Is it 1673 that you have your -- no, no, no, no.
13 1670? Is that where your exhibits are?

14 MR. RUKAVINA: No, Your Honor. It's 1863. I think
15 we did an amended one because we numbered our exhibits instead
16 of having seventeen Os and Ps. So it's 1863.

17 THE COURT: 1863? Okay. All right. There it is.
18 Okay. Again, this is -- I'm sorry. I got sidetracked. What
19 exhibit? It's Exhibit 2, is admitted. Okay.

20 MR. RUKAVINA: Thank you, Your Honor.

21 (Certain Funds and Advisors' Exhibit 2 is received into
22 evidence.)

23 BY MR. RUKAVINA:

24 Q Real quick, Mr. Seery. What do these HIF, NSOF, NC, what
25 do they stand for? Do they stand for the retail funds you

Post - Direct

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1 just named?

2 MR. SEERY: I don't think he meant me.

3 THE WITNESS: Yeah.

4 BY MR. RUKAVINA:

5 Q I'm sorry, Mr. Post. I didn't hear you.

6 A You addressed me as Mr. Seery.

7 Q Oh. I apologize. What do those initials stand for?

8 A The names of the funds that I mentioned.

9 Q Okay. And what do these percentages show?

10 A The percentages show the amount of shares outstanding and
11 the preference shares that each of the respective funds hold
12 of the named CLOs.

13 Q And those CLOs on the left there, those are the CLOs that
14 the Debtor manages pursuant to agreements, correct?

15 A Yes. Those are some of them, correct.

16 Q Yes. The ones that the retail funds you mentioned have
17 interests in, correct?

18 A Correct.

19 Q And what does the far-right column summarize or show?

20 A That would be the aggregate across the three retail funds.

21 Q In each of those CLOs?

22 A Correct.

23 Q Thank you.

24 MR. RUKAVINA: Mr. Vasek, you may pull this down.

25 BY MR. RUKAVINA:

Post - Direct

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1 Q Mr. Post, in the aggregate, how much do those three retail
2 funds have invested in those CLOs, ballpark?

3 A I believe it's approximately \$130 million, give or take.

4 Q Is it closer to 140 or 130?

5 A A hundred -- I think it's 140, actually.

6 Q Okay. Thank you. Who controls those three retail funds?

7 A Ultimately, the board --

8 Q And what --

9 A -- of the funds.

10 Q What is -- what do you mean by the board? Do they have
11 independent boards?

12 A Yes. They have a majority independent board, the funds
13 do.

14 Q Do you report to that board?

15 A Yes.

16 Q Does Mr. Dondero sit on those boards?

17 A He does not.

18 Q Okay.

19 MR. RUKAVINA: I'll pass the witness, Your Honor.

20 Thank you, Mr. Post.

21 THE COURT: All right. Any other Objector
22 examination of Mr. Post?

23 All right. Mr. Morris, do you have cross?

24 MR. MORRIS: Yes, Your Honor, I do.

25 THE COURT: Okay.

Post - Cross

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CROSS-EXAMINATION

BY MR. MORRIS:

Q Mr. Post, can you hear me okay, sir?

A Yes, I can hear you.

Q Okay. Nice to see you again. When did you first join Highland?

A I believe it was July of '08.

Q So you've worked with the Highland family of companies for about a dozen years now; is that right?

A Yes.

Q And you were actually employed by the Debtor from 2008 until October 2020; is that right?

A Correct.

Q And you left at that time and went to join Mr. Dondero as the chief compliance officer of the Advisors; do I have that right?

A Yes. I transitioned to NexPoint Advisors shortly, I believe, after Mr. Dondero left, but I was already the named CCO for that entity.

Q Right, but your employment status changed from being an employee of the Debtor to being an employee of NexPoint; is that right?

A Correct.

Q And that happened shortly after Mr. Dondero resigned from the Debtor and went to NexPoint Advisors, correct?

1 A Correct.

2 Q Okay. You mentioned that the funds are controlled by
3 independent boards; do I have that right?

4 A It's a majority independent board, correct.

5 Q Okay. There's no independent board member testifying in
6 this hearing, is there?

7 A I --

8 MR. RUKAVINA: Your Honor, Mr. Post wouldn't know
9 that, but I'll stipulate to that as a fact.

10 THE COURT: All right.

11 MR. MORRIS: Okay.

12 BY MR. MORRIS:

13 Q Did you -- do you speak with the board members from time
14 to time?

15 A Yes.

16 Q Did you tell them that it might be best if they came and
17 identified themselves and helped persuade the Court that they
18 were, in fact, independent?

19 A They have counsel to assist them with that determination.
20 I never mentioned anything along those line to them.

21 Q Okay. Can you tell me who the board members are?

22 A Yes. Ethan Powell, Bryan Ward, Dr. Bob Froehlich, John
23 Honis, and then Ed Constantino. He is only a board member,
24 though, for NSOF. NexPoint Strategic Opportunities Fund.

25 Q All right. Mr. Honis, is he -- has he been determined to

1 be an interested director, for purposes of the securities
2 laws?

3 A Yes.

4 Q Okay. Mr. Froeh..., do you know much about his
5 background?

6 A I believe he worked at Deutsche Bank and a couple of the
7 other -- or maybe a couple of other investment firms in the
8 past. And he also owns a minor league baseball team.

9 Q Do you know how long he served as a director of the funds?

10 A I don't know, approximately. I think maybe seven -- six,
11 seven years.

12 Q Okay. How about Mr. Ward? Did Mr. Froehlich ever work
13 for Highland?

14 A Not that I can recall.

15 Q Did Mr. Ward ever work for Highland?

16 A Not that I can recall.

17 Q Do you recall how long he's been serving as a director of
18 the funds?

19 A Mr. Ward?

20 Q Yes.

21 A I believe -- I'd be -- I don't recall specifically. I
22 think it's been, you know, 10 to 12 years, give or take.

23 Q He was a director when you got to Highland; isn't that
24 right?

25 A He was on the board of directors.

1 Q Yeah. So fair to say that Mr. Ward has been a director
2 since at least the mid to late oughts? 2005 to 2008?

3 A I'm sorry, you cut out. Late what?

4 Q The late oughts. Withdrawn. Is it fair to say that Mr.
5 Ward's been a director of the funds since somewhere between
6 2005 and 2008?

7 A Again, I don't recall specifically. You know, I joined
8 the complex, the retail complex as the named CCO in 2015, and
9 he had been serving in that role prior to that, and I believe
10 it was for probably a period of five to seven years, so that
11 sounds in line.

12 Q Did you have a chance to review Dustin Norris's testimony
13 from the December 16th hearing?

14 A I did not.

15 Q Do you know -- are you aware that he testified at some
16 length regarding the relationship of each of these directors
17 to Mr. Dondero and Highland?

18 A I didn't review anything, so I don't know what he said or
19 how long it took.

20 Q Do you know if Mr. Powell's ever worked for Highland?

21 A He has.

22 Q Do you know in what capacity and during what time periods?

23 A He was -- I think his last title was -- I believe was
24 chief product strategist, I believe. And he was also the
25 named PM for one of -- or, a suite of ETF funds. I think he

Post - Cross

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1 was last employed maybe --from my recollection, 2014,
2 possibly. Or 2015. Somewhere around in there.

3 Q Okay. And to the best of your knowledge, did Mr. Dondero
4 appoint Mr. Powell to be the chief product strategist?

5 A I don't -- I don't know. I wasn't involved in the
6 decision for his appointment. I don't know how he attained
7 that role.

8 Q To the best of your knowledge, did Mr. Dondero appoint Mr.
9 Powell as the PM of the ETF funds?

10 A Again, I wasn't involved in that determination, but he
11 probably would have had a role in making the determination on
12 who was the PM, along with probably some other investment
13 professionals.

14 Q Okay. And did Mr. Powell join the board of the funds
15 before or after he left Highland around 2015?

16 A I can't recall specifically if he was already on the board
17 or was an interested member, but I believe he, you know, I
18 believe he joined shortly after he left.

19 Q Okay. So he went from being an employee and being a
20 portfolio manager at Highland to being on the board of these
21 funds. Do I have that right?

22 A Again, I can't recall specifically. He may have already
23 been on the board as an interested board member. But, you
24 know, I believe, you know, if that wasn't the case, he would
25 have joined the board shortly after leaving.

Post - Cross

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1 Q And Mr. Ward, I think you said, has been on the funds'
2 board since somewhere between 2005 and 2008. Does that sound
3 right?

4 A I think that was a time frame you referenced, and I think
5 that was kind of in line, walking it back. But I don't recall
6 specifically when he joined.

7 Q And to the best of your knowledge, have the Advisors for
8 which you serve as the chief compliance officer managed the
9 Funds for which Mr. Ward has served as a director since the
10 time he became a director?

11 A I'm sorry. Can you repeat the question?

12 Q Yeah. I'm just trying to understand if the advisors --
13 withdrawn. The Advisors manage the Funds; do I have that
14 right?

15 A They provide investment advice on behalf of the Funds.

16 Q And they do that pursuant to written agreements; do I have
17 that right?

18 A Correct.

19 Q And is it your understanding that, for the entire time
20 that Mr. Ward has served as a member of the board of the
21 Funds, the Advisors have provided the investment advice to
22 each of those Funds?

23 A Yes, in one form or fashion. I believe at one period in
24 time, historically, the Advisor may have changed its name, but
25 it would have been, you know, at the end of the day, one or

Post - Cross

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1 more -- one of either NexPoint Advisors or Highland Capital
2 Management Fund Advisors would have advised those Funds.

3 Q Is it fair to say that each of the Advisors for which you
4 serve as the chief compliance officer has always been managed
5 by an Advisor owned and controlled by Mr. Dondero?

6 A I believe so, yes.

7 MR. MORRIS: I have no further questions, Your Honor.

8 THE COURT: All right. Any redirect?

9 MR. RUKAVINA: Yes.

10 THE COURT: Okay. Mr. Rukavina?

11 MR. RUKAVINA: Your Honor, was I on mute? I
12 apologize.

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. RUKAVINA:

16 Q Mr. Post, why did you leave Highland?

17 A It -- because I was a HCMLP employee and it was --
18 basically, there was conflicts that were created by being an
19 employee of the Debtor and by also serving as the CCO to the
20 named Funds and the Advisors, and it coincided with Jim
21 toggling over from HCMLP to NexPoint. It just made sense more
22 functionally and from a silo perspective for me to be the
23 named CCO for that entity since he was no longer an employee
24 of HCMLP.

25 Q And by Jim, you mean Jim Dondero?

Post - Redirect/Recross

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1 A Yes, sorry. Jim Dondero.

2 Q You're not some kind of lackey for Mr. Dondero, where you
3 go wherever he goes, are you?

4 MR. MORRIS: Objection to the question.

5 THE WITNESS: No.

6 THE COURT: Overruled. He can answer.

7 MR. RUKAVINA: Okay.

8 THE WITNESS: No.

9 MR. RUKAVINA: Okay. Thank you, Your Honor. I'll
10 pass the witness.

11 THE COURT: Any other Objector examination?

12 All right. Any recross, Mr. Morris?

13 RECCROSS-EXAMINATION

14 BY MR. MORRIS:

15 Q Just one question, sir. The conflicts that you just
16 mentioned, they were in existence for the one-year period
17 between the petition date and the date you left; isn't that
18 right?

19 A I think -- I believe so, and I think they became more
20 evident as, you know, time progressed.

21 Q Okay. But they existed on day one of the bankruptcy
22 proceeding; isn't that right?

23 A Yes, I believe so.

24 Q All right.

25 MR. MORRIS: No further questions, Your Honor.

Post - Recross

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1 THE COURT: All right. Thank you, Mr. Post. You're
2 excused from the virtual witness stand.

3 (The witness is excused.)

4 THE COURT: All right. Your next witness?

5 MR. RUKAVINA: Your Honor, my exhibit has been
6 admitted, I promised I'd be short, and my evidentiary
7 presentation is done. Thank you.

8 THE COURT: All right. Well, Mr. Taylor, your
9 evidence?

10 MR. TAYLOR: First of all, given the testimony that
11 we have received just recently, we have released Mr. Sevilla
12 from his subpoena and are not going to call him.

13 With that being said, we do have some documents that we
14 would like to get into evidence. We filed our witness and
15 exhibit list at Docket No. 1874. I don't believe any of these
16 are controversial. I'm trying to keep from duplicating those
17 that are already into evidence by the Debtor. And therefore I
18 would like to offer into evidence Exhibits No. 6 through 12
19 and 17. And that is it, Your Honor.

20 THE COURT: Okay. Is there any objection to Dondero
21 Exhibits 6 through 12 and 17, appearing at Docket 1874?

22 MR. MORRIS: I just want to be clear that Exhibits 6
23 and 7, which are letters, I believe, from Mr. Lee (phonetic)
24 are not being offered for the truth of the matter asserted in
25 either letter.

1 MR. TAYLOR: That is correct, Your Honor. Just
2 merely that those requests and the words that were stated in
3 there were indeed sent on those dates.

4 MR. MORRIS: And the same comment, Your Honor, with
5 respect to Exhibits 9 through 12, that those documents are not
6 being offered for the truth of the matter asserted.

7 MR. TAYLOR: Again, just that those requests were
8 sent and those responses as stated were sent.

9 And I apologize. I missed one, Your Honor. Also No. 15.
10 6 through 12, 15, and 17.

11 MR. MORRIS: Your Honor, the Debtor has no objection
12 to Exhibits 15, 16, and 17.

13 THE COURT: All right. So, so they are all admitted
14 with the representation that 6 and 9 through 12 are not being
15 offered for the truth of the matter asserted. With that
16 representation, you have no objection, Mr. Morris?

17 MR. MORRIS: That's right. I do just want to get
18 confirmation that Exhibits 1 through 5 and 13 through 16 -- 13
19 and 14 are not being offered at all.

20 THE COURT: Mr. Taylor?

21 MR. TAYLOR: So, that -- that is correct. 1 through
22 5 would be duplicative of what has already been introduced
23 into the record by Mr. Morris, so I am not offering those.
24 And do not believe that 13 and 14 are relevant anymore, and so
25 therefore did not offer those.

1 THE COURT: Okay. So, with that, I have admitted 6
2 through 12, 15, 16, and 17 at Docket Entry 1874.

3 (Dondero Exhibits 6 through 12 and 15 through 17 are
4 received into evidence.)

5 THE COURT: All right. Anything else, Mr. Taylor?

6 MR. TAYLOR: No, Your Honor. We are not calling any
7 witnesses.

8 THE COURT: All right. Mr. Draper, what about you?
9 Any evidence?

10 MR. DRAPER: No evidence or witnesses. The evidence
11 that's been introduced by Mr. Taylor and Mr. Rukavina are
12 sufficient for me.

13 THE COURT: All right. Ms. Drawhorn, anything from
14 you?

15 MS. DRAWHORN: No additional evidence, Your Honor.

16 THE COURT: All right. Well, then, Mr. Morris, did
17 you have anything in rebuttal?

18 MR. MORRIS: No, Your Honor. I think we can proceed
19 to closing statements. I would just appreciate confirmation
20 by the Objecting Parties that they rest.

21 THE COURT: All right. Well, I guess we'll get that
22 clear if it is isn't clear. All of the Objectors rest.
23 Confirm, yes, Mr. Rukavina?

24 MR. RUKAVINA: Confirm.

25 THE COURT: And Mr. Taylor?

1 MR. TAYLOR: Confirmed, Your Honor.

2 THE COURT: Okay. And Draper and Drawhorn?

3 MR. DRAPER: Yes, Your Honor.

4 MS. DRAWHORN: Confirmed, Your Honor.

5 THE COURT: All right. By the way, I assume Mr.

6 Dondero has been participating this morning. I didn't

7 actually get that clarification before we started. Mr.

8 Taylor, is he there with you this morning?

9 MR. TAYLOR: Your Honor, he is. He has been
10 participating. He is sitting directly to my left about
11 slightly more than six feet apart.

12 THE COURT: Okay. All right. Good.

13 All right. Well, let's talk about our closing arguments
14 and let me figure out, do we have -- should we break a bit
15 before starting? I have an idea in my brain about a time
16 limitation, but before I do that, let me ask. Mr. Morris,
17 first I'll ask you. How much time do you think you need for a
18 closing argument?

19 MR. MORRIS: Your Honor, --

20 MR. POMERANTZ: Your Honor?

21 MR. MORRIS: -- I'll defer to Mr. Pomerantz, who's
22 going to deliver that portion of our presentation today.

23 THE COURT: All right. Mr. Pomerantz?

24 MR. POMERANTZ: Your Honor, I will be making -- yes,
25 Your Honor. I will be making the majority portion of the

1 argument. Mr. Kharasch will be making the portion of the
2 argument dealing with the Advisor and Funds' objection. But I
3 expect my closing to be quite lengthy, given the 1129
4 requirements, all the legal issues, which I plan to spend a
5 fair amount of time. So I would anticipate a range of an hour
6 and 45 minutes.

7 THE COURT: An hour and 45 minutes? All right.
8 Well, --

9 MR. POMERANTZ: Correct.

10 THE COURT: I'm getting an echo.

11 MR. CLEMENTE: Your Honor, it's Matt Clemente on
12 behalf on the Committee. I'll have 15 minutes or less, Your
13 Honor. Just some things I would like to touch on.

14 THE COURT: All right. So, two hours. If I were to
15 --

16 MR. POMERANTZ: And then you need, Your Honor, to add
17 Mr. Kharasch. I think he's on. He can indicate how long his
18 part of the closing will be.

19 THE COURT: Mr. Kharasch?

20 MR. KHARASCH: Yes. I would figure my argument would
21 probably be about 20 minutes to 30 minutes.

22 THE COURT: Okay.

23 MR. RUKAVINA: Your Honor, let me interject something
24 that I think will help everyone out. With the CLOs having
25 consented through their counsel to the assumption, the bulk of

1 my objection is now moot. We no longer can and will argue
2 that the contracts are unassignable under 365(b) or (c)
3 because we do have now their consent. So that will hopefully
4 help the Debtor on that issue.

5 MR. KHARASCH: Your Honor, Ira Kharasch again. I was
6 not anticipating that. I believe that that will take away the
7 bulk of my argument. I'm still going to be dealing with some
8 of the other non-assumption-type arguments raised by the CLO
9 Objectors, kind of dovetailing with Mr. Pomerantz's arguments
10 on the injunction. But that will greatly reduce, Your Honor,
11 my argument.

12 THE COURT: All right. So if I say two hours of
13 argument for the Debtor and Creditors' Committee, Rukavina,
14 Taylor and Draper and Drawhorn, can you collectively manage to
15 share that two hours? Have a two-hour argument in the
16 aggregate? That seems fair to me.

17 MR. RUKAVINA: Your Honor, I think -- I think that's
18 fine, Your Honor.

19 THE COURT: All right. And I guess I'll --

20 MR. TAYLOR: This is Mr. Taylor. And yes, I agree.

21 THE COURT: Okay. And Mr. Draper?

22 MR. DRAPER: This is Douglas Draper. I agree. I
23 agree also, Your Honor.

24 THE COURT: All right. And I'm going to ask --

25 MR. POMERANTZ: Your Honor, I --

1 THE COURT: Go ahead.

2 MR. POMERANTZ: Your Honor, we -- I think we may need
3 like two hours and ten minutes, because mine was 1:45, Mr.
4 Clemente was 15, and then Mr. Kharasch. But we'll be around
5 that. And I tend to speak fast, so I might even shorten mine.

6 THE COURT: Okay. You negotiated me up to two hours
7 and ten minutes, Debtors/Objectors, each.

8 I'm going to ask one more time. The U.S. Trustee lobbed a
9 written objection, but we've not heard anything from the U.S.
10 Trustee. Are you out there wanting to make an oral argument?

11 MS. LAMBERT: Yes, Your Honor. The United States
12 Trustee is on the line. And we've been listening to the
13 hearing. I can turn my video on. I think you're --

14 THE COURT: Yes. I can hear you. I can't see you.

15 MS. LAMBERT: Okay. All right. And so the U.S.
16 Trustee feels that the issues about the releases have been
17 adequately joined and raised by the other parties and that
18 it's an issue of law. The U.S. Trustee does not feel that we
19 can add to that dialogue by, you know, wasting more of the
20 Court's time. I think it's been adequately briefed and it's
21 been adequately argued here today.

22 THE COURT: Okay.

23 MS. LAMBERT: And we do have an agreement to include
24 governmental release language in the order. I understand that
25 agreement is still being honored. That's a separate agreement

1 than the issue of whether the releases are precluded. But
2 we're going to let the other people carry the water on that.

3 THE COURT: Okay.

4 MR. POMERANTZ: Yeah. And that is correct. That is
5 correct, Your Honor. They asked for some information -- a
6 provision on government releases. They also asked for a
7 provision regarding joint and several liability for Trustee
8 fees.

9 As I mentioned previously, the IRS has asked for a
10 provision in the confirmation order, as have the Texas Taxing
11 Authorities.

12 We have not uploaded a proposed confirmation order, but I
13 will state right now on the record that, before we do so, we
14 will, of course, give Ms. Lambert, Mr. Adams, and the Texas
15 Taxing Authorities the opportunity to review. We expect there
16 won't be any issue because the language has already been
17 agreed to.

18 THE COURT: All right. Well, how about this. It's
19 11:23 Central time. Let's break until 12:00 noon Central
20 time, okay, so that gives everyone a little over 30 minutes to
21 have a snack and get their notes together, and we'll start
22 with closing arguments at 12:00 noon. All right? So we're in
23 recess until then.

24 THE CLERK: All rise.

25 (A recess ensued from 11:24 a.m. until 12:05 p.m.)

1 THE COURT: All right. Please be seated. All right.
2 This is Judge Jernigan. We are back on the record in
3 Highland. Let me make sure we have the people we need. Do we
4 have the Pachulski team there? Mr. Pomerantz, Mr. Kharasch?

5 MR. POMERANTZ: Yes, you do, Your Honor.

6 THE COURT: All right. For our Objectors, Mr.
7 Taylor, are you there?

8 MR. TAYLOR: Yes, Your Honor, I am.

9 THE COURT: All right. I see Mr. Draper there on the
10 video. You're there.

11 MR. DRAPER: I'm here. Can you hear me?

12 THE COURT: I can hear you loud and clear, yes.

13 MR. DRAPER: Great, because I didn't -- I'm not
14 hearing, something so I apologize.

15 THE COURT: All right. So we have Mr. Rukavina, and
16 I think I see Mr. Hogewood there as well. Is that correct?
17 You're ready to go forward?

18 MR. RUKAVINA: Yes, Your Honor.

19 THE COURT: All right.

20 MR. RUKAVINA: Yes, Your Honor. Good afternoon.

21 THE COURT: All right. And Ms. Drawhorn, you're
22 there?

23 MS. DRAWHORN: Yes, Your Honor.

24 THE COURT: Okay. Committee. Mr. Clemente, are you
25 there?

1 MR. CLEMENTE: Yes, Your Honor. I'm here, Your
2 Honor.

3 THE COURT: Okay. Very good. All right. So, let me
4 reiterate. We've given two-hour and 10-minute time
5 limitations for the Debtor, and that'll be both any time you
6 reserve for rebuttal and your closing, initial closing
7 argument. Mr. Clemente, you're going to be in that time frame
8 as well. Okay?

9 MR. CLEMENTE: Yes, Your Honor.

10 THE COURT: And so, as supporters of the plan.

11 And then, of course, the Objectors, they have collectively
12 two hours and ten minutes.

13 A couple of things. I'm going to have my law clerk, Nate,
14 who you can't see but he's to my right, he's going to keep
15 time. I promise I won't be a jerk and cut anyone off
16 midsentence, but please don't push the limit if I say, you
17 know, "Time."

18 The other thing I will tell you is I'll probably have some
19 questions here or there. And I've told Nate, cut off the
20 timer if we're in a question-answer session. I won't count
21 that as part of the two hours and ten minutes.

22 All right. So, with that, Mr. Pomerantz, you may begin.

23 CLOSING STATEMENT ON BEHALF OF THE DEBTOR

24 MR. POMERANTZ: Thank you, Your Honor. As Your Honor
25 is aware, the Debtor has been able to resolve all objections

1 to confirmation other than the objection by Mr. Dondero or his
2 entities and the United States Trustee.

3 Your Honor, I have a very lengthy closing argument, given
4 the number of issues that are raised in the objections, and I
5 want to make a complete record, since I understand that
6 there's a good likelihood that (garbled) appeal.

7 With that in mind, Your Honor, I'm prepared to go through
8 each and every confirmation requirement in Section 1129.
9 However, as an alternative, I might propose that I can go
10 through each of the Section 1129 requirements that are the
11 subject of pending objections or otherwise depend upon
12 evidence that Your Honor has heard.

13 THE COURT: Okay.

14 MR. POMERANTZ: And of course, I'll be happy to
15 answer any questions that you have in the process.

16 THE COURT: Okay.

17 MR. POMERANTZ: And after my closing argument, I will
18 turn it over to Mr. Kharasch to address the Advisor and Funds'
19 objections.

20 THE COURT: Okay.

21 MR. POMERANTZ: Before I walk the Court through the
22 confirmation requirements, I did want to note for the Court,
23 as I did previously, that we filed an updated ballot summary
24 at Docket No. 1887. And as reflected in the summary, Classes
25 2 and 7 have voted to accept the plan with the respective

1 numerosity and amounts required. In fact, the votes are a
2 hundred percent.

3 Class 8, however, has voted to reject the plan. Seventeen
4 creditors in Class 8 voted yes and 24 objectors, which are, I
5 think, all but one the employees with one-dollar claims for
6 voting purposes, voted against.

7 In dollar amount, Class 8 has accepted the plan by 99.8
8 percent of the claims. And I will address the issues of the
9 cram-down over that class a little bit later on.

10 Lastly, during the course of my presentation, I will
11 identify for the Court certain modifications we have made to
12 address the objections that were filed on January 22nd and
13 then also on February 1st. And at the end of my presentation,
14 I will raise a couple of other modifications that I won't get
15 to during my presentation and will explain to the Court why
16 all the modifications do not require resolicitation and are
17 otherwise appropriate under Section 1127.

18 Your Honor, as Your Honor is aware, Section 1129 requires
19 the Debtors to demonstrate to the court that the plan
20 satisfies a number of statutory requirements. 1129(a)(1)
21 provides that the plan requires -- complies with all statutory
22 provisions of Title 11, and courts interpreted this provision
23 as requiring the debtor to demonstrate it complies with
24 Section 1122 and 1123.

25 With respect to classification, Your Honor, there has been

1 one objection that was raised to essentially a classification,
2 and that was raised by Mr. Dondero to Article 3C of the plan
3 on the grounds that it purports to eliminate a class that did
4 not have any claims in it as of the effective date but which
5 may later have a claim in that class.

6 I think he was primarily concerned about Class 9
7 subordinated claims. But Mr. Dondero misunderstands the
8 provision. It only eliminates a claim for voting purposes,
9 and if there's later a claim in that class, it will be treated
10 as the plan provides the treatment.

11 In any event, Class 9, as we know now, will be populated
12 by the HarbourVest claims, as well as the UBS claims and the
13 Patrick Daugherty claims, if the Court approves the settlement
14 approving those claims.

15 Next, Your Honor, Section 1123(a) contains seven mandatory
16 requirements that a plan must include. Sections 1, 2, and 3
17 of 1123(a) apply to the classification of claims and where
18 they're impaired and treatment. The plan does that.

19 There has been an objection to 1123(a)(3) raised by
20 several parties with respect to the classification and
21 treatment of subordinated claims. The concerns stem from the
22 mistaken belief that the Debtor reserved the right to
23 subordinate claims without providing parties with notice and
24 without obtaining a court order.

25 The Debtor never intended to have unilateral ability to

1 subordinate claims without affording parties due process
2 rights, and we've added some clarificatory language to so
3 provide.

4 We made changes to the plan on January 22nd, and then on
5 February 1st, and the plan addresses all those issues in
6 Article 3(j) and it talks about when a claim is going to be
7 subordinated as a non-creditor. We've also redefined the
8 definition of subordinated claims to make clear that a claim
9 is only subordinated upon entry of an order subordinating that
10 claim.

11 Mr. Dondero also objected on the grounds that the plan did
12 not contain a deadline pursuant to which the Debtor would be
13 required to seek any subordination, and we have revised
14 Article 7(b) of the plan to provide that any request to
15 subordinate a claim would have to be made on or before the
16 claim objection deadline, which is 180 days after the
17 effective date.

18 Lastly, certain former employees, Mr. Yang and Borud,
19 objection also joined by Mr. Deadman, Travers, and Kauffman,
20 objected to the inclusion of language in the definition of
21 "Subordinated Claims" that a claims arising from a Class A, B,
22 or C limited partnership is deemed automatically subordinated.
23 The concerns were that the language could broadly apply to any
24 potential claims by a former partner, and could be also read
25 to encompass claims outside the statutory scope of 510(b) or

1 otherwise relating to limited partnership interests.

2 While the Debtor does reserve the right to seek to
3 subordinate the claims on any basis, we have modified the plan
4 to address that concern and to address the concern that we're
5 not attempting to create any new causes of action for
6 subordination that don't otherwise exist under applicable law,
7 but it just preserves the parties' rights with respect to
8 subordination and deals with that at a later date.

9 Next, Your Honor, Section 1123(a)(5). I skipped over
10 1123(a)(4) because there are no objections to that provision.

11 THE COURT: Okay.

12 MR. POMERANTZ: Section 1123(a)(5), a plan must
13 provide for adequate means of implementation. And the plan
14 provides a detailed structure and blueprint how the Debtor's
15 operations will continue, how the assets will be monetized,
16 including the establishment of the Claimant Trust,
17 establishment of the Litigation Sub-Trust, the Reorganized
18 Debtor, the Claimant Trust Oversight Board. And the documents
19 precisely describing how this will occur were filed as part of
20 the various plan supplements.

21 1123(a)(7), Your Honor, requires that the plan only
22 contain provisions that are consistent with the interest of
23 equity holders and creditors with respect to the manner,
24 selection, and -- of any director, officer, or trustee under
25 the plan. And as discussed in the plan, at the disclosure

1 statement, and as testified to by Mr. Seery, the Committee and
2 the Debtor had arm's-length negotiations regarding the post-
3 effective date corporate governance and believe that the
4 selection of the claimant Trustee, the Litigation Sub-Trustee,
5 and the Claimant Trust Oversight Board are in the best
6 interest of stakeholders.

7 HCMFA has raised a particular objection, I think, to these
8 issues, but I will address it in the context of the
9 requirement under Section 1129(a)(5).

10 Your Honor, Section 1129(a)(2) requires that the plan
11 comply with the disclosure and solicitation requirements under
12 the plan. Section 1125 requires that the Debtor only solicit
13 with a court-approved disclosure statement. The Court
14 approved the disclosure statement on November 23rd, and
15 pursuant to the proofs of service on file, the plan and
16 disclosure statement were mailed, along with solicitation
17 materials that the court approved.

18 Now, there has been an objection raised by Dugaboy, and
19 also alluded to by Mr. Taylor in some of his comments before,
20 that the plan does violate 1129(a)(2) because the Debtor's
21 disclosure statement was deficient.

22 In support of that argument, Dugaboy points to the
23 reduction in the anticipated distribution to creditors from
24 the November plan analysis to the January plan analysis, and
25 argues that that reduction requires resolicitation. However,

1 those arguments are not well-taken.

2 First, none of the people making these objections were
3 solicited for their vote on the plan, or if they had been,
4 they didn't vote or decided to reject the plan. And to the
5 extent that Class 8 creditors, the distribution has gone down
6 -- that's the class that Mr. Taylor and Mr. Draper are
7 concerned about -- you don't hear the Committee, Acis,
8 Redeemer, UBS, HarbourVest, Daugherty, or the Senior Employees
9 making their argument, this argument, and they represent over
10 99 percent of the claims in that class. And in fact, of the
11 17 Class 8 creditors that have accepted the plan, 15 are
12 represented by the parties I just mentioned.

13 So who are the two creditors that they're so concerned
14 about? One is Contrarian, which is a claims trader that
15 actually elected to be treated in Class 7, and one is one of
16 the employees who voted to accept the plan.

17 Second, Your Honor, the argument conflates the difference
18 between adverse change to the treatment of a claim or interest
19 that would require a resolicitation under Section 1127 and a
20 change to the distribution that would not.

21 More importantly, Your Honor, the argument is specious.
22 As Mr. Seery testified yesterday, the material differences
23 between the analysis contained on November and late January
24 and the one we filed on February 1st were based on three types
25 of changes: an update regarding the increased value of assets

1 based upon events that had transpired during this period,
2 which included an increase in asset value, no recoveries, and
3 revenues expected to be generated by the CLO management
4 agreements; an update to the expected costs of the Reorganized
5 Debtor and the Claimant Trust as a result of the continued
6 evaluation of staffing needs, operational expenses, and
7 professional fees; and an update to reflect resolution of the
8 HarbourVest and UBS claims.

9 In the filing Monday, Your Honor, we updated the plan
10 projection, a liquidation analysis which revised the unsecured
11 claims based upon the UBS settlement that I was able to
12 disclose to Your Honor. And in the filing, the distribution
13 now revised to Class 8 creditors is now 71 percent, compared
14 to the 87 percent that was in the disclosure statement that
15 went out for solicitation.

16 Your Honor, there can be no serious argument that the
17 creditors in this case were not fully aware of the potential
18 for the UBS and HarbourVest creditors receiving claims. Your
19 Honor's UBS 3018 order granting its claim for voting purposes
20 was entered right around the time that the disclosure
21 statement was approved. And, in fact, a last-minute addition
22 to the disclosure statement disclosed the 3018 amount,
23 although the amount did not make it to the attachment to the
24 disclosure statement. And that reference, Your Honor, to the
25 UBS claim being allowed for voting purposes can be found at

1 Page 41 of Docket No. 1473.

2 And the HarbourVest settlement was filed on about December
3 23, two weeks before the voting deadline, sufficient time for
4 people to take that into consideration.

5 And as Your Honor surely knows, the hearings in this case
6 have been very well-attended by the major parties, and I
7 believe that if we went back and looked at the records of who
8 was on the WebEx system during the HarbourVest and UBS
9 hearings, you would find that representatives of basically
10 every creditor, every major creditor in this case in Class 8
11 participated.

12 Moreover, Your Honor, creditors were not guaranteed any
13 percentage recovery under the plan and disclosure statement,
14 which clearly identified the size of the claims pool as a
15 material risk.

16 Article 4(a)(7) of the disclosure statement, which is at
17 Docket 1473, is entitled "Claims Estimation" and warns
18 creditors that there can be no assurances that the Debtor's
19 claims estimates will prove correct, and that the actual
20 amount of the allowed claims may vary materially.

21 And if Dugaboy is arguing it was misled as the holder of a
22 disputed administrative claim and general unsecured claim,
23 that argument is simply preposterous.

24 Dugaboy cites several cases for the proposition that
25 deficient disclosure may warrant resolicitation, and the

1 Debtor agrees with the proposition as a general matter. But
2 if one looks at the cases that were filed -- that Dugaboy
3 cited to, it will see that they are clearly inapposite and
4 distinguishable.

5 *In re Michaelson*, the Bankruptcy Court for the Eastern
6 District of California, revoked confirmation because the
7 debtor failed to disclose in the disclosure statement a mail
8 fraud indictment of the turnaround specialist who was to lead
9 the reorganization effort and a prior Chapter 7 company he
10 drove into the ground.

11 In *In re Brotby*, the Ninth Circuit BAP affirmed a decision
12 of the Bankruptcy Court that the individual debtor's decision
13 to modify its financial projections on the eve of confirmation
14 did not require a resolicitation. And there, the financial
15 projections were off by 75 percent.

16 And in *Renegade Holdings*, the Bankruptcy Court granted a
17 motion by a group of states to revoke confirmation by the
18 debtors, who manufactured and distributed tobacco products,
19 because the debtors failed to disclose in its disclosure
20 statement that the debtor and its principals were under
21 criminal investigation for unlawful trafficking in cigarettes,
22 which was not disclosed to creditors.

23 Your Honor, none of these cases are remotely analogous to
24 this case, and they certainly do not stand for the proposition
25 that the Debtor was required to resolicit.

1 Next, Your Honor, the next requirement is 1129(a)(3),
2 which requires that any plan be proposed in good faith. As
3 Mr. Seery testified at length, and the Court has personal
4 knowledge of, having presided over this case for a year, the
5 plan is the result of substantial arm's-length negotiations
6 with the Committee over a period of several months.

7 Mr. Seery testified yesterday that, soon after the board
8 was appointed, the Committee wanted to immediately pursue down
9 the path of an asset monetization plan. However, as Mr. Seery
10 testified, the board decided that it was inappropriate to rush
11 to judgment and that it should consider all potential
12 restructuring alternatives for the Debtor. And Mr. Seery
13 testified what those alternatives were: a traditional
14 restructuring and continuation of the Debtor's business; a
15 potential sale of the Debtor's assets in one or more
16 transactions; an asset monetization plan like the one before
17 the Court today; and, last but not least, a grand bargain plan
18 that would involve Mr. Dondero sponsoring the plan with a
19 substantial equity infusion.

20 As Mr. Seery testified, by the early summer of 2020, the
21 Debtor decided that it was appropriate to start moving down
22 the path of an asset monetization plan while it continued to
23 work on the grand bargain plan. Accordingly, Mr. Seery
24 testified that the Debtor commenced good-faith negotiations
25 with the Committee regarding the asset monetization plan, and

1 that those negotiations took several months, were hard-fought
2 and at arm's-length, and involved substantial analysis of the
3 appropriate post-confirmation corporate structure, governance,
4 operational, regulatory, and tax issues. And on August 12th,
5 Your Honor, the plan was filed with the Court.

6 And although the Debtor at that time had not reached an
7 agreement with the Committee on some of the most significant
8 issues, Mr. Seery testified that the independent board
9 believed that it was important to file that plan at that time,
10 a proverbial stake in the ground to act as a catalyst for
11 reaching a consensual plan with the Committee or others, which
12 it has done.

13 As Mr. Seery testified, he continued to work with Mr.
14 Dondero to try to achieve a grand bargain plan, while at the
15 same time proceeding down the path of the filed plan.

16 He testified that the parties participated in mediation at
17 the end of August and early September to try to reach an
18 agreement on a grand bargain plan, but were unsuccessful. And
19 the Debtor proceeded on the path of the August 12th plan and
20 sought approval of its disclosure statement on August 27th,
21 2020.

22 Mr. Seery testified that, at that time, the Debtor still
23 had not reached an agreement with the Committee on certain
24 significant issues involving post-confirmation governance and
25 the scope of releases. And as a result, after a contested

1 hearing, Your Honor, Your Honor did not approve the disclosure
2 statement on October 27th, but asked us to go back again to
3 try to work out the issues, and we came back on November 23rd.

4 Mr. Seery testified that the Debtor continued to negotiate
5 with the Committee to resolve the material disputes leading --
6 which led up to the November 23rd hearing, where we came in
7 with the support of the Committee. But as Mr. Seery has also
8 testified, he has continued to try to reach a consensus on a
9 global plan, notwithstanding the approval of the disclosure
10 statement. And he spent personally several hundred hours
11 since his appointment trying to build consensus.

12 As part of this process, Mr. Seery testified that Mr.
13 Dondero received access to substantial information regarding
14 the Debtor's assets and liabilities, most recently in
15 connection with a series of informal document requests which
16 were made at the end of December.

17 And after the Court asked the parties to again reengage in
18 efforts to try to reach a global hearing after the Debtor's
19 preliminary injunction motion, Mr. Seery testified that he and
20 the board participated in calls with Mr. Dondero and his
21 advisors and the Committee to see if common ground could be
22 attained.

23 Unfortunately, as Mr. Seery testified, the Committee and
24 Mr. Dondero were not able to reach an agreement.

25 Accordingly, Your Honor, the testimony unequivocally and

1 overwhelmingly demonstrates that the plan was proposed in good
2 faith.

3 I expect the Objectors may argue in closing that they have
4 filed a plan under seal that is a better alternative than that
5 being proposed by the plan that the Debtor seeks to confirm.
6 Your Honor, as a threshold matter, yesterday I said any
7 mention of the specifics of the recent plan would be
8 inappropriate. We are not here today to debate the merits of
9 Mr. Dondero's plan, which the Court permitted him to file
10 under seal. He had ample opportunity to file this plan after
11 exclusivity was terminated, seek approval of a disclosure
12 statement, and, if approved, solicit votes in connection with
13 a confirmation hearing, but he failed to do so.

14 What matters today, Your Honor, is whether the Debtor's
15 plan, the plan that has been accepted by 99.8 percent of the
16 amount of creditors, and opposed only by Mr. Dondero, his
17 related entities, and certain employees, meets the
18 confirmation requirements of Section 1129, which we most
19 certainly argue it does.

20 And perhaps most importantly, Your Honor, the Court
21 remarked at the last hearing that, without the Committee's
22 support for a competing plan, Mr. Dondero's plan would be dead
23 on arrival. And as you have heard from Mr. Clemente, Mr.
24 Dondero does not yet have the Committee's support.

25 Next, Your Honor, is Section 1129(a)(5). That requires

1 that the plan disclose the identity of any director,
2 affiliate, officer, or insider of the debtor, and such
3 appointment be consistent with the best interest of creditors
4 and equity holders. Courts have held that this section
5 requires the disclosure of the post-confirmation governance of
6 the reorganized entity.

7 HCMFA objects to the plan, arguing that it did not comply
8 with Section 1129(a)(5) because it didn't disclose the people
9 who would control and manage the Reorganized Debtor and who
10 might be a sub-servicer. HCMFA's objection is off-base.
11 Under the plan, Mr. Seery will be the claimant Trustee and
12 Marc Kirschner will be the Litigation Trustee. Mr. Seery
13 testified extensively about his background, and he has
14 appeared before the Court many times and the Court is familiar
15 with him. We have also introduced his C.V. into evidence.

16 As he testified, he will be paid \$150,000 per month,
17 subject to further negotiations with the Claimant Trust
18 Oversight Committee regarding the monthly amount and any
19 success fee and severance fee, which negotiation is expected
20 to be completed within the 45 days following the effective
21 date.

22 Mr. Seery also testified regarding the names of the
23 members of the Claimant Trust Oversight Committee, which
24 information was also contained in the plan supplement and it
25 generally includes the four members of the Committee and David

1 Pauker, a restructuring professional with decades of
2 restructuring experience.

3 The members of the Oversight Committee will serve without
4 compensation, except for Mr. Pauker, who Mr. Seery testified
5 will receive \$250,000 in the first year and \$150,000 for
6 subsequent years.

7 As set forth in the Claimant Trust agreement, if at any
8 time there is a vacant seat to be filled by another
9 independent member, their compensation will be negotiated by
10 and between the Claimant Trust Oversight Board and them.

11 Mr. Seery has also testified that he believed the Claimant
12 Trust will have sufficient personnel to manage its business.
13 Specifically, he has testified that he intends to employ
14 approximately ten of the Debtor's employees, who will be
15 sufficient to enable him to continue to operate the Debtor's
16 business, including as an advisor to the managed funds and the
17 CLOs, until the Claimant Trust is able to effectively and
18 efficiently monetize its assets for fair value, whether that
19 takes two years or whether that takes 18 months or whether
20 that takes longer.

21 Mr. Seery further testified that he believes that the
22 operations can be best conducted by the Debtor's employees.
23 And while he did consider the retention of a sub-servicer, he
24 ultimately decided, in consultation with the Committee, that
25 the monetization would be a lot more effective if done with a

1 subset of the Debtor's current employees.

2 The proposed corporate governance is also consistent with
3 the interests of the Debtor and its stakeholders. The Court
4 is very familiar with Mr. Seery and the Debtor, and I believe
5 that Mr. Clemente, when he comments, will say the Committee
6 can think of no better person to continue managing the
7 Claimant Trust than Mr. Seery.

8 Mr. Kirschner is also well qualified to be the Litigation
9 Trustee. His C.V. is part of the evidence that's been
10 admitted and contains additional information regarding his
11 background. And he will receive \$40,000 a month for the first
12 three months and \$20,000 a month thereafter, plus a to-be-
13 negotiated success fee.

14 There just simply can be no challenge to Mr. Seery's or
15 Mr. Kirschner's qualifications or abilities to act in a manner
16 contemplated by the plan or that their involvement is not in
17 the best interest of the estate and its creditors.

18 Your Honor, the next requirement that is objected to is
19 Section 1129(a)(7). That, of course, requires the Debtor to
20 demonstrate that creditors will receive not less under the
21 plan than they would receive if the Debtor was to be
22 liquidated in Chapter 7. And on February 1st, Your Honor, we
23 filed our updated liquidation analysis, which contains the
24 latest-and-greatest evidence to support that.

25 These documents, the updated documents, in connection with

1 the prior analysis, was provided to objecting parties in
2 advance of the January 29th deposition, and Your Honor has
3 heard the differences between the January 29th and the
4 February 1st documents being very minimal.

5 The Court heard extensive evidence and testimony from Mr.
6 Seery regarding the assumptions that went into the preparation
7 of the liquidation analysis and the differences of what
8 creditors are projected to receive under the plan as compared
9 to what they are projected to receive in a Chapter 7.

10 Such testimony also included a comparison between the
11 liquidation analysis that was filed with the plan in November,
12 the updated liquidation analysis filed on the -- or, provided
13 to parties on January 28th, and the last version, filed on
14 February 1st.

15 Mr. Seery testified that, on the revenue side, the
16 liquidation analysis was updated to include the HCLOF
17 interest, which was required as part of the settlement with
18 HarbourVest; the increase in value of certain assets,
19 including Trussway; revenue expected to be generated from
20 continued management of the CLOs; and increased recovery on
21 notes as a result of the acceleration of certain related
22 notes.

23 On the expense side, Mr. Seery testified regarding his
24 best estimate of the likely expenses to be incurred by a
25 Chapter 7 trustee -- by the Claimant Trust, including

1 personnel costs; professional costs, which increase because of
2 the litigious nature this case has become; and operating
3 expenses.

4 And lastly, on the claim side, Your Honor, Mr. Seery
5 testified that the claims numbers have been updated to include
6 the settlement from HarbourVest and initially the amount
7 approved to UBS pursuant to the 3018 order and then the
8 reduction at \$50 million based upon the settlement announced.
9 And like the prior liquidation analysis, the current analysis
10 demonstrates that creditors will fare substantially better
11 under in Chapter -- under the plan than in Chapter 7. In
12 fact, the projected recovery under the plan is 85 percent for
13 Class 7 creditors and 71.32 percent for Class 8 creditors, as
14 compared to 54.96 percent for all unsecured creditors in a
15 Chapter 7.

16 Mr. Seery also testified that expenses are expected to be
17 more under Chapter 11 than under Chapter 7, but he also
18 testified that the tens of millions of dollars in greater
19 revenue and asset recoveries under the plan will more than
20 offset the additional expenses.

21 As a result, the Court has more than sufficient
22 evidentiary basis to conclude that the Debtor has carried its
23 burden to prove that it meets the best interest of creditors
24 best.

25 But Mr. Dondero's counsel spent a lot of time crossing --

1 cross-examining Mr. Seery, in a vain attempt to demonstrate to
2 the Court that a Chapter 7 actually would be much better for
3 creditors. And this argument has also been made by Dugaboy
4 and the Advisors and the Funds.

5 Before I address these arguments on its merits, Your
6 Honor, I just wanted to remind the Court of the Objectors --
7 these Objectors' interest in this case. Mr. Dondero owns no
8 equity in the Debtor. He owns a general partner. Strand, in
9 turn, owns a quarter-percent -- a quarter of one percent of
10 the total equity in the Debtor. And Mr. Dondero's claim, it's
11 only a claim for indemnification. Dugaboy asserts two claims:
12 a frivolous administrative claim relating to the postpetition
13 management of a Multi-Strat, which, as an administrative
14 claim, if it's valid, would not even be affected by the best
15 interest of creditors test, because it would have to be paid
16 in full. And he also asserts a claim that the Debtor's
17 subsidiary -- against the Debtor's subsidiary for which it
18 tries to pierce the corporate veil.

19 Just think about it. Dugaboy, Mr. Dondero's entity, is
20 arguing that he should be able to pierce the corporate veil to
21 get at the entity that was his before the bankruptcy.

22 Dugaboy's only other interest in this case relates to a --
23 a one -- point eighteen and several-hundredths percent of the
24 equity interest of the Debtor, and that is out of the money.

25 And as I mentioned previously, Your Honor, Mr. Rukavina's

1 clients either didn't file any general unsecured claims or
2 filed them and withdrew them. Their only claim is a disputed
3 administrative claim against the Debtor that was filed a week
4 ago and which, at the appropriate time, the Debtor will
5 demonstrate is without merit.

6 And I understand that, just today, NexPoint Advisors also
7 filed administrative claim.

8 So I'm not going to argue to Your Honor that these parties
9 do not have standing, although their standing is tenuous, at
10 best, to assert this argument. The Court should keep their
11 relative interests in mind when evaluating the merits and the
12 good faith of this objection.

13 The principal objection, as I said, is that creditors will
14 do better in a Chapter 7. Essentially, they argue that a
15 Chapter 7 trustee can liquidate the assets just as well as Mr.
16 Seery can and not require the cost structure that is included
17 in the Debtor's plan projections. Yes, they argue that a
18 Chapter 7 will be more efficient.

19 Mr. Seery's testimony, the only testimony on the topic,
20 however, establishes that this preposterous proposition has no
21 basis in reality. Mr. Seery testified that a Chapter 7
22 trustee's mandate would be to reduce Debtor's assets as fast
23 as possible, while he will monetize assets as and when
24 appropriate to maximize the value.

25 But even if you can assume that the Chapter 7 trustee

1 could get court authority in a Chapter 7 to operate, there are
2 several reasons Mr. Seery testified why a liquidation by a
3 Chapter 7 trustee would be far worse than the plan.

4 First, Your Honor, no matter how competent the Chapter 7
5 trustee is -- and Mr. Seery did not say he is more competent
6 than anyone else out there -- the lack of a learning curve
7 that Mr. Seery established through the 13 months in this case
8 puts Mr. Seery at such a major advantage compared to a Chapter
9 7 trustee.

10 Second, Mr. Seery questioned whether the Chapter 7 trustee
11 would be able to retain the Debtor's existing professionals,
12 even assuming they were willing to be retained. I'm not sure
13 what's the Court's practice or the practice in the Northern
14 District, but in many districts around the country debtor's
15 counsel and professionals cannot be retained by Chapter 7
16 trustee, as general counsel, at least.

17 And I could just imagine, Your Honor, Mr. Dondero's
18 position if the Chapter 7 trustee actually sought to hire
19 Pachulski Stang and DSI.

20 Third, Your Honor, regardless of whether the Chapter 7
21 trustee obtained some operating authority, the market
22 perception will be that a Chapter 7 trustee will sell assets
23 for less value than would Mr. Seery as claimant Trustee. Mr.
24 Seery testified to that.

25 The argument that the Objectors make that a Chapter 7

1 process, whereby the trustee would seek court approval of
2 assets, is better for value than a process overseen by the
3 Claimant Trust Board lacks any evidentiary basis and also is
4 contradicted by Mr. Seery's testimony.

5 In fact, Mr. Seery testified that the Chapter 7 process,
6 the public process of it, would very likely result in less
7 recovery than a sale conducted in the Claimant Trust.

8 And lastly, Mr. Seery testified that it's unlikely that
9 the ten or so valuable employees who Mr. Seery is planning to
10 heavily rely on to assist him with post-confirmation would
11 agree to a work for Chapter 7 trustee. Your Honor is all too
12 familiar with the fights in the *Acis* case and Chapter 7
13 trustee, and it's just hard to believe that any of the
14 Highland employees would go work for the Chapter 7 trustee.

15 So why is Mr. Dugaboy -- why is Dugaboy and Mr. Dondero
16 actually making this objection and advocating for a Chapter 7?
17 It's because they would expect to buy the Debtor's assets on
18 the cheap from a Chapter 7 trustee, exactly what they've been
19 trying to do in this case.

20 Your Honor, moving right now to Section 1129(a)(11), that
21 requires the debtor to demonstrate that the plan is feasible.
22 In other words, it's not likely to be followed by a further
23 liquidation or restructuring. Under the Fifth Circuit law,
24 the debtor need only demonstrate that the plan will have a
25 reasonable probability of success to satisfy the feasibility

1 requirement, and the Debtor has easily met this standard.

2 As Mr. Seery testified, the Debtor's plan contemplates
3 continued operations through which time the assets will be
4 monetized for the benefit of creditors. The plan contemplates
5 that Class 7 creditors will be paid off shortly after the
6 effective date. Class 8 creditors are not guaranteed any
7 recovery but will receive pro rata distributions over a period
8 of time. Class 2, Frontier secured claim, will be paid off
9 over time, and the projections demonstrate that it will -- the
10 Debtor will have money to do so.

11 Mr. Seery testified at length regarding the assumptions
12 that went into the preparation of the projections most
13 recently filed on February 1, and based on that testimony, the
14 Debtor has clearly demonstrated that the plan is feasible.

15 Your Honor, I think that brings us to Section 1129(b). Of
16 course, again, Your Honor, if Your Honor has any other
17 questions with the sections I'm skipping over. I believe
18 we've adequately covered them in the briefs and I don't think
19 there's any objection.

20 But as I mentioned before, we have three classes that have
21 voted to reject the plan. Class 8 is the general unsecured
22 claims. They voted to reject the plan. Yes. Even though,
23 based upon the ballot summary, 99 percent of the amount of
24 claims in that class voted to accept the plan, approximately
25 24 employees voted to reject the plan. And accordingly, the

1 Debtor cannot satisfy the numerosity requirement of Section
2 1126(c).

3 I do want to briefly recount for Your Honor Mr. Seery's
4 testimony regarding the nature of the claims of the 24
5 employees who voted to reject the plan. And I'm not doing
6 this to argue that the votes from these contingent creditors
7 are not valid or that the Debtor doesn't need to satisfy the
8 cram-down requirements. The Debtor understands it needs to
9 demonstrate to the Court that Section 1129(b) is satisfied for
10 the Court to confirm the plan.

11 Rather, why I do this, Your Honor, is to provide the Court
12 with context about the nature and extent of the creditors in
13 this class as the Court determines whether the plan is, in
14 fact, fair and equitable and can be crammed down to a
15 dissenting vote.

16 Mr. Seery testified that these employees originally had
17 claims under the annual bonus plan and the deferred
18 compensation plan. And as he testified, in order for claims
19 under each of those plans to vest -- I think he referred to
20 them as be-in-the-seat plans -- the employee was required to
21 remain employed as of that date.

22 Mr. Seery testified that the Debtor terminated the annual
23 bonus plan in the middle of January and replaced it with the
24 key employee retention plan that the Court previously
25 approved.

1 Accordingly, Mr. Seery testified that no employee who
2 voted to reject the plan anymore has a claim on the annual
3 bonus plan. He also testified that, with respect to the
4 deferred compensation plan, people have contingent claims
5 under that plan and that no payments are due until May 20 --
6 2021.

7 As Mr. Seery testified, if the employees who would be
8 entitled to receive payments under the deferred compensation
9 plan do not agree to enter into a separation agreement that
10 was approved by the Court, they will be terminated before May
11 and there will no -- not longer be any deferred compensation
12 due.

13 Accordingly, while the 24 employees who voted to reject
14 the plan do technically have claims at this time they have
15 voted, Mr. Seery testified the claims will go away soon.

16 I do want to point out something that's obviously
17 painfully obvious at this point, that while Class 8 voted to
18 reject the plan, the Committee, the statutory fiduciary for
19 all unsecured creditors, supports the plan enthusiastically
20 and I believe it does so unanimously.

21 The other classes to reject the plan, Your Honor, are
22 Class 11, the A limited partnerships, and none of the holders
23 in Class B and C limited partnerships voted on the plan, so
24 cram-down is required over those classes as well. So Your
25 Honor is able to confirm the plan pursuant to the cram-down

1 procedures under 1129(b) if the Court determines that the plan
2 is fair and equitable and does not discriminate unfairly
3 against the rejecting classes.

4 Let's first turn to the fair and equitable requirement. A
5 plan is fair and equitable if it follows the absolute priority
6 rule, meaning that if a class does not receive payment in
7 full, no junior class will receive anything under the plan.
8 With respect to Class 8, no junior class -- junior class to
9 Class 8 will receive payment, and here is the key point,
10 unless Class 8 is paid in full, with appropriate interest.
11 NPA and Dugaboy -- Dugaboy in a brief filed on Monday -- argue
12 that the plan does not satisfy the absolute priority rule
13 because Class 10 and Class Equity Interests have a contingent
14 right to receive property under the plan.

15 Your Honor, this argument misunderstands the absolute
16 priority rule. Class 10 and Class Creditors will only receive
17 payment after distribution to 8 and 9, the unsecured claims
18 and the subordinated claims, are all paid in full, plus
19 interest.

20 And, in fact, Dugaboy, in its brief, to its credit, admits
21 that the argument is contrary to the Bankruptcy Court's
22 decision of Judge Gargotta in the Western District case of *In*
23 *re Introgen Therapeutics*. There, the Court was faced with a
24 similar argument by a group of unsecured creditors who argued
25 that the debtor's plan violated the absolute priority rule

1 because equity was retaining a contingent interest that would
2 only be payable if general unsecured claims were paid in full.

3 In rejecting the argument, the Court reasoned, and I
4 quote, "The only way Class 4 will receive anything is if Class
5 3, in fact, gets paid in full, in satisfaction of
6 1129(b) (2) (B) (i)," meaning that the absolute priority rule
7 would not be an issue. If Class 3 is not paid in full, Class
8 4's property interest is not -- is just -- is not just
9 valueless, it just doesn't exist.

10 Your Honor, this is precisely the situation in this case.
11 Equity interests will only receive a recovery if Class 8 and 9
12 are paid in full.

13 But Dugaboy attempts to escape the logical reading of the
14 absolute priority rule by claiming that *Introgen* was wrongly
15 decided and goes against the Supreme Court's decision in
16 *Ellers* (phonetic). Dugaboy argues that because the Supreme
17 Court decided that property given to a junior class without
18 paying a senior class in full is property, even if it's
19 worthless.

20 But Dugaboy misses the point. Like the debtor in the
21 *Introgen*, the Debtor here is not arguing that the property --
22 the absolute priority rule is not violated because the
23 contingent trust is worthless. Rather, the argument is that
24 the absolute priority rule is not violated; it's, in order to
25 receive anything on account of the junior -- of the equity,

1 the senior creditors have to be paid a hundred percent plus
2 interest.

3 In fact, Your Honor, if the plan just didn't give any
4 recovery to the equity Class 10 and 11, I bet you Dugaboy and
5 Mr. Dondero would be arguing that it violated the absolute
6 priority rule because senior classes, unsecured creditors,
7 could potentially receive more than a hundred percent of their
8 interest. And there's a case in the Southern District of
9 Texas, *In re MCorp*, where the Bankruptcy Court said that for a
10 plan to be confirmed, its stockholders eliminated, creditors
11 must not receive more than payment in full.

12 Excess proceeds, Your Honor, if any, have to go somewhere.
13 They can't go to creditors, so they have to go to equity. And
14 the absolute priority rule is not violated.

15 And how is Dugaboy harmed? They say they may want to buy
16 the contingent interests, and the lack of a marketing effort
17 violates the *LaSalle* opinion as well. And who holds the Class
18 B and Class C partnership interests that come before Dugaboy
19 that Dugaboy is concerned may have this opportunity rather
20 than them? Yes, it's Hunter Mountain, Your Honor, an entity,
21 like Dugaboy, that's owned and controlled by Mr. Dondero.

22 Accordingly, the argument that the plan violates the
23 absolute priority rule is actually a frivolous argument.

24 Turning now to unfair discrimination, Your Honor, Dugaboy
25 argued in its brief Monday that because the projected

1 distribution to unsecured creditors has gone down in the
2 recent plan projections, the discrepancy between Class 7 and
3 Class 8 is so large that that amounts to unfair
4 discrimination.

5 Again, the Court should first ask why is Dugaboy even the
6 right party to be making the objection. Its claim against the
7 Debtor to pierce the corporate veil, as I mentioned, is
8 frivolous. It's subject to objection. It didn't even bother
9 to have the claim temporarily allowed for voting purposes, as
10 did other creditors who thought they had a valid claim. Yet
11 this is another example of Mr. Dondero, through Dugaboy,
12 trying to throw as many roadblocks in front of confirmation as
13 he can.

14 But this argument, like the other ones, fails as well.
15 Class 8 contains the general unsecured creditor claims,
16 predominately litigation claims that have been pending against
17 the Debtor for years. The Debtor was justified in treating
18 the other unsecured creditors differently.

19 Class 6 consists of the PTO claims in excess of the cap,
20 which are of different quality and nature than the other
21 claims.

22 Class 7 consists of the convenience class. And it's
23 appropriate to bribe convenience class creditors with a
24 discount option for smaller claims to be cashed out for
25 administrative convenience.

1 Mr. Seery testified that when the plan was formulated, the
2 concept was to separately classify liquidated claims in small
3 amounts in Class 7 and unliquidated claims in Class 8. Mr.
4 Seery also testified that there's a valid business
5 justification to treat the -- hold business 7 -- Class 7
6 claims differently. These creditors had a reasonable
7 expectation of getting paid promptly, as compared to
8 litigation creditors, who would expect to be paid over time.

9 As the Court is aware, the litigation claims in Class 8
10 involve litigation that has been pending for several years in
11 the case of Acis, Daugherty, Redeemer, and more than a decade
12 in UBS.

13 And most importantly, as Mr. Seery testified, the
14 Committee and the Debtor had significant negotiation regarding
15 the classification and treatment provisions of the plan for
16 Class 7.

17 The Committee does have one constituent who is a Class 7
18 creditor. However, the other three creditors are all in Class
19 8 and hold claims in excess of \$200 million and supported the
20 separate classification and the different treatment.

21 So, Your Honor, discrimination, different treatment among
22 Class 7 and 8 is appropriate, and the different treatment is
23 not unfair. In the February 1 projections, the Class 8
24 creditors are estimated to receive 71.32 percent of their
25 claims, but that's just an estimate. As Mr. Seery testified,

1 the number can go up based upon the value he can generate from
2 the assets and, importantly, from litigation claims. Class 8
3 creditors could up end up receiving a hundred percent on
4 account of their claims. Class 7 creditors are fixed at 85
5 percent.

6 Giving Class 8 creditors the opportunity to roll the dice
7 and potentially get more or less than the 85 percent offered
8 to Class 7 is not at all unfair.

9 For these reasons, Your Honor, the Court has the ability
10 and should confirm the plan pursuant to the cram-down
11 provisions of 1129(b).

12 Your Honor, I'm now going to switch from the statutory
13 requirements to all the issues raised by the release,
14 injunction, and exculpation provisions.

15 I'd just like to take a brief sip of water.

16 Dugaboy -- I will first deal with the Debtor release
17 provided in Article 9(f) of the plan, which we claim is
18 appropriate. Dugaboy and the U.S. Trustee have objected to
19 the release contained in Article 9(f). Dugaboy objects
20 because it believes that the Debtor release releases claims
21 that the Claimant Trust or Litigation Trust have that have not
22 yet arisen, and the U.S. Trustee objects because it believes
23 that the release is a third-party release.

24 These objections have no merit, and they should be
25 overruled.

1 I would like to ask Ms. Canty to put up a demonstrative
2 which contains the provision Article 9(f) of the plan.

3 Your Honor, as set forth in this Article 9(f), only the
4 Debtor is granting any release. While that --

5 THE COURT: And for the record, it's 9(d)? 9(d),
6 right?

7 MR. POMERANTZ: 9(d)? 9(d), correct, Your Honor.

8 THE COURT: Yes. Okay.

9 MR. POMERANTZ: Sorry about that.

10 THE COURT: Uh-huh.

11 MR. POMERANTZ: While the release is broad, it does
12 not purport to release the claims of any third party. The
13 Claimant Trust and the Litigation Trust are only included in
14 the release as successors of the Debtor. The release is
15 specifically only for claims that the Debtor or the estate
16 would have been legally entitled to assert in their own right.

17 Section 1123(b) (3) (A) of the Bankruptcy Code provides that
18 a plan may provide for the settlement or adjustment of any
19 claims or interests belonging to the debtor or the estate, and
20 that's exactly what the Debtor release provides.

21 Accordingly, Dugaboy is wrong that the release effects a
22 release of claims that the Claimant Trust or the Litigation
23 Sub-Trust have that won't arise until after the effective
24 date. And the U.S. Trustee is simply wrong; there's no third-
25 party release aspect under the release.

1 The last point I will address on the release, Your Honor,
2 is who is being released and why and what does the evidence
3 show. The Debtor release extends to release parties which
4 include the independent directors, Strand, for actions after
5 January 9th, Jim Seery as the CEO and CRO, the Committee,
6 members of the Committee, professionals, and employees.

7 You have heard Mr. Seery's testimony that the Debtor does
8 not believe that any claims against the parties that are
9 proposed to be released actually exist. You have heard Mr.
10 Seery's testimony that he worked closely with the employees
11 and believes that not only have they all been instrumental in
12 getting the Debtor to the -- be on the cusp of plan
13 confirmation, but that also Mr. Seery is not aware of any
14 claims against them.

15 Moreover, as Mr. Seery testified, the release for the
16 employees is only conditional. He testified that the
17 employees are required to assist in the monetization of assets
18 and the resolution of claims, and if they do not like -- if
19 they do not lose their release, then any Debtor claims are
20 tolled, such that could be pursued by the Litigation Trustee
21 at a future time.

22 Lastly, I'm sure that the Dondero entities will argue that
23 someone needs to investigate claims against Mr. Seery for
24 mismanagement or for, God forbid, having failed to file the
25 2015.3 statements. Such claims are part of the continuing

1 harassment of Mr. Seery that the Dondero entities have
2 embarked on after it was apparent that nobody would support
3 their plan.

4 There is no evidence of any claims that exist, Your Honor.
5 In fact, the Committee and its professionals have watched the
6 Debtor through this case like a hawk. They have not been
7 afraid to challenge the Debtor's actions in general and Mr.
8 Seery's in particular. FTI has worked on a daily basis with
9 DSI and the company, had access to information. When COVID
10 was happening, they were looking at trades going on on a daily
11 basis.

12 So if the Committee, whose members hold approximately \$200
13 million of claims against the estate, are okay with the
14 release against the independent directors and Mr. Seery, that
15 should provide the Court with comfort to approve the releases
16 as part of the plan.

17 In summary, Your Honor, the Debtor release is entirely
18 appropriate and does not affect the release of third-party
19 claims that have not yet arisen.

20 Next, Your Honor, I want to go to the discharge. There's
21 been objections to the discharge. Dugaboy and NexPoint have
22 objected that the Debtor receiving a discharge under the plan
23 -- argue a debtor is liquidating. The objection is not well
24 taken based upon Mr. Seery's testimony regarding what it is
25 the Claimant Trust and the Reorganized Debtor plan to do after

1 the effective date, as compared to what the limitations of a
2 discharge are under 1141(d)(3).

3 Your Honor, Article 9 of the -- 9(b) of the plan provides
4 that as -- except as otherwise expressly provided in the plan
5 or the confirmation order, upon the effective date, the Debtor
6 and its estate will be discharged or released under and to the
7 fullest extent provided under 1141(d)(A) [sic] and other
8 applicable provisions of the Bankruptcy Court. Bankruptcy
9 Code.

10 Section 1141(d)(3) provides an exception to the discharge,
11 and I'd like to have that section put up for Your Honor at
12 this point. Ms. Canty?

13 As this -- as the section reflects, and as the Fifth
14 Circuit has ruled in the *TH-New Orleans Limited Partnership*
15 case cited in our materials, in order to deny the debtor a
16 discharge under 1141(d)(3), three things must be true: (1)
17 the plan provides for the liquidation of all or substantially
18 all of the property in the estate; (2) the debtor does not
19 engage in business after consummation of the plan; and (3) the
20 debtor would be denied a discharge under 727(a) of this title
21 if the case was converted to Chapter 7. Here, only C applies.

22 With respect to A, Your Honor, while the plan does project
23 that it will take approximately two years to monetize the
24 Debtor's assets for fair value, the Debtor is just not
25 liquidating within the meaning of Section A.

1 As Mr. Seery testified, during the post-confirmation
2 period, post-effective date period, the Debtor will continue
3 to manage its funds and conduct the same type of business it
4 conducted prior to the effective date. It'll manage the CLOs.
5 It'll manage Multi-Strat. It'll manage Restoration Capital.
6 It'll manage the Select Fund, and it'll manage the Korea Fund.

7 The Bankruptcy Court for the Southern District of New
8 York's 2000 opinion in *Enron*, cited in our materials, is on
9 point. There, the Court found that a debtor liquidating its
10 assets over an indefinite period of time that is likely to
11 take years is not liquidating within the meaning of Section
12 1141(b)(3)(A), justifying a denial of discharge.

13 But even if we failed A, based upon Mr. Seery's testimony,
14 we would not fail B. The Debtor will be continuing to do what
15 it has done during the case, as it did before, as I said,
16 managing its business. B says the debtor does not engage in
17 the business after management. So while Mr. Seery testified
18 that it would take approximately two years, it could take
19 more, it could take less, and there is no requirement to
20 liquidate assets over a period of time.

21 Accordingly, Your Honor, the Debtor is conducting the type
22 of business contemplated by Section B so as not to just deny a
23 discharge.

24 As the Fifth Circuit said in the *TH-New Orleans* case, the
25 court granted a discharge there because it was likely that the

1 debtor would be liquidating its assets and conducting business
2 (indecipherable) years following a confirmation date. And
3 this result makes sense, Your Honor, because the Debtor will
4 need the discharge and the tenant injunctions, which I'll get
5 to in a moment, in order to prevent interference with the
6 Debtor's ability to implement the terms of the plan and make
7 distributions to creditors.

8 I would now like, Your Honor, to turn to the exculpation
9 provisions, which there's been -- there's been a lot of
10 briefing on it, and I know Your Honor is very aware of the
11 exculpation provisions and the *Pacific Lumber* case. And
12 several parties have objected to the exculpation contained in
13 the plan, based primarily on the Fifth Circuit ruling in
14 *Pacific Lumber*.

15 The exculpation provision, which is not dissimilar to what
16 is found in many plans around the country, including in plans
17 confirmed in bankruptcy courts in the Fifth Circuit, acts to
18 exculpate the exculpated parties for negligent-only acts as it
19 contains the standard carve-outs for gross negligence,
20 intentional conduct, and willful misconduct.

21 I do want to bring to the Court's attention a deletion we
22 made to the parties protected by the exculpation in the plan
23 and now -- were filed on February 1st. The definition of
24 exculpated parties included, before February 1, not only the
25 Debtor but its direct and indirect majority-owned subsidiaries

1 and the managed funds. In the plan amendment, we have deleted
2 the Debtor's direct and indirect majority-owned subsidiaries
3 and managed funds from the definition and are not seeking
4 exculpation for those entities.

5 But before, Your Honor, I address *Pacific Lumber* and why
6 the Debtor believes it does not preclude the Court from
7 approving the exculpation in this case, I do want to focus on
8 something that the Objectors conveniently ignore from their
9 argument.

10 As I mentioned in my opening argument, Your Honor, the
11 independent directors were appointed pursuant to the Court's
12 order on January 9, 2020. They have resolved many issues
13 between the Debtor and the Committee, and avoided the
14 appointment of a Chapter 11 trustee.

15 The January 9th order was specifically approved by Mr.
16 Dondero, who was in control of the Debtor at the time, and I
17 believe the transcripts that are admitted into evidence will
18 demonstrate that he was fully behind the approval of the
19 January 9th order.

20 In addition to appointing the independent directors into
21 what was sure to be a contentiously litigious case, the
22 January 9th order set the standard of care for the independent
23 directors, and specifically exculpated them from negligence.

24 You have heard Mr. Seery and Mr. Dubel testify that they
25 had input into what the order said and would have not agreed

1 to be appointed as independent directors if it did not include
2 Paragraph 10, as well as the provisions regarding
3 indemnification and D&O insurance.

4 I would like to put a demonstrative on the screen, which
5 is actually Paragraph 10 of that order. Your Honor, Paragraph
6 10, there's two concepts embedded here. First, it requires
7 any parties wishing to sue the independent directors or their
8 agents to first seek such approval from the Bankruptcy Court.
9 Secondly, and importantly for purposes of the independent
10 directors and their agents, who would include the employees,
11 it set the standard of care for them during the Chapter 11 and
12 entitled them to exculpation for negligence. Paragraph 10
13 says the Court will only permit a suit to go forward if such
14 claim represents a colorable claim for willful misconduct or
15 gross negligence.

16 And Your Honor, Paragraph 10 does not expire by its terms.

17 By not including negligence in the definition of what a
18 colorable claim might be, the Court has already exculpated the
19 independent directors and their agents, which include the
20 employees acting at their direction.

21 And because the independent directors and their agents are
22 exculpated under Paragraph 10, Strand needs to be exculpated
23 as well for actions occurring after January 9th. This is
24 because a suit against Strand for conduct after the
25 independent board was appointed is effectively a suit against

1 the independent directors, who were the only people in control
2 of Strand at that time.

3 After the effective date, Mr. Dondero will regain control
4 of Strand, as the independent directors will be discharged.
5 And for parties able to sue Strand essentially for negligence
6 for conduct conducted by the independent directors after
7 January 9th, Strand will then be able to seek indemnification
8 from the Debtor under the Debtor's partnership agreement
9 because the partnership agreement does provide the general
10 partner is entitled to indemnification.

11 Accordingly, an exculpation for Strand is really the
12 functional equivalent of an exculpation for the independent
13 directors and the Debtor.

14 The January 9th order was not appealed, and an objection
15 to exculpation at this point as it relates to the independent
16 directors, their agents, and Strand is a collateral attack on
17 this order. So, Your Honor, Your Honor does not even need to
18 get to the thorny issues addressed by *Pacific Lumber*.

19 However, even in the absence of the January 9th order,
20 exculpation of the independent directors and their employees,
21 as well as the other exculpated parties, is not prohibited by
22 *Pacific Lumber*. In *Pacific Lumber*, the Fifth Circuit reversed
23 a bankruptcy court order confirming a plan because the
24 exculpation provision was too broad and included parties that
25 the Fifth Circuit thought could not be exculpated under

1 Section 524(e) of the Code.

2 A close look at the issue before the Court, Your Honor,
3 the reasoning for the Court's ruling and why certain parties
4 like Committee and its members were entitled to exculpation,
5 reflects that this case does not prevent the Court from
6 approving exculpation of this case.

7 A careful read of the underlying briefs and opinions in
8 *Pacific Lumber* reveals that the concern that the Appellants
9 had in that case was the application of exculpation to non-
10 fiduciary sponsors. There were two competing plans in the
11 case. The first was filed by the indenture trustee. The
12 second was filed by the debtor's parent and lender, and was
13 deemed -- called the Marathon Plan. The Court confirmed the
14 Marathon Plan, and the indenture trustee appealed, and the
15 indenture trustee argued that the plan sponsors could not be
16 exculpated.

17 After determining that the appeal of the exculpation
18 provisions were not equitably moot, the Fifth Circuit
19 determined that exculpation was not authorized under 524(e) of
20 the Code because that section provides a discharge of the
21 debtor does not affect the liability of any other entity on
22 such debt.

23 However, and here's the important part, Your Honor: The
24 Fifth Circuit did not say that all exculpations are prohibited
25 under the Code and authorized the exculpation of the Committee

1 and its members. And why did the Court do that? Because it
2 looked at the Committee's qualified immunity under 1103 and
3 also reasoned that Committee members are essentially
4 disinterested volunteers that should be entitled to
5 exculpation on negligence.

6 The Court also cited approvingly *Colliers* for the
7 proposition that if Committee members were not exculpated for
8 negligence and subject to suit by people who are unhappy with
9 them, they just would not serve.

10 Accordingly, the Fifth Circuit based its willingness to
11 exculpate Committee members on the strong public policy that
12 supports exculpation for those parties under those
13 circumstances. And against this backdrop, Your Honor, there
14 are several reasons why the Court should authorize exculpation
15 in this case, notwithstanding *Pacific Lumber*.

16 First, Your Honor, the independent directors in this case
17 are analogous -- much more analogous to the Committee members
18 that the Fifth Circuit ruled were entitled to than the
19 incumbent officer and directors.

20 Your Honor has the following facts before the Court, based
21 upon the testimony of Mr. Seery and Mr. Dubel and other
22 evidence in the record. The independent board members were
23 not part of the Highland enterprise before the Court appointed
24 them on January 9th. The Court appointed the independent
25 directors in lieu of a Chapter 11 trustee to address what the

1 Court perceived as the serious conflicts of interest and
2 fiduciary duty concerns with current management, as identified
3 by the Committee.

4 The independent directors would not have agreed to accept
5 their role without indemnification, insurance, exculpation,
6 and the gatekeeper function provided by the January 9th order.

7 And Mr. Dubel testified regarding the significant
8 experience he has as an independent director during his 30-
9 plus years in the restructuring community, including several
10 engagements as an independent director in Chapter 11 cases.
11 And he testified that independent directors have become
12 commonplace in complex restructurings over the last several
13 years and have been appointed in many cases, including high-
14 profile cases. We've cited to just a few of those cases in
15 our brief, but we could go on and on.

16 Mr. Dubel testified that the independent directors are a
17 critical tool in proper corporate governance and restoring
18 creditor confidence in management in modern-day
19 restructurings, and he testified that, based upon his
20 experience, independent directors expect to be indemnified by
21 the company, expect to obtain directors and officers
22 insurance, and expect to be exculpated from claims of
23 negligence when they agree to be appointed.

24 He further testified that if independent directors cannot
25 be assured that they will be exculpated for simple negligence,

1 he believes they will be unwilling to serve in contentious
2 cases like the one we have here, which will have a material
3 adverse effect on the Chapter 11 restructuring process as we
4 know it.

5 Based upon the foregoing testimony, Your Honor, which is
6 uncontroverted, the Court should have no problem finding that
7 the independent directors are much more analogous to the
8 Committee members in *Pacific Lumber* who the Fifth Circuit said
9 could be exculpated.

10 The facts, these facts also distinguish this case from the
11 *Dropbox v. Thru* case which Your Honor decided and which was
12 reversed on this issue by the District Court. In neither
13 *Pacific Lumber* or *Thru* was there an argument that the policy
14 reasons that supported exculpation of Committee members also
15 supported the exculpation of the parties sought to be
16 exculpated.

17 Moreover, Your Honor, the independent directors in this
18 case were pointed as essentially as substitute for a Chapter
19 11 trustee. There was a Chapter 11 trustee motion filed a few
20 days before, I believe, and the Court, in approving this, said
21 that you -- better than a Chapter 11 trustee. And Chapter 11
22 Trustees are entitled to qualified immunity. So, while, yes,
23 the independent directors aren't truly Chapter 11 trustees,
24 they are analogous.

25 Second, Your Honor, while there is language in *Pacific*

1 *Lumber* that says that the directors and officers of the debtor
2 are not entitled to exculpation, the issue before the Court
3 really on appeal was the plan sponsors and whether they were.
4 So I would argue that any discussion of the exculpation not
5 being available for directors and officers in the Fifth
6 Circuit opinion in *Palco* is actually dicta.

7 Third, Your Honor, as I discussed before, the *Pacific*
8 *Lumber* decision was based solely on 524(e) of the Bankruptcy
9 Code, which only says that the discharge of a claim against
10 the debtor does not affect the discharge of a third party.
11 However, the Debtor is not relying on 524(e) as the basis of
12 their exculpation. As we outline in our brief, Your Honor, we
13 believe that the exculpation is appropriate under Section 105
14 and 1123(b)(6) as a means -- part of an implementation of the
15 plan.

16 Importantly, Your Honor, as other courts hostile to third-
17 party releases have determined, exculpation only sets a
18 standard of care for parties and is not an effort to relieve
19 fiduciaries of liability.

20 Other courts that have aligned with the Fifth Circuit and
21 rejected third-party releases, like the Ninth Circuit, have
22 recently determined exculpation has nothing to do with 524(e).
23 In *In re Blixseth*, a Ninth Circuit case decided at the end of
24 2020 cited in our materials, they examined several of their
25 circuit cases that had strongly prohibited non-consensual

1 third-party releases under 524(e). But again, the Court
2 concluded that 524(e) only prohibits third parties from being
3 released from liability of a prepetition claim for which the
4 debtor receives a discharge. The Court reasoned that the
5 exculpation clause, however, protects parties from negligence
6 claims relating to matters that occurred during the Chapter 11
7 case and has nothing to do with 524(e).

8 The Ninth Circuit, which along with the Fifth Circuit has
9 been notorious for prohibiting third-party releases, issued
10 its ruling against this backdrop and said that exculpations
11 are appropriate.

12 Your Honor, the Objectors made a point yesterday of
13 pointing out that Strand, as the Debtor's general partner, is
14 liable for the debts under applicable law. To the extent they
15 intend to argue that the exculpation is seeking to discharge
16 any such prepetition liability, they would be wrong. The
17 exculpation only applies to postpetition matters. And to the
18 extent they argue that the exculpation seeks to discharge
19 Strand's potential postpetition liability, for the reasons I
20 discussed, a claim against Strand will essentially be a claim
21 against the Debtor because the Debtor will be obligated to
22 indemnify them.

23 Accordingly, Your Honor, we submit that if this matter
24 goes up to appeal to the Fifth Circuit, which it may very well
25 do, that the Fifth Circuit may very well come out the same way

1 as the Ninth Circuit and start relaxing the standard or
2 otherwise provide that the independent directors are much more
3 like Committee members.

4 Lastly, Your Honor, if the Court does confirm the plan,
5 which we certainly hope it will do, it will have made a
6 finding that the plan has been proposed in good faith, and in
7 doing so, the Court essentially finds that the independent
8 directors and their agents have acted appropriately and
9 consistent with their fiduciary duties, and it makes --
10 exculpation for negligence naturally flows from that finding.

11 Your Honor, I would now like to go to the injunction
12 provisions, and my argument is that the injunction provisions
13 as amended are appropriate.

14 THE COURT: Can I stop you?

15 MR. POMERANTZ: We received several of -- yes.

16 THE COURT: I want to just recap a couple of things I
17 think I heard you say. You're not asking this Court, you say,
18 to go contrary to *Pacific Lumber* per se. You have thrown out
19 there the possibility that *Pacific Lumber* mistakenly relied on
20 524(e) in rejecting exculpations of plan sponsors. You're
21 saying, eh, as a technical matter, I think they were wrong in
22 focusing on that statute because that statute seems to deal
23 with prepetition liability. Okay? Its actual wording, 524(e)
24 states, discharge of a debt of a debtor does not affect the
25 liability of any other entity on such debts.

1 And reading between the lines, I think you're saying --
2 well, maybe this isn't what you're saying, but here's what I
3 inferred -- "debt" is defined in 101(12) to mean liability on
4 a claim, and then "claim" is defined in 101(5) of the
5 Bankruptcy Code as meaning right to payment. It doesn't say
6 as of the petition date, but I think if you look at, then,
7 Section 502 of the Bankruptcy Code that addresses claims and
8 interests, clearly, it seems to be referring to the
9 prepetition time period, you know, claims and interest as of
10 the petition date. And then -- that's 502. And then 503
11 speaks of, for the most part, postpetition administrative
12 expenses.

13 So that was my rambling way of saying I'm understanding
14 you to say, eh, as a technical matter, we think the Fifth
15 Circuit was wrong to focus on 524(e) because when you're
16 talking about exculpation you're talking about postpetition
17 liability, not prepetition liability. And 524(e) is talking
18 more about prepetition liability.

19 But I think what I also hear you saying is, at bottom,
20 *Pacific Lumber* was sort of a policy-driven holding where, you
21 know, we're worried about no one would ever sign up for being
22 on an unsecured creditors' committee if they could be exposed
23 to lawsuits. They're fiduciaries, we think, for policy
24 reasons. Exculpation is appropriate for this one group. And
25 you're saying, well, they didn't have an independent board

1 that they were considering. They were just considering non-
2 fiduciary plan sponsors. And so the rationale presented by
3 *Pacific Lumber* applies equally here, and just they didn't make
4 a holding in this factual context.

5 Have I recapped what you're saying?

6 MR. POMERANTZ: Your Honor, that's generally --
7 generally correct, with a couple of nuances. So, yes, first,
8 I think, on a policy basis, Your Honor -- again, putting aside
9 the January 9th order, because we don't see --

10 THE COURT: Right. Right.

11 MR. POMERANTZ: -- Your Honor even needs to get to
12 this issue.

13 THE COURT: I understand.

14 MR. POMERANTZ: But if Your Honor does get to this
15 issue, we think, as a first point, Your Honor could be totally
16 consistent with *Pacific Lumber* because there's policy reasons
17 and there was not a categorical rejection of exculpation.
18 Okay. So if there was a categorical rejection, then it
19 wouldn't have been okay for committee members. Okay.

20 Second argument, yes, we don't think -- we think it's part
21 of dicta. It's not part of the holding. We understand that
22 other courts may have not agreed, maybe your *Thru* case, which
23 Your Honor was appealed on.

24 But the third issue, our argument is all they looked at
25 was 524(e). They said 523 -- 4(e) does not authorize it.

1 They did not say 524(e) prohibits it.

2 We think there's other provisions in the Code. And then
3 when you basically add in the analysis that Your Honor
4 provided, which we agree with, and what 524 was -- to do,
5 524(e) just says that discharge doesn't affect. It doesn't
6 say that under another provision of the Code or for another
7 reason you are authorized to give an exculpation. I think
8 it's a nuance and it's a difference there.

9 And my point of bringing up the *Blixseth* case -- which, of
10 course, is Ninth Circuit and it's not binding on Your Honor,
11 it's not binding on the Fifth Circuit -- is to say, when that
12 was presented to them, they saw the distinction that 524(e)
13 has nothing to do with an exculpation. And while, yes, the
14 Fifth Circuit hasn't ruled on that, and if the Fifth -- if
15 that argument is made to the Fifth Circuit, we don't know how
16 they would rule, I think that, based upon their analysis --
17 which, again, Your Honor, is no more than a page and a half of
18 their opinion, right, of a long, lengthy opinion on the
19 confirmation issues. So I think, Your Honor, with the Fifth
20 Circuit, there is a good chance that based upon the developing
21 case law of exculpation, based upon the sister circuit in
22 *Blixseth* making that distinction, that there is a very good
23 chance that the Fifth Circuit would change.

24 But look, I recognize that argument requires Your Honor to
25 say, okay, this is outside and -- and what *Pacific Lumber* did

1 or didn't do. But I think, Your Honor, there's several
2 potential reasons, there's several potential arguments that
3 you can get to the same place.

4 THE COURT: Okay. Thank you.

5 MR. POMERANTZ: Okay. If I may just get another
6 glass of -- sip of water before my time starts?

7 THE COURT: Okay.

8 MR. POMERANTZ: Okay, Your Honor. We're now turning
9 to the injunction provision. The Debtor received several
10 objections to the injunction provisions in -- I think I have
11 it right now -- Article 9(f) to the plan. And we've modified
12 Article 9(f) to address certain of those concerns, and we
13 believe that, as modified, that the injunction provision
14 implements and enforces the plan's discharge, release, and
15 exculpation provisions to prevent parties from pursuing claims
16 in interest that are addressed by the plan and otherwise
17 interfering with consummation and implementation of the plan.

18 I'd like to put up the first paragraph of the injunction
19 on the screen now.

20 Okay, Your Honor. The first paragraph, all it does is
21 prohibits the enjoined parties from taking action to interfere
22 with consummation or implementation of the plan. I suspect a
23 sentence like that is probably in hundreds of plans in the
24 Fifth Circuit and elsewhere.

25 Initially, to address a concern that it applied to too

1 many parties, the Debtor added a definition in the revised
2 plan that defines "enjoined parties," which I'd like to now
3 put that definition up on the screen.

4 The changes -- it's a little hard to read there, but you
5 have it in the -- oh, there you go. The changes made clear
6 that only parties who have a relationship to this case, either
7 holding a claim or interest, having appeared in the case, be a
8 -- or be a party in interest, Jim Dondero, or related entity,
9 or related person of the foregoing are covered. The claim
10 objectors argue that the word "implementation and
11 consummation" is vague, or vague and unclear. Your Honor,
12 these terms are both defined in the Bankruptcy Code and under
13 the case law, and they're, as I said, common features of many
14 plans.

15 Section 1123(a)(5) of the Code provides that a plan shall
16 provide for its implementation, and identifies a list of items
17 that the plan can include. Article 4 of our plan is defined
18 as "Means of Implementation of This Plan," and describes the
19 various corporate steps required to implement the provisions
20 of the plan, including canceling equity interests, creation of
21 new general partners and a limited part of the Reorganized
22 Debtor, the restatement of the limited partnership agreement,
23 and the establishment of the various trusts.

24 Paragraph 1 rightly and appropriately enjoins efforts to
25 interfere with these steps.

1 Nor is the term "consummation of the plan" vague.
2 "Consummation" also is a commonly-used term and has been
3 defined by the Fifth Circuit and the Code. 1102 -- 1101(2)
4 defines "Substantial Consummation" to be the transfer of
5 assets to be transferred under the plan, the assumption by the
6 debtor of the management of all the property dealt with by the
7 plan, and the commencement of distributions under the plan.

8 Section 1142 gives the Court authority to direct a party
9 to perform any act necessary for consummation of a plan. And
10 as the Fifth Circuit, in *United States Brass Corp.*, which is
11 said in our material, states, said the Bankruptcy Court had
12 post-confirmation jurisdiction to enforce the unperformed
13 terms of a plan with respect to a matter that could affect the
14 parties' post-confirmation rights because the plan had not
15 been fully consummated.

16 And Your Honor just wrote on this issue last year in the
17 *Senior* -- the *Texas* -- the *TXMS Real Estate v. Senior Care*
18 case, and you cited to *U.S. Brass* to find that, in that case,
19 post-confirmation jurisdiction existed to resolve a dispute
20 relating to an assumed contract because the matter related to
21 interpretation, implementation, and execution of the plan.

22 Accordingly, Your Honor, neither implementation or
23 consummation are vague, and the first paragraph of the
24 injunction is necessary and appropriate to enforce the
25 Debtor's discharge.

1 As I said before, I will leave it to Mr. Kharasch to
2 address specifically the concerns that the Advisor and the
3 Funds have with the injunction.

4 The second and third paragraphs of the injunction, Your
5 Honor, certain parties have objected to them on the ground
6 that they constitute an improper release of the independent
7 directors as well as the release of claims against the
8 Reorganized Debtor, the Claimant Trust, and the Litigation
9 Sub-Trust, entities that will not have come into existence
10 until after the effective date.

11 We believe we have addressed these concerns by
12 modifications to the second and third paragraphs of the
13 injunction, which I would now like to put the second and third
14 paragraphs on the screen.

15 (Pause.)

16 MR. POMERANTZ: As that is happening, Your Honor, I
17 will -- there we go.

18 We believe that the changes that were made to these
19 paragraphs should address the Objectors' concerns.

20 First, as with the first paragraph, we have created a
21 defined term of "Enjoined Parties" who are subject to the
22 injunction which is narrower than all persons, I believe, or
23 all entities that was included in the prior plan. So we've
24 narrowed that.

25 "Enjoined Parties" are generally defined, as I mentioned

1 before, as entities involved in this case or related to Jim
2 Dondero, or have appeared in this case.

3 Second, we have removed independent directors from these
4 paragraphs to address the concern that the injunction was a
5 disguised third-party release.

6 Third, we have removed the Reorganized Debtor and the
7 Claimant Trust from the second paragraph and moved them to the
8 third paragraph. We did this to make clear that the
9 Reorganized Debtor and Claimant Trust were only getting the
10 benefit of the injunction as the successors to the Debtor. As
11 the Reorganized Debtor and the Claimant Trust receives the
12 property from the Debtor free and clear of all claims and
13 interests and equity holders under 1141(c), they are entitled
14 to the benefit of the injunction.

15 Fourth, we have addressed the concern that the injunction
16 improperly affected set-off rights. We added language to make
17 clear that the injunction would only affect the parties' set-
18 off of an obligation owed to the Debtor to the extent that
19 that was permissible under 553 and 1141 of the Bankruptcy
20 Code.

21 In other words, we are punting the issue for another day,
22 and there's nothing in the plan that gives the Debtor any more
23 set-off rights than it otherwise has under the Bankruptcy
24 Code.

25 Lastly, Your Honor, certain Objectors have argued that the

1 injunction somehow prevents them from enforcing the rights
2 they have under the plan or the confirmation order. We don't
3 really understand this concern, as the language leading into
4 the second paragraph of the injunction says, except as
5 expressly provided in the plan, the confirmation order, or a
6 separate order of the Bankruptcy Court.

7 With these modifications, Your Honor, the provisions do
8 nothing more than implement 1123(b)(6) and 1141 by preventing
9 parties from taking actions to interfere with the Debtor's
10 plan.

11 The Court has also heard testimony from Mr. Seery
12 regarding the importance of the injunction to implementation
13 of the plan. He testified that he intends to monetize assets
14 in a way that will maximize value. And to effectively do
15 that, he has testified that the Claimant Trust needs to be
16 able to pursue its objectives without interference and
17 continued harassment from Mr. Dondero and his related
18 entities.

19 In fact, Mr. Seery testified that if the Claimant Trust
20 were subject to interference by Mr. Dondero, it would take him
21 more time to monetize assets, they would be monetized for less
22 money, and creditors would be harmed.

23 If Your Honor doesn't have any questions for me on the
24 injunction provisions, I'd like to turn to the last part of
25 the injunction, which is really the gatekeeper provision.

1 THE COURT: All right. You may.

2 MR. POMERANTZ: Your Honor, the last paragraph in
3 Article 9(f) is really not an injunction but is rather a
4 gatekeeper provision. And as originally drafted, it'd do two
5 things: first, it'd require that before any entity, which is
6 defined very broadly, could file an action against a protected
7 party relating to certain specified matters, the entity would
8 have to seek a determination from this Court that the claim
9 represented are colorable claim of bad faith, criminal
10 conduct, willful misconduct, fraud, or gross negligence. The
11 specified matters to which the gatekeeper provision would
12 apply included the Chapter 11 case, negotiations regarding the
13 plan, the administration of the plan, the property to be
14 distributed under the plan, the wind-down of the Debtor's
15 business, the administration of the Claimant Trust, or
16 transactions related to the foregoing.

17 Subject to certain exceptions for Dondero-related parties,
18 protected parties were defined to include the Debtor, its
19 successors and assigns, indirect and direct, majority-owned
20 subsidiaries and managed funds, employees, Strand, Reorganized
21 Debtor, the independent directors, the Committee and its
22 members, the Claimant Trust, the Claimant Trustee, the
23 Litigation Trust, the Litigation Sub-Trustee, the members of
24 the Oversight Committee, retained professionals, the CEO and
25 CRO, and persons related to the foregoing. Essentially,

1 parties related to the pre-effective-date administration of
2 the estate or the post-confirmation implementation of the
3 plan.

4 Second, the gatekeeper provision as originally presented
5 gave the Bankruptcy Court exclusive jurisdiction to adjudicate
6 any cause of action that it determined would pass through the
7 gate. The gatekeeper provision, Your Honor, is not a release
8 in any way. Rather, it permits enjoined parties who believe
9 they have a claim against the protected parties to pursue such
10 a claim, provided they first make a showing that the claim is
11 colorable to the Bankruptcy Court.

12 Several parties, Your Honor, objected to the Bankruptcy
13 Court having exclusive jurisdiction to adjudicate the claims
14 that pass through the gate. The Debtor believes that the
15 Bankruptcy Court would ultimately have jurisdiction of any of
16 those claims that pass through the gate. However, the Debtor
17 did, upon reflection, appreciate the concern that if the Court
18 agreed to that now, it would essentially be determining its
19 jurisdiction before a claim was filed.

20 Accordingly, in the January 22nd plan, Your Honor, we
21 amended the provision to provide that the Bankruptcy Court
22 will only have jurisdiction over such claims to the extent it
23 was legally permissible to do so, essentially deferring the
24 issue to a later time.

25 And as Your Honor, I believe, in one of cases called the

1 *Icing on the Cake*, the retention and jurisdiction provisions
2 in the plan only are to the extent under applicable law and
3 are quite broad and include the things that we would have the
4 Court -- have jurisdiction for the Court, otherwise
5 determined.

6 The Court made some other changes to the gatekeeper
7 provision, and I would like to place the amended gatekeeper
8 provision on the screen right now. In addition to the change
9 I mentioned, the Debtor made the following changes: the
10 provision is limited now to apply only to enjoined parties,
11 rather than any entity. Than any entity. Much narrower. The
12 provision added the administration of the Litigation Sub-Trust
13 to the matters to which the provision would apply. The
14 provision makes clear now that any claim, including
15 negligence, is a claim that could be sought and pursued
16 through the gatekeeper function. And the provision made some
17 other syntax changes.

18 We believe, Your Honor, with these changes, we believe
19 that the gatekeeper provision is within the Court's
20 jurisdiction and it's appropriate to include under the plan.

21 But certain parties have argued that the Court does not
22 have the authority, the jurisdictional authority to perform
23 the gatekeeper function, separate and apart from whether it
24 has jurisdiction to adjudicate the claims that pass through
25 the gate.

1 Your Honor, we submit that these arguments represent a
2 fundamental misunderstanding of Bankruptcy Court jurisdiction
3 and the Court's authority to make sure the Debtor is free of
4 interference in carrying out the plan which I'll get to in a
5 couple moments.

6 As a preliminary matter, Your Honor, it is important for
7 the Court to remember that Paragraph 10 of the January 9 order
8 already contains a gatekeeper provision as it relates to the
9 independent directors and their agents. And as I mentioned on
10 a couple of occasions, that order is not going away, it
11 doesn't expire by its terms, and it cannot be collaterally
12 attacked in this forum.

13 The Debtor does acknowledge, though, that the gatekeeper
14 provision in the plan is broader in terms of the people it
15 protects and it applies to post-confirmation matters.

16 Before I address the Court's authority to approve the
17 gatekeeper provision, I want to summarize the evidence that it
18 has heard from Mr. Seery and Mr. Tauber regarding why the
19 gatekeeper is so important a provision to the success of the
20 plan.

21 Although the Court is all too familiar with the history of
22 litigation initiated by and filed against Mr. Dondero and his
23 related affiliates, Mr. Seery spent some time on the stand
24 testifying about the litigation so the Court would have a
25 complete record for this hearing. He testified that prior to

1 the petition date, the Debtor faced years of litigation from
2 Mr. Terry and Acis that led to the *Acis* bankruptcy case, which
3 Your Honor has said many times it's still in your mind. Years
4 of litigation with the Redeemer Committee which precipitated
5 the filing of a bankruptcy case and resulted in an award very
6 critical of the Debtor's conduct. Years of litigation with
7 UBS. Years of litigation with Patrick Daugherty. And we
8 placed all the dockets for all these matters before the Court.

9 Also, during the bankruptcy and after the Committee
10 essentially rejected the Debtor's pot plan proposal and
11 indicated -- and the Debtor indicated it would be terminating
12 the shared service agreements with Mr. Dondero and his related
13 entities, the Debtor was the subject of harassment from Mr.
14 Dondero and related entities which resulted in the temporary
15 restraining order against him, a preliminary injunction
16 against him, a contempt motion, which Your Honor is scheduled
17 to hear Friday, a motion by the Debtor's controlled -- by the
18 Dondero-controlled investors and funds in CLO managed --
19 managed by the Debtor, which the Court referred to that motion
20 as being frivolous and a waste of the Court's time. Multiple
21 plan objections, most of which are focused on allowing the
22 Debtors to continue their litigation crusade against the
23 Debtor and its successors post-confirmation. An objection to
24 the Debtor approval of the *Acis* order and a subsequent appeal.
25 An objection to the HarbourVest settlement and subsequent

1 appeal. A complaint and injunction against the Advisors and
2 the Funds to prevent them from violating Paragraph 9 of the
3 January 9th order. And a temporary restraining order against
4 those parties, which was by consent.

5 Mr. Dondero's counsel tends to argue that he is the victim
6 here and that the litigation is being commenced against him
7 and -- instead of by him. That response does not even deserve
8 a response, Your Honor. It is disingenuous.

9 Mr. Tauber testified that he was part of the team at Aon
10 that sourced coverage for the independent directors after
11 their appointment in January 2020 and that he has over 20
12 years of underwriting experience. He testified that at Aon he
13 builds bespoke insurance programs which are not cookie-cutter
14 programs for his clients, with an emphasis on D&O and E&O.
15 And he was asked by the independent board to obtain D&O and
16 E&O insurance after the board's appointment on January 9th.

17 Based upon the process Aon conducted in reaching out to
18 insurance carriers, Mr. Tauber testified that Aon was only
19 able to obtain D&O insurance based upon the inclusion of
20 Paragraph 10 of the January 9 order, the gatekeeper provision.
21 I know Mr. Taylor said that that was spoon-fed to the
22 insurers, but Mr. Tauber's testimony is they knew about Mr.
23 Dondero and they knew about his litigation tactics, so it is
24 not a good inference to be made from the testimony that they
25 would not have required something. They probably would have

1 just said no.

2 Aon has now been -- Mr. Tauber testified that Aon has now
3 been asked to obtain D&O coverage for the Claimant Trustee,
4 the Litigation Trustee, the Oversight Committee, the members,
5 the Claimant Trust, and the Litigation Sub-Trust. He
6 testified that he and Aon have approached the insurance
7 carriers that they believe might be interested in underwriting
8 coverage.

9 And no, he hasn't approached every D&O and E&O carrier out
10 there, and there may be, just like an investment banker
11 doesn't have to approach everyone. They are experts in the
12 field, and he testified they approached the people they
13 thought would likely be willing or interested and potentially
14 be willing to extend coverage. And as a result of Aon's
15 efforts, Mr. Tauber has determined that there's a continued
16 resistance to provide any coverage that does not contain an
17 exclusion for actions relating to Mr. Dondero or his related
18 entities. And he further believes that all carriers that will
19 -- that have discussed a willingness to provide coverage will
20 only do so if there is a gatekeeper provision, and only one
21 carrier will agree to provide coverage without a Dondero
22 exclusion.

23 Mr. Tauber testified that he believes that any ultimate
24 policy will provide that if at any time the gatekeeper
25 provision is not in place, either the carrier will not cover

1 any actions related to Mr. Dondero or his affiliates or that
2 the coverage will be vacated or voided.

3 Based upon the foregoing record, Your Honor, which is
4 uncontroverted, there's ample justification on a factual basis
5 for approval of the gatekeeper provision.

6 I will now turn to the Court's authority to approve the
7 gatekeeper provision.

8 There are three alternative bases upon which the Court can
9 approve the gatekeeper provision. First, several provisions
10 of the Bankruptcy Code give broad authority to approve a
11 provision like the gatekeeper provision.

12 Second, the Court can analogize to the Barton Doctrine the
13 facts and circumstances in this case and authorize the Court
14 to act as a gatekeeper to prevent frivolous litigation from
15 being filed against court-appointed officers and directors and
16 those that will lead the post-confirmation monetization of the
17 estate's assets.

18 And third, Your Honor, the Court can find that Mr. Dondero
19 and his entities are vexatious litigants, and use the
20 gatekeeper provision as a sanction to prevent the filing of
21 baseless litigation designed merely to harass those in charge
22 of the estate post-confirmation.

23 So, Bankruptcy Court authority. Your Honor, there are
24 several provisions in the Bankruptcy Code which we rely on to
25 support the Court's authority. First, Section 1123(a)(5)

1 permits the plan to approve adequate means of implementation,
2 and contains a long, non-exclusive list. Mr. Seery's
3 testimony is uncontroverted that a gatekeeper provision is
4 necessary for the adequate implementation of the plan.

5 Second, Your Honor, 1123(b)(6) authorizes a plan to
6 include any appropriate provision in a plan not inconsistent
7 with any other provision in this Code. There are not any
8 provisions and none have been cited by the Objectors that
9 would prohibit a gatekeeper provision. Section 1141
10 effectively holds that the terms of a plan bind the debtor and
11 its creditors and vest property in a reorganized debtor, free
12 and clear of the interests of third parties.

13 If nothing else, Your Honor, the spirit of 1141 allows the
14 Court to prevent, in appropriate cases, vexatious litigation
15 by unhappy creditors and parties in interest from torpedoing
16 the plan.

17 1142(b), Your Honor, provides that the confirmation --
18 that, after confirmation, the Court may direct any parties to
19 perform any act necessary for the consummation of the plan,
20 and requiring the party to seek court-approval before filing
21 an action is certainly an act.

22 And lastly, Your Honor, Section 105 allows the Court to
23 enter orders necessary to order other things, enforce orders
24 of the Court like the confirmation order, and prevent an abuse
25 of process which would certainly occur if baseless litigation

1 were filed against the parties in charge of the Reorganized
2 Debtor and the trust vehicles entrusted with carrying out the
3 plan.

4 Your Honor, gatekeepers are not a novel concept and have
5 been approved by courts in appropriate circumstances. In the
6 *Madoff* cases, the Court has been the gatekeeper post-
7 confirmation to determine whether investor claims are
8 derivative or direct claims.

9 In *General Motors*, the Court has been the gatekeeper post-
10 confirmation to determine whether product liability claims are
11 proper claims against the reorganized debtor.

12 Closer to home, Judge Lynn, Mr. Dondero's counsel,
13 approved a gatekeeper provision, arguably even more far-
14 reaching than the provision here, in the *Pilgrim's Pride* case.
15 In that case, Judge Lynn held that *Pacific Lumber* prevented
16 him -- prevented the Court from approving the exculpation
17 provision in the plan. However, he did hold that it was
18 appropriate for the Court to ensure that debtor
19 representatives are not improperly pursued for their good-
20 faith actions by requiring that any actions against the debtor
21 or its representatives, and further, on the performance of
22 their obligations as debtor-in-possession, be heard
23 exclusively before the Bankruptcy Court.

24 And *Pilgrim's Pride* is not the only case in this district
25 to include a gatekeeper provision, as Judge Houser approved

1 one in the *CHC Group* in 2016, which is cited in our materials.

2 The theme in all these cases, Your Honor, is that there
3 are circumstances where it is necessary and appropriate for
4 the Bankruptcy Court to act as a gatekeeper as a means of
5 reducing litigation that could interfere with a confirmed plan
6 and that a Court has the authority to approve such provisions.

7 The Objectors argue that the Bankruptcy Court does not
8 have jurisdiction to approve that provision. The Debtor
9 understands the argument as it related to the prior provision,
10 which gave the Court exclusive jurisdiction over any claim it
11 found colorable, and we've amended the plan to address that
12 issue. The jurisdiction to deal with those claims could be
13 left to a later day.

14 But to the extent the Objectors still pursue the
15 jurisdiction argument in light of the current provision,
16 they're really conflating two very different things: the
17 ability to determine whether a claim is colorable and the
18 ability to adjudicate that claim if the Court determines it's
19 colorable.

20 None of the authorities cited by the Objectors hold that
21 the Court is without jurisdiction to approve a gatekeeper
22 provision like the one here. So, rather, what they do is they
23 try to -- they argue, based upon the *Craig's Stores* case,
24 which is narrower than other circuits of post-confirmation
25 jurisdiction in the Bankruptcy Court, and argue that the

1 gatekeeper provision doesn't fall within that. But that --
2 such reliance is misplaced, Your Honor.

3 *Craig* held that the Bankruptcy Court did not have
4 jurisdiction to adjudicate a post-confirmation dispute over a
5 private-label credit card agreement between the debtor and the
6 bank. In declining to find jurisdiction, the Fifth Circuit
7 remarked that there was no antagonism or claim pending between
8 the parties as of the reorganization and no facts or law
9 deriving from the reorganization or the plan was necessary to
10 the claim asserted by the debtor.

11 However, in so ruling, Your Honor, the Fifth Circuit did
12 reason that post-confirmation jurisdiction in the Bankruptcy
13 Court continues to exist for matters pertaining to
14 implementation and execution of the plan. Requiring parties
15 to seek Bankruptcy Court determination the claim is colorable
16 before embarking on litigation that will impact
17 indemnification rights and affect distributions to creditors
18 is not an expansion of jurisdiction and fits well within the
19 *Craig* reasoning.

20 Unlike the credit card agreement dispute in *Craig*, Mr.
21 Dondero and his entities have demonstrated tremendous
22 antagonism towards the Debtor. And while the Debtor's plan
23 may be confirmed, further litigation has been threatened by
24 Mr. Dondero. It's in the pleadings. That's one of the
25 reasons Mr. Dondero says his plan is better. It'll avoid

1 tremendous amount of litigation.

2 After *Craig*, the Fifth Circuit again examined the
3 bankruptcy court's post-confirmation jurisdiction in the
4 *Stoneridge* case in 2005. In that case, the Fifth Circuit
5 ruled that a bankruptcy court has post-confirmation
6 jurisdiction to resolve a dispute between two nondebtors that
7 could trigger indemnification claims against a liquidating
8 trust formed as a result of a confirmed plan.

9 And lastly, as I mentioned Your Honor's decision before,
10 the *TXMS Real Estate* case, I think just a couple of months
11 ago, it stands for the proposition that post-confirmation
12 jurisdiction exists for matters bearing on the implementation,
13 interpretation, and execution of a plan. In that case, Your
14 Honor ruled that Your Honor had jurisdiction to resolve a
15 post-confirmation dispute between a liquidating trust formed
16 under a plan and a landlord, the result of which could
17 significantly and adversely affect the value of the
18 liquidating trust and monies available for unsecured
19 creditors.

20 And you have heard Mr. Seery testify that litigation will
21 have an adverse effect on the ability to make distributions to
22 creditors.

23 So, Your Honor, under these authorities, the Court
24 undoubtedly would have jurisdiction to act as the gatekeeper
25 for the litigation.

1 There's also an independent basis for the gatekeeper
2 provision, Your Honor, the Barton Doctrine, which the Court is
3 very familiar from your opinion in the *In re Ondova* case in
4 2017 and which provides that before a suit may be brought
5 against a trustee, leave of Court is required. In *Ondova*, the
6 Court reviewed the history of the doctrine in connection with
7 litigation brought by a highly-litigious debtor against a
8 trustee and his professionals. This Court noted that there
9 are several important policies followed by the doctrine,
10 including a concern for the overall integrity of the
11 bankruptcy process and the threat of trustees being distracted
12 from or intimidated from doing their jobs. And Your Honor's
13 language still: For example, losers in the bankruptcy process
14 might turn to other courts to try to become winners there by
15 alleging the trustee did a negligent job.

16 Your Honor, this is precisely what the Debtor is trying to
17 prevent here, Mr. Dondero and his entities from putting the
18 bad experience before Your Honor in this case behind it and
19 going to try to find better luck in a more hospitable court.

20 Your Honor, the Barton Doctrine originally only applied to
21 receivers, and over the course of time has been extended to
22 apply to various court-appointed fiduciaries, as we have cited
23 in our materials: trustees, debtors-in-possession, officers
24 and directors, employees, and attorneys representing the
25 debtor.

1 And I expect the Objectors to argue that there is a
2 statutory exception to the Barton Doctrine under 28 U.S.C. 959
3 and it does not apply to acts or transactions in carrying out
4 business conducted with a property. The exception, Your
5 Honor, is very narrow and was meant to apply for things like
6 slip-and-fall cases. In fact, the Eleventh Circuit in the
7 *Carter v. Rodgers* case, 220 F.3d 1249 in 2000, held that
8 Section 11 -- 28 U.S.C. 959(a) does not apply to suits against
9 trustees for administering or liquidating the bankruptcy
10 estate.

11 The Objectors also argue that the gatekeeper provision
12 violates *Stern v. Marshal*. However, as the Court acknowledged
13 in *Ondova*, the Fifth Circuit in *Villegas v. Schmidt* has
14 recognized that the Barton Doctrine remains viable post-*Stern*
15 *v. Marshal*. The Fifth Circuit reasoned that while Barton
16 Doctrine is jurisdictional in that a court does not have
17 jurisdiction of an action if preapproval has not been
18 obtained, it does not implicate the extent of a bankruptcy
19 court's jurisdiction to adjudicate the underlying claim,
20 precisely the distinction we're making here. The bankruptcy
21 court would be the gatekeeper for deciding whether the claim
22 passes through the gate, and then after will decide if it has
23 jurisdiction to rule on the underlying claim.

24 And this is important especially in a case like this, Your
25 Honor, where Your Honor has had extensive experience with the

1 parties and is in the best position to determine whether the
2 claims are valid or attempted to be used as harassment.

3 The Objectors will complain about the open-ended nature of
4 the gatekeeper provision, whether it will or won't apply after
5 the case is closed or a final decree is issued, and the unfair
6 burden of their rights.

7 Your Honor has a previous reported opinion where basically
8 jurisdiction does extend after a case is closed or a final
9 decree is entered, so that issue is a red herring.

10 As Your Honor is well aware, it's a decade-long -- a
11 decade of litigation against the Dondero-controlled entities
12 that caused the Highland bankruptcy. And the Court is very
13 well aware of the litigation that occurred in *Acis*, very well
14 aware of the litigation that's occurred here that I mentioned
15 a few minutes ago. Your Honor, it is not over, you'll be
16 presiding over the contempt hearing.

17 And if the Court needs yet another ground to approve the
18 gatekeeper provision, the Debtor submits that the procedure is
19 an appropriate sanction for Dondero's vexatious litigation
20 activities. We cited the *In re Carroll* case in the Fifth
21 Circuit of 2017 that held that a bankruptcy court has the
22 authority to enjoin a litigant from filing any pleading in any
23 action without the prior authority from the bankruptcy court.

24 And in affirming the decision of the bankruptcy court, the
25 Fifth Circuit commented on the reasons the bankruptcy court

1 gave for its ruling. After recounting the bad faith of
2 appellants, the bankruptcy court determined that the Carrolls'
3 true motives were to harass the trustee and thereby delay the
4 proper administration of the estate, in the hope that they
5 would be able to retain their assets or make pursuit of the
6 assets so unappealing that the trustee would be compelled to
7 settle on terms favorable to appellants.

8 Sounds familiar, Your Honor. The same can certainly be
9 said about what Mr. Dondero is doing in this case.

10 And to make a showing that a party is vexatious litigant,
11 the Court must find that the party has a history of vexatious
12 and harassing litigation, whether the party has a good faith
13 -- the litigation or has filed it as a means to harass, the
14 burden to the Court and other parties, and the adequacy of
15 alternative sanctions.

16 And as Your Honor is well aware from all the litigation,
17 Your Honor is well, well able to make the finding required for
18 the vexatious litigation finding.

19 But here, we don't ask for the drastic sanction of
20 enjoining from any further filings. Rather, we just ask for a
21 less-severe sanction, requiring Mr. Dondero and his entities
22 to first make a showing that he has a colorable claim.

23 The Fifth Circuit in *Baum v. Blue Moon*, 2007, did exactly
24 that. In *Baum*, the district court barred a vexatious litigant
25 from initiating litigation without first obtaining the

1 approval of the district court. Ultimately, the matter
2 reached the Fifth Circuit after the district court had
3 modified the pre-filing injunction to limit it to a certain
4 case, and then broadened it again based upon continued bad
5 faith conduct.

6 On appeal, the Fifth Circuit, citing several prior cases,
7 noted that a district court has the authority to impose a pre-
8 filing injunction to defer vexatious, abusive, and harassing
9 litigation.

10 And for those reasons, Your Honor, the Debtor asks the
11 Court to overrule any objections to the gatekeeper provision.

12 Your Honor, I was just going to then go to the plan
13 modification provisions, but I wanted to stop and see if you
14 had any questions at this point.

15 THE COURT: I do not. Let's give him a time
16 estimate, Nate. About how --

17 THE CLERK: Twenty.

18 MR. POMERANTZ: I have another five or six minutes, I
19 think, based upon --

20 THE COURT: Okay.

21 MR. POMERANTZ: And then I'll be ready to turn it
22 over to --

23 THE COURT: Okay.

24 MR. POMERANTZ: -- to Mr. Kharasch.

25 THE COURT: All right. Yes. You've got -- you've

1 done an hour and 33 minutes. So you have about, I guess, 37
2 minutes left. Okay. Go ahead.

3 MR. POMERANTZ: Thank you, Your Honor.

4 I would like to address the modifications of the plan that
5 were contained in our January 22nd plan and the additional
6 changes filed on February 1, several of which I have referred.

7 As a preliminary matter, Your Honor, under 1127(b), the
8 Debtor can modify a plan at any time prior to confirmation if
9 -- and not require resolicitation if there's no adverse change
10 in the treatment of claim or interest of any equity holder.

11 With that background, I won't go through the changes we
12 made that I've already discussed, but I will point out a
13 couple, Your Honor, that I would like to point out now. We
14 have modified the plan with respect to conditions of the
15 effective date in Article 8. First, a condition to the
16 effective date will now be entry of a final order confirming a
17 plan, as opposed just to entry of order. And final order is
18 defined as the exhaustion of all appeals.

19 In addition, the ability to obtain directors and officers
20 insurance coverage on terms acceptable to the Debtor, the
21 Committee, the Claimant Trustee, the Claimant Trustee
22 Oversight Board, and the Litigation Trustee is now a condition
23 to the effective date.

24 The Court heard testimony today and has experienced
25 firsthand the litigiousness of Mr. Dondero and his related

1 entities. And the Court heard testimony from Mr. Tauber and
2 Aon that the D&O insurance will not be available post-
3 effective date without assurances that the gatekeeper
4 provision will be in effect for the duration of the policy and
5 any run-off period.

6 Mr. Tauber further testified that he expected the final
7 terms from the insurance carrier to provide that if the
8 confirmation order was reversed on appeal and the gatekeeper
9 was removed, it would void -- it would either void the
10 directors and officers coverage or it'd result in a Dondero
11 exclusion.

12 Mr. Dondero and his entities are no strangers to the
13 appellate process, as Your Honor knows. They appealed several
14 of your orders, and continue the tack in this case, having
15 appealed the Acis and the HarbourVest orders and the
16 preliminary injunction. It would not surprise the Debtor if
17 Mr. Dondero and his entities appealed your confirmation order,
18 if Your Honor decides to confirm the plan.

19 The Debtor is confident that it will prevail on any appeal
20 in the confirmation order, as we believe the Debtor has made a
21 compelling case for confirmation.

22 The Debtor also believes a compelling case exists that if
23 the plan went effective without a stay pending appeal, that
24 the appeal would be equitably moot, but we understand we are
25 facing headwinds from the courts, bankruptcy court have

1 addressed that issue before.

2 However, given the effect a reversal would have on the
3 availability of insurance coverage, the Claimant Trustee, the
4 Claimant Oversight Committee, and the Litigation Trustee are
5 just not willing to take that risk.

6 We are hopeful that Mr. Dondero and his entities will
7 recognize that any appeal is futile and step aside and let the
8 plan proceed and become effective.

9 If Mr. Dondero and his related entities do appeal the
10 confirmation order, preventing it from becoming final and
11 preventing the effective date from the occurring, the Debtor
12 intends to work closely with the Committee to ratchet down
13 costs substantially and proceed to operate and monetize assets
14 as appropriate until an order becomes final.

15 None of these modifications adversely affect the treatment
16 of claims or interests under the plan, Your Honor, and for
17 those reasons, Your Honor, we request that the Court approve
18 those modifications.

19 And with that, I would like to turn the podium over to Mr.
20 Kharasch to briefly address the remaining CLO objections.

21 THE COURT: All right. Mr. Kharasch?

22 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23 MR. KHARASCH: Good afternoon, Your Honor. I'll be
24 as brief as possible. I know we're under a deadline.

25 As you've heard yesterday, you've heard before in other

1 proceedings, Your Honor, the CLO Objecting Parties, the so-
2 called investors, do have rights under the CLO management
3 agreements and indentures, including contractual rights to
4 terminate the management agreements under certain
5 circumstances.

6 What they complain about today, Your Honor, is that the
7 injunction language in the plan, including the language
8 preventing actions to interfere with the implementation and
9 consummation of the plan, is so broad and ambiguous that their
10 rights are or may be improperly impacted, especially any
11 rights to remove the manager for acts of malfeasance.

12 But the Debtor is primarily relying, Your Honor, not so
13 much on the plan injunctions but on the clear provisions of
14 the January 9 order, to which Mr. Dondero consented and which
15 provides that Mr. Dondero shall not cause any of his related
16 entities to terminate any agreements with the Debtor.

17 Yes, that is a broad provision, but it is very clear, and
18 it does not even allow the CLO Objecting Parties to come to
19 court under a gatekeeper-type provision. But that is what Mr.
20 Dondero consented to on behalf of himself and his related
21 entities.

22 Important to note, Your Honor, we are not here today to
23 litigate who is and who is not a related entity. That will be
24 left for another day. However, Your Honor, we have considered
25 these issues, including last night and this morning, and we

1 are going to propose -- well, we will modify our plan through
2 a provision in the confirmation order to provide the
3 following: Notwithstanding anything in the plan or the
4 January 9 order, the CLO Objecting Parties will not be
5 precluded from exercising their contractual or statutory
6 rights in the CLOs based on negligence, malfeasance, or any
7 wrongdoing, but before exercising such rights shall come to
8 this Court to determine whether those rights are colorable and
9 to also determine whether they are a related entity. If the
10 Court has jurisdiction, the Court can determine the underlying
11 colorable rights or claims.

12 This does not impact the separate settlement we have with
13 CLO Holdco, Your Honor.

14 We think that such modification addresses some of the
15 concerns raised yesterday by the objecting parties by
16 providing more clarity as to what the plan is doing and not
17 doing with respect to the plan and the January 9 order, and we
18 think it is also a fair resolution of some legitimate
19 concerns.

20 So, with that, Your Honor, we think that, with that
21 clarification that we did not have to make but are willing to
22 make, that this should fully satisfy the CLO Objecting Parties
23 with regard to their objections to the injunction and the
24 gatekeeper.

25 Thank you, Your Honor.

1 THE COURT: All right. Mr. Clemente?

2 CLOSING ARGUMENT ON BEHALF OF THE CREDITORS' COMMITTEE

3 MR. CLEMENTE: Yes, Your Honor. And I actually am
4 going to be brief. Mr. Pomerantz's discussion, obviously, was
5 very, very thorough, so I'm able to cut out a lot of stuff.

6 Thank you, Your Honor. Matt Clemente, Sidley Austin, on
7 behalf of the Committee.

8 The plan, Your Honor, meets the confirmation standards and
9 should be confirmed. Mr. Pomerantz covered a lot of ground,
10 and I will endeavor not to repeat that, but there are a few
11 points that I think the Committee wishes to emphasize.

12 Your Honor, since I first appeared in front of you, I have
13 maintained consistently that no plan can or should be
14 confirmed without the consent of the Committee. Your Honor,
15 in her wisdom, understood this immediately, as it was obvious
16 -- it was the obvious conclusion, given the makeup of the
17 creditor body, the asset pool, and the impetus for the filing
18 of the case.

19 Unfortunately, not everyone came to this conclusion so
20 easily, and it took much hard-fought negotiations as well as a
21 defeated disclosure statement, among other things, and
22 tireless dedication and commitment by each individual
23 Committee member to drive for a value-maximizing plan that is
24 in the best interests of its constituencies and for us to get
25 to where we are today.

1 And where we are today, Your Honor, is at confirmation for
2 a plan that the Committee unanimously supports, which was the
3 inevitable outcome for this case from the very beginning.

4 I've also said, Your Honor, that context is critical in
5 this case. It has been from the beginning, and it remains so
6 now. Mr. Draper, interestingly, began his comments yesterday
7 by saying that even a serial killer is entitled to *Miranda*
8 rights. While I will admit that at times the rhetoric in this
9 case has been heated, I have never certainly likened Mr.
10 Dondero to a serial killer. But the record shows, and Mr.
11 Dondero's own words and actions show, that he is, in fact, a
12 serial litigator who has no hesitation at all to take any
13 position in an attempt to leverage an outcome that suits his
14 self-interest. And he has no hesitation at all to use his
15 many tentacles in a similar fashion.

16 That is a very important context in which the Court should
17 view the remaining objections of the Dondero tentacles and
18 weigh confirmation of the Debtor's plan.

19 Against this context of a serial litigator, Your Honor, we
20 have a plan supported by each member of the Official Committee
21 of Unsecured Creditors, accepted by two classes of claims,
22 Class 2 and Class 7, and holders of almost one hundred percent
23 in amount of non-insider claims in Class 8.

24 The parties that have voted against the plan are either
25 employees who are not receiving distributions under the plan

1 or are insiders or parties related to Mr. Dondero.

2 The overwhelming number and amount of creditors who are
3 receiving distributions under this plan, therefore, have
4 accepted the plan. The true creditors and economic parties in
5 interest have spoken, they have spoken loudly, and they have
6 spoken in favor of confirming the plan.

7 Your Honor, I'm not going to address the technical
8 requirements, as Mr. Pomerantz did that. So I'm going to skip
9 over my remarks in that regard, except I do want to emphasize
10 the remarks regarding the gatekeeper, exculpation, and
11 injunction provisions as they're of critical importance to the
12 plan.

13 The testimony has shown and the proceedings of this case
14 has shown, again, Mr. Dondero is a serial litigator with a
15 stated goal of causing destruction and delay through
16 litigation.

17 The testimony has further shown that none of the
18 independent board members would have signed onto the role
19 without the gatekeeper and injunction provisions and the
20 indemnity from the Debtor.

21 Therefore, it follows that such provisions are necessary
22 to entice parties to serve in the Claimant Trustee and other
23 roles under the plan, which, as I remarked in my opening
24 comments, are integral to providing the structure that the
25 creditors believe is necessary to unlocking the value and

1 unlocking themselves from the Dondero web.

2 Regarding the exculpation and injunction provisions
3 specifically, Your Honor, the Court will recall that the
4 Committee raised objections to them in connection with the
5 first disclosure statement hearing. In response, the Debtor
6 narrowed the provisions, and the Committee believes they
7 comply with the Fifth Circuit precedent, as Mr. Pomerantz ably
8 walked Your Honor through.

9 And to be clear, Your Honor, not only does the Committee
10 believe the exculpation and injunction provisions comply with
11 Fifth Circuit law, the Committee does not believe the estate
12 is harmed by such provisions, as the Committee does not
13 believe there are any cognizable claims that could or should
14 be raised that would otherwise be affected by the exculpation
15 or injunction, and, frankly, with respect to the release that
16 Mr. Pomerantz walked Your Honor through with respect to the
17 directors and the officers.

18 Regarding the gatekeeper, Your Honor, Your Honor
19 presciently approved it in her January 9th order, and the
20 developments since then only serve as further justification
21 for including it in the plan and confirmation order. Mr.
22 Dondero is a serial and vexatious litigator, and the
23 instruments put in place under the plan to maximize value for
24 the creditors and to oversee that value-maximizing process
25 must be protected, and the gatekeeper function serves that

1 protection while also, importantly, as Mr. Pomerantz pointed
2 out, providing Mr. Dondero with a forum to advance any
3 legitimate claims he and his tentacles may have.

4 In short, Your Honor, the gatekeeper provision is
5 necessary to the implementation to the plan, is fair under the
6 circumstances of the case, and is therefore within this
7 Court's authority, and it is appropriate to approve.

8 Your Honor, in sum, it has been a long road to get here
9 today, but we are finally here. And we are here, Your Honor,
10 I believe in large part as a result of the tireless efforts of
11 the individual members of my Committee, and for that I thank
12 them.

13 The Committee fully supports and unanimously supports
14 confirmation of the plan. As demonstrated by the evidence,
15 the plan meets all the requirements of the Bankruptcy Code.
16 The Committee believes the plan is in the best interests of
17 its constituencies. And therefore the Committee, along with
18 two classes of creditors and the overwhelming amount of
19 creditors in terms of dollars, urge you to confirm the plan.

20 That's all I have, Your Honor, but I'm happy to answer any
21 questions you may have for me.

22 THE COURT: Okay. Not at this time.

23 Nate, how much time --

24 (Clerk advises.)

25 THE COURT: Twenty-five minutes remaining? All

1 right. Just so you know, you've got a collective Debtor's
2 counsel/Committee's counsel 25 minutes remaining for any
3 rebuttal, if you choose to make it.

4 Let's take a five-minute break, and then we'll hear the
5 Objectors' closing arguments. Okay.

6 THE CLERK: All rise.

7 (A recess ensued from 2:00 p.m. until 2:06 p.m.)

8 THE COURT: All right. Please be seated. We're
9 going back on the record in Highland. We're ready to hear the
10 Objectors' closing arguments. Who wants to go first?

11 MR. DRAPER: Your Honor, this -- this is Douglas
12 Draper. I get the joy of going first.

13 THE COURT: Okay.

14 CLOSING ARGUMENT ON BEHALF OF THE GET GOOD AND DUGABOY TRUSTS

15 MR. DRAPER: We've heard a great deal of testimony
16 about the Debtor's belief that the circumstances in this case
17 warrant an exception to existing Fifth Circuit case law, the
18 Bankruptcy Code, and Court's post-confirmation jurisdiction.

19 I would not be standing here today objecting to the plan
20 if the Debtor didn't attempt to extend, move past and beyond
21 the Barton Doctrine, move beyond 1141, move beyond *Pacific*
22 *Lumber*. In fact, I think I heard an argument that *Pacific*
23 *Lumber* is not applicable and this Court should disregard Fifth
24 Circuit case law.

25 Let's start with the exculpation provision. And the focus

1 of this case has been, and what we've heard over the last few
2 days, is about the independent directors. I understand there
3 was an order entered earlier, the order stands, and the order
4 is applicable in this case. It cuts off, however, when we
5 have a Reorganized Debtor, because these independent directors
6 are no longer independent directors. It cuts off when we have
7 a new general partner.

8 And so the protections that were afforded by that order do
9 not need to be afforded to the new officers and new directors
10 of the new general partner. And in fact, the protections that
11 they're entitled to are completely different than the
12 protections that were entitled -- that are covered by the
13 order that the Court has looked at.

14 Let's first focus on, however, the exculpation provision.
15 And I wanted to ask the Court to look at the exculpated
16 parties. Have to be very careful and very interest -- and
17 focus solely on the independent directors. But if you look at
18 the parties covered by exculpation provision, it includes the
19 professionals retained by the Debtor. My reading of *Pacific*
20 *Lumber* is that neither the Creditors' Committee counsel nor
21 the Debtor can be covered by an exculpation provision. This
22 in and of itself makes the plan non-confirmable. This
23 exculpation provision is unwarranted and unnecessary.

24 Two, --

25 THE COURT: Well, let's drill down on that.

1 MR. DRAPER: -- we have --

2 THE COURT: Let's drill down on that. Mr. Pomerantz
3 says that this wasn't what they considered one way or another
4 by *Pacific Lumber*. Debtor, debtor professionals. Okay? Do
5 you disagree with that?

6 MR. DRAPER: I disagree with that. *Pacific Lumber*
7 said you could only have releases and exculpations for the
8 Creditors' Committee members. And the rationale behind that
9 was that those people volunteered to be part and parcel of the
10 bankruptcy process, that those parties did not get paid.
11 Here, we have two professionals who both volunteered and are
12 being paid, and are not entitled to an exculpation under
13 *Pacific Lumber*. They're not entitled to a --

14 THE COURT: Okay. So you say *Pacific* --

15 MR. DRAPER: -- release. Now, ultimately, they --

16 THE COURT: -- *Pacific Lumber* categorically rejected
17 all exculpations except to Creditors' Committee and its
18 members. That's your --

19 MR. DRAPER: I agree. That's --

20 THE COURT: -- interpretation of *Pacific Lumber*?

21 MR. DRAPER: Yes.

22 THE COURT: Okay. All right. So you just absolutely
23 disagree, one by one, with every one of the arguments, that it
24 was really -- the only thing before the Fifth Circuit was plan
25 sponsors, okay? A plan proponent that I think was like a

1 competitor previously of the debtor, and I think a large
2 creditor or secured creditor. I think those were the two plan
3 proponents.

4 So you disagree -- I'm going to, obviously, go back and
5 line-by-line pour through *Pacific Lumber*, but you disagree
6 with Mr. Pomerantz's notion that, look, it was really a page
7 and a half or two of a multipage opinion where the Fifth
8 Circuit said, no, I don't think 524(e) is authority to give
9 exculpation from postpetition liability for negligence as to
10 these two plan sponsors. And I guess it was also -- I don't
11 know. They say, Pachulski's briefing says it was really only
12 looking at these two plan sponsors and the Committee and its
13 members on appeal, you know, going through the briefing, and
14 in such, you can see that these were all that was presented
15 and addressed by the Fifth Circuit. You disagree with that?

16 MR. DRAPER: Look, I know the facts of *Pacific Lumber*
17 and they -- I know what the posture of the case was. However,
18 the literal language by the opinion in it, it transcends just
19 a dispute in the case. And I think the U.S. Trustee's
20 position that this exculpation provision is correct as a
21 matter of law support -- is further evidence of the fact that
22 the U.S. Trustee, as watchdog of this process, and *Pacific*
23 *Lumber* say this cannot be done, period, end of story.

24 THE COURT: Okay. So you, at bottom, just totally
25 disagree with Mr. Pomerantz? You say *Pacific Lumber* is

1 actually a very broad holding, and I guess, if such, there's a
2 conflict among the Circuits, right?

3 MR. DRAPER: Well, that's okay.

4 THE COURT: So, --

5 MR. DRAPER: I mean, quite frankly, *Pacific Lumber* is
6 binding on you.

7 THE COURT: Understood.

8 MR. DRAPER: There may be a conflict in the Circuits,
9 and ultimately the Supreme Court may make a decision and
10 decide who's right and who's wrong.

11 But for purposes of today and for purposes of this
12 exculpation provision and for purposes of this confirmation,
13 *Pacific Lumber* is the applicable law.

14 THE COURT: Okay. Well, again, this is a hugely
15 important issue, although in many ways I don't understand why
16 it is, because we're just talking about postpetition acts and
17 negligence, okay? You know, many might say it's much ado
18 about nothing, but it's front and center of your objection.
19 So I guess I'm just thinking through, if the Fifth Circuit was
20 presented these exact facts and was presented with the
21 argument, you know, the *Blixseth* case says 524(e) has nothing
22 to do with exculpation because exculpation is a postpetition
23 concept, and it's just talking about standard liability --
24 these people aren't going to be liable for negligence; they
25 can be liable for anything and everything else -- if presented

1 with that *Blixseth* case, you know, there are several arguments
2 that Mr. Pomerantz has made why, if you accept that 524(e)
3 might not apply here, let's look at the reasoning, the little
4 bit of reasoning we had of *Pacific Lumber*, that it was really
5 a policy rationale, right? These independent fiduciaries,
6 strangers to the company and case, they'd never want to do
7 this if they knew they were vulnerable for getting sued for
8 negligence. Mr. Pomerantz's argument is that these
9 independent board members are exactly analogous to a
10 Committee, more than prepetition officers and directors. What
11 do you have to say about that policy argument?

12 MR. DRAPER: Well, I think there's a huge distinction
13 between the members of a Creditors' Committee who are
14 volunteers and are not paid versus a paid independent
15 director. And more importantly, I think there's a huge
16 difference between a member of a Creditors' Committee who's
17 not paid and counsel for a Debtor and counsel for a Creditors'
18 Committee.

19 THE COURT: Okay.

20 MR. DRAPER: Look, you have -- you've --

21 THE COURT: So, at bottom, it was all about
22 compensation to the Fifth Circuit?

23 MR. DRAPER: Well, no. The Fifth Circuit policy
24 decision was we want to protect a party who wants to serve and
25 do their civic duty to serve on a Creditors' Committee for no

1 compensation. I agree with that. I think it's a laudable
2 policy decision. I think it makes sense.

3 However, the Fifth Circuit in its language basically said,
4 nobody else gets it. It didn't say, look, you know, if there
5 are circumstances that are different, we may look at it
6 differently. The language is absolute in the opinion. And
7 that's what I think is binding and I think that's what the
8 case stands for.

9 And look, just so the Court is very clear, when Pachulski
10 files its fee application and the Court grants the fee
11 application, any claim against them is res judicata. So, in
12 fact, they do have -- they do have protection. They do have
13 the ability to get out from under. The Court -- they're just
14 not -- they just can't get out from under through an
15 exculpation provision. And the same goes for Mr. Clemente and
16 his firm.

17 THE COURT: Which, --

18 MR. DRAPER: And the same goes for DSI.

19 THE COURT: Which, by the way, that's one reason I
20 think sometimes this is much ado about nothing. It goes both
21 ways. The Debtor professionals, the Committee professionals,
22 estate professionals, they're going to get cleared on the day
23 any fee app is approved, right? I mean, there's Fifth Circuit
24 law that says --

25 MR. DRAPER: I -- I --

1 THE COURT: -- says that's res judicata as to any
2 future claims.

3 But I guess I'm really trying to understand, you know, at
4 bottom, I feel like the Fifth Circuit was making a holding
5 based on policy more than any directly applicable Code
6 provision.

7 I mean, it's been said, for example, that Committee
8 members, they're entitled to exculpation because of, what,
9 1103, some people argue, 1103, which subsection, (c)? That's
10 been quoted as giving, quote, qualified immunity to
11 Committees. But it doesn't really say that, right? It's just
12 something you infer.

13 MR. DRAPER: No. Look, what I think, if you really
14 want to put the two concepts together, I think what the Fifth
15 Circuit, when they told lawyers and professionals that you
16 can't get an exculpation, was very mindful of the fact that
17 you can get released once your fee app is approved. So, as a
18 policy, they didn't need to do it in a exculpation provision.
19 There was another methodology in which it could be done.

20 THE COURT: Uh-huh.

21 MR. DRAPER: And so that's -- you have to look at it
22 as holistic and not just focus on the exculpation provision.
23 Because, in fact, they recognize and they -- I'm sure they
24 knew their existing case law on res judicata, and that's why
25 they read it out.

1 So, honestly, there's no reason for Pachulski to be in
2 here. There's no reason for Mr. Clemente to be in here.
3 There's no reason for the professionals employed by the Debtor
4 to be in here. They have an exit not by virtue of the plan.

5 THE COURT: But so then it boils down to the
6 independent directors and Strand post January 9th?

7 MR. DRAPER: It boils down somewhat to them, but
8 quite frankly, there are two parts to this. One is you have
9 an order that's in place. I am not asking the Court to
10 overturn the order. And quite frankly, this provision could
11 have been written to the effect that the order that was in
12 place on -- that's been presented to the Court is applicable
13 and applied.

14 However, let's parse that down. Let's look at Mr. Seery.
15 The order that's in place solely protects the independent
16 directors acting in their capacities as independent directors.
17 If somebody's acting as -- and if you want to liken it to a
18 trustee, their protection is afforded by the Barton Doctrine,
19 and that's how the protection arises.

20 What's going on here is they're extending the provisions,
21 first of all, of the Court's order, and number two, of the
22 Barton Doctrine, which are -- which cannot be -- which should
23 not be extended. The law limits what protections you have and
24 what protections you don't have. And we, as lawyers -- look,
25 I'll give you the best example. Think of all the times you

1 had somebody write in the concept of superpriority in a cash
2 collateral order. And how many times have you had a lawyer
3 rewrite the concept of the issue as to diminution in value?
4 The Code says diminution in value, and quite frankly, a cash
5 collateral order should just say if, to the extent there's
6 diminution in value, just apply the Code section. It's
7 written there. Smart people put it in, and Congress approved
8 it. And once you start getting beyond that, those things
9 should be limited.

10 And what we have are lawyers trying to extend out by
11 definitions things that the Code limits by its reach. That
12 goes for post-confirmation jurisdiction. That goes for the
13 injunction. That goes for the so-called gatekeeper provision.

14 And so, again, I would not be here if, in fact, they had
15 said, we have an injunction to the full extent allowed by the
16 Bankruptcy Code and *Pacific Lumber*. We have an exculpation
17 provision that's allowed by virtue of the Court's order. We
18 have the full extent and full reach of the Barton Doctrine.
19 Those are legitimate. Once you start expanding upon that,
20 you're reaching into matters that are not authorized and not
21 allowed.

22 And then you get into 105 territory, which is always very
23 dangerous. And that's really what's going on here. And
24 that's the tenor of my argument and what I'm trying to say.
25 The Code gives protections. It is not for us to extend the

1 protections. It's not for us to enlarge them, even under a,
2 gee, the other party's litigious.

3 And so that's -- let's take *Craig's Store*. Attempted to
4 limit its reach. *Craig's Store* says once you have a confirmed
5 plan, any dispute between the parties, for -- let's take an
6 executory contract. If there's a breach of the executory
7 contract, that's a matter to be handled aft... by another
8 court. It's not a matter to be handled by this Court. This
9 Court lets the parties out.

10 And in this case, it's even worse, because you basically
11 have a new general partner coming in, you have an assumption
12 of various executory contracts, and you have a -- Strand is no
13 longer present.

14 If you adopted Mr. Seery's argument, anybody who appeals a
15 decision, questions what he does or how he does it, is a
16 vexatious litigator. That's not the case. And the fact that
17 we are appealing a decision is a right that we have. It
18 shouldn't be limited, and it shouldn't be held against us.
19 Courts can rule against us. That's fine.

20 And so that's really what the focus is here and that's why
21 I gave the opening that I had. We are willing to be bound by
22 applicable law. And quite frankly, the concept that the
23 exigencies of a case allow a court to change what applicable
24 law is is problematic. I gave the criminal example as a
25 reason. And the reason was that, in certain instances, the

1 application of law may allow a criminal to go free. It's a
2 problem with our system and how we work, but that's what the
3 law does, and it is absolute in its application.

4 Let me address the so-called gatekeeper provision. The
5 gatekeeper provision, in a certain sense, is recognized in the
6 Barton Doctrine. It's jurisdictional, and it says, to the
7 extent you're going to litigate with somebody who served
8 during the bankruptcy, who was a trustee, then you have to
9 come to the bankruptcy court and pass through a gate. It
10 doesn't say you have to pass through a gate for a reorganized
11 debtor who does something after a plan is confirmed and going
12 forward. And so that's -- there's a distinction.

13 And if you look at Judge Summerhays' decision, which I
14 will be happy to send to the Court, in *WRT* involving -- it's
15 kind of (indecipherable) and Mr. Pauker, where, in that case,
16 the trustee, the litigation trustee, spent more litigating
17 than it had in recoveries, and Baker Hughes filed suit. Judge
18 Summerhays said, look, the Barton Doctrine only applies to a
19 certain extent. It is limited once you get into post-
20 confirmation matters and related-to jurisdiction.

21 And so, again, the Barton Doctrine is what it stands for.
22 We agree with it, we recognize it, and it should be applied.
23 The Barton Doctrine, however, should not be extended, should
24 not go past its reach, and should not go past the grant of
25 jurisdiction for this Court.

1 And so you have in here, though they have -- they have
2 tried to hide it in a limited fashion, this gatekeeper
3 provision. The gatekeeper provision, as currently written,
4 covers post-confirmation claims that somebody has to come
5 before this Court to the extent there's a breach of a
6 contract. That's not proper, and it's not covered by your
7 post-confirmation jurisdiction. To the extent there's an
8 interpretation of an existing contract and an interpretation
9 of the order, you do have authority, and I don't question
10 that.

11 THE COURT: But address Mr. Pomerantz's statement
12 that there's a difference between saying you have to go to the
13 bankruptcy court and make an argument, we have a colorable
14 claim that we would like to pursue, and having that
15 jurisdictional step required. There's a difference between
16 that and the bankruptcy court adjudicating the claim.

17 MR. DRAPER: Well, there are two parts to that.
18 Number one is there's an injunction in place from an action
19 taken post-confirmation against property of the estate. We
20 all agree at that, correct? And we believe that the
21 injunction applies to post-confirmation action against
22 property of the pre-confirmation estate. We all agree to
23 that.

24 However, if in fact there's a breach of a contract
25 postpetition that the parties have a dispute about, that

1 contract is now no longer under your purview once the contract
2 has been assumed. And so they shouldn't have to make a
3 colorable claim to you that a breach of the contract has
4 occurred. That should be the determining factor for another
5 court.

6 That's, in essence, what *Craig's Store* says. Your
7 jurisdiction and the jurisdiction of a bankruptcy court is
8 limited. It's limited by *Stern vs. Marshall*. It's limited by
9 your ability to render findings of fact and conclusions of law
10 versus render a final decision. That decision has been made
11 not by us, it's been made by Congress and it's been made by
12 the United States Constitution.

13 THE COURT: All right. And I think we all agree with
14 you regarding the holding of *Craig's Stores* and some of the
15 other post-confirmation bankruptcy subject matter jurisdiction
16 holdings. But Mr. Pomerantz is arguing that this gatekeeping
17 function is warranted by, among other things, you know, there
18 was a district court holding, *Baum v. Blue Moon*, or a Fifth
19 Circuit case, that upheld a district court having the ability
20 to impose pre-filing injunctions in the context of a vexatious
21 litigator. So, you know, that's a strong analogy he makes to
22 what's sought here. What is your response to that?

23 MR. DRAPER: My response to that is a district court
24 can do that. A district court has jurisdiction to make that
25 decision. And quite frankly, a district court can sanction a

1 vexatious litigator under Rule 11.

2 So, in fact -- again, you have to bifurcate your power
3 versus the power that a district court has. And that
4 gatekeeper provision is allowed by a district court because
5 they had authority over the case. You may not have authority
6 over being the gatekeeper for a post-confirmation matter that
7 you had no jurisdiction over to start with.

8 THE COURT: Okay.

9 MR. DRAPER: That, that's the distinction between
10 here. That's -- what's going on here is they are -- they are
11 mashing together a whole load of concepts under the vexatious
12 litigator and the anti-Dondero function that fundamentally
13 abrogate the distinction between what your jurisdiction is
14 pre-confirmation versus your jurisdiction post-confirmation.
15 And that --

16 THE COURT: Do you think --

17 MR. DRAPER: -- is sacrosanct.

18 THE COURT: Do you think Judge Lynn got it wrong in
19 *Pilgrim's Pride*? Do you think Judge Houser got it wrong in
20 *CHC*? Or do you think this situation is different?

21 MR. DRAPER: There are two parts to that. I have
22 told Judge Lynn, since I have been working with him, that I
23 think *Pilgrim's Pride* is wrongfully decided. However, having
24 said that, *Pilgrim's Pride* and those cases dealt with claims
25 against the -- the channeling injunction affected actions

1 during the bankruptcy. It did not serve as a post-
2 jurisdictional grant of jurisdiction to the bankruptcy court.
3 It did not pose as an ability -- as a limitation on a post-
4 confirmation litigator or a post-effective date litigator to
5 address a wrong done to them by an independent director of a
6 general partner.

7 In a sense, Judge Lynn's determination, and Judge Houser,
8 is consistent somewhat with the Barton Doctrine. Now, do I
9 agree that they're right? No. But I understand the decision
10 and I understand the context in which it was rendered and I
11 don't have a huge problem with it.

12 So, again, let's parse what we're trying to do here.
13 Number one, we are -- we have to bifurcate post-confirmation
14 jurisdiction or post-effective date jurisdiction and what you
15 can do as a post-effective date arbiter versus what you could
16 do pre-effective date and pre-effective date claims. And
17 again, that's the problem with what's written here. It is
18 designed one hundred percent to expand your post-effective
19 date jurisdiction through both the gatekeeper provision and
20 the jurisdictional grant that's here from your pre-effective
21 date capability, your pre-effective date jurisdiction, and
22 your pre-effective date ability to either curb a claim or not
23 to curb a claim. And that, that's the issue.

24 And again, let's start talking about the independent
25 directors. I recognize, again, that there's an order there.

1 But if Mr. Seery -- let's take Mr. Seery -- is acting as a
2 director of Strand but is also an accountant for the Debtor
3 and makes a mistake, he would be sued in his capacity as the
4 accountant for the Debtor, not as an independent director of
5 Strand. That distinction needs to be made.

6 What we are doing here under this plan, and what's been
7 argued by Mr. Pomerantz, is too broad a brush. It needs to be
8 cut back. The Court needs to take a very hard look at what's
9 being presented here.

10 And again, the Court's order is very clear. And this is
11 binding. I recognize that. But the protection they got was
12 serving as an independent director. The protection they
13 didn't get was -- let's take Mr. Seery, if Mr. Seery was
14 serving as an accountant and blew a tax return. Those are
15 distinctions that warrant analysis and warrant looking at
16 here. And again, it is too broad a brush that's touted here,
17 and that is why this plan on its face is not confirmable with
18 respect to both the post-confirmation jurisdiction, the
19 gatekeeper provision, the exculpation provisions.

20 And so let me address a few other things, just to address
21 them. Number one, the argument has been made with respect to
22 the creditors and the resolicitation issue and that creditors
23 could have come in looking, seen, followed the case, and
24 basically calculated and made the same calculation that the
25 Debtor made when they filed this and put forth the new plan

1 analysis versus liquidation analysis. And then they've also
2 made the argument, well, nobody came and complained. Well,
3 two parts to that.

4 Number one, as you know, a disclosure statement needs to
5 be on its face and should not require a creditor to go back in
6 and monitor the record -- and quite frankly, in this record,
7 there are thousands of pages -- and do the calculation
8 himself. This was incumbent upon the Debtor to possibly
9 resolicit when these material changes took place.

10 Number two, the recalculation has not been subject to the
11 entire creditor body seeing it. And anybody who wanted to
12 call them would have had to have seen the document they filed
13 on February 1st and made a telephone call basically
14 contemporaneous with seeing it.

15 Those are two things. The argument that they didn't call
16 me is just nonsensical. There's nobody -- you, you are
17 sitting here -- and I've had a number of battles over the
18 years with Judge (indecipherable), who was -- who -- and her
19 view was, I'm here to protect the little guy who's not --
20 didn't hire counsel, who's not represented by Mr. Clemente and
21 his huge clients who have voted in favor of the plan. It's
22 the little person, *i.e.*, the employees who would vote against
23 a plan that they so -- so desperately tried to get out from
24 under.

25 THE COURT: Well, --

1 MR. DRAPER: It's really a function --

2 THE COURT: -- Mr. Pomerantz argues it's not as
3 though there was a materially adverse change in treatment; it
4 was the disbursement estimate. And doesn't every Chapter 11
5 plan -- most Chapter 11 plans, not every -- they make an
6 estimate. I mean, and it's, frankly, it's very often a big
7 range of recovery, right, a big range of recovery, because we
8 don't know what the allowed claims are going to compute to at
9 the end of the day. There's obviously liquidation of assets.
10 We don't know. Isn't this sort of like every -- not, again,
11 not every other plan, but most other plans -- where there's a
12 big range of possible estimated distributions? I mean, this
13 wasn't a change in treatment, right?

14 MR. DRAPER: Well, let me address that. There are
15 two parts to that. Most plans I see that contain some sort of
16 analysis have a range. This one doesn't have a range. What
17 they've done is they've buried in a footnote or assumption
18 that these numbers may change. So had they said, look, your
19 recovery can go from 60 cents to 85 cents, God bless, they
20 probably would have been right.

21 Number two, which is more problematic to me, to be honest
22 with you, is the fact that, number one, the operating expenses
23 have increased over a hundred percent. And number two, the
24 Debtor has made a determination post-disclosure statement and
25 pre-hearing that they're going to change their model of

1 business.

2 The original disclosure statement said we're not going to
3 get into the managing CLO part of the business and we're going
4 to let these contracts go. However, at some point along the
5 way, they made a change. I don't know to this day, because I
6 was never furnished the backup to the expense side. I
7 understand what they said why they didn't give me the asset
8 side, but the expense side, they should have given me, and I
9 did ask for.

10 But, you know, what we have now is a more fundamental
11 problem with the execution of the plan and the expectation
12 that creditors -- what they're going to get, because, in fact,
13 the expense items have doubled.

14 I think creditors were entitled to know that, rather than
15 it having been sprung upon everybody, when I got it the day
16 before a deposition. And so those are things that I think
17 warranted a change in solicitation. Now, the result may have
18 been the same. I don't know. More people may have voted
19 against the plan. More people may have opted in from Class 8
20 to Class 7, I mean, based upon that information. That
21 information was not provided to them.

22 And so I look at two -- three things. One is a range
23 could have been given, and they probably would have been a
24 whole lot better off. Two, you have a material change in
25 expenses. And three, you have a material change in business

1 model. Three things that occurred between November and this
2 confirmation hearing. Three things that were not known by the
3 creditor body and not told to them.

4 THE COURT: Mr. Draper, I --

5 MR. DRAPER: Now, it may have been told --

6 THE COURT: I don't want to belabor this any more
7 than I think we need to, but I've got a Creditors' Committee
8 with very sophisticated professionals, very sophisticated
9 members. They're fiduciaries to this constituency. You know,
10 you mentioned the little guy. I'm not quite sure who is the
11 little guy in this case. I think it's a case of all big guys.
12 But, I mean, they're fine with what's happened here.

13 Meanwhile, you -- I mean, clarify your standing here for
14 Dugaboy and Get Good. I mean, --

15 MR. DRAPER: I have --

16 THE COURT: -- I know you have standing. Mr.
17 Pomerantz did not say you don't have standing. But in
18 pointing out the economic interests here, I think he said your
19 clients only have asserted a postpetition administrative
20 expense. Is that correct?

21 MR. DRAPER: No. I have a post -- I have an -- I
22 have a claim that's been objected to. I don't think my
23 economic --

24 THE COURT: A claim of what amount?

25 MR. DRAPER: I think it's \$10 million. But Mr.

1 Pomerantz is right, it requires a looking through the --
2 through the entity that I had a loan relationship with.

3 I recognize all of those things. I don't think that's
4 relevant to whether my argument is correct or incorrect. I
5 have standing to do it. I don't think whether my claim is 50
6 cents or \$50 million should change the Court's view of whether
7 the claim is good or bad.

8 THE COURT: Well, I do want to understand, though.
9 Okay. So you have not asserted an administrative expense,
10 correct?

11 MR. DRAPER: No. There's been an administrative
12 expense that's been asserted, --

13 THE COURT: For what?

14 MR. DRAPER: -- but that --

15 THE COURT: For what?

16 MR. DRAPER: I don't have the number in front of me,
17 Your Honor. I don't -- I don't have those numbers --

18 THE COURT: Okay. Well, then, --

19 MR. DRAPER: -- in front of me. I have asserted --

20 THE COURT: -- what is the concept? What is the
21 basis for it?

22 MR. DRAPER: It deals with -- Mr. Pomerantz is
23 absolutely right as to how he's articulated it.

24 THE COURT: I can't remember what he said.

25 MR. DRAPER: It deals with -- it deals with a

1 transaction that's unrelated to the Debtor that deals with
2 Multi-Strat. I agree with that.

3 THE COURT: Okay. So I remember him saying piercing
4 the corporate veil. Your trusts -- both of them, one of them,
5 I don't know -- engaged in a transaction with Multi-Strat that
6 you say --

7 MR. DRAPER: No, that --

8 THE COURT: -- gave -- okay. Well, you say Multi-
9 Strat is liable and the Debtor is also liable?

10 MR. DRAPER: No. Let me make two things. The
11 administrative claim deals with a Multi-Strat transaction that
12 took place during the bankruptcy. My unsecured claim deals
13 with a transaction that took place prior to the bankruptcy,
14 where we lent money to another entity that then funneled money
15 out into the Debtor. We're -- our contention is that the
16 Debtor is liable for that loan.

17 THE COURT: All right. So both the administrative
18 expense as well as the prepetition claim require veil-piercing
19 to establish liability of the Debtor?

20 MR. DRAPER: Or single business enterprise. I don't
21 necessarily have to veil-pierce.

22 THE COURT: Okay. I'm not even sure that single
23 business enterprise is completely available anymore in Texas,
24 by the Texas legislature doing different things, assuming
25 Texas law applies. I don't know, maybe Delaware does. But I

1 -- sorry. Just let me let that sink in a little bit. You're

2 -- okay. Okay. Let me let it --

3 MR. DRAPER: Your Honor, I --

4 THE COURT: -- sink in a little bit.

5 MR. DRAPER: Okay.

6 THE COURT: These trusts -- of which Mr. Dondero is
7 the beneficiary ultimately, right?

8 MR. DRAPER: Yes. Well, and to --

9 THE COURT: So, your --

10 MR. DRAPER: Again, I have not gone up --

11 THE COURT: The beneficiary of your client --

12 MR. DRAPER: Mr. Dondero is --

13 THE COURT: The beneficiary of your client is
14 ultimately hoping to succeed on the administrative expense and
15 the claim on the basis that you should disregard the
16 separateness of Highland and these other entities?

17 MR. DRAPER: Well, let's take the --

18 THE COURT: When he's resisted that --

19 MR. DRAPER: -- unsecured claim. The --

20 THE COURT: -- in multiple pieces of litigation?

21 Right? I'm sorry. I'm just trying to let this sink in.

22 Okay. If you could elaborate. I'm sorry. I'm talking too
23 much. You answer me.

24 MR. DRAPER: Okay. What we are saying is that, in
25 essence, the party we lent the money to was a conduit for the

1 Debtor.

2 THE COURT: Okay. And who was that entity that
3 either --

4 MR. DRAPER: Highland Select.

5 THE COURT: -- Dugaboy or Get Good lent money to?

6 MR. DRAPER: The Get Good claim is completely
7 different. The Get Good claim is written as a tax claim.
8 Honestly, I haven't taken a hard look at it. I will, once we
9 get through this, and it may be withdrawn. The Dugaboy claim
10 is a claim that arises through a conduit loan.

11 THE COURT: Okay. But to which entity?

12 MR. DRAPER: Highland Select.

13 THE COURT: Okay. All right. Well, continue with
14 your argument. I'll get my flow chart out and --

15 MR. DRAPER: Well, let me -- again, I think I've made
16 the points that I needed to make. I think I've done it in a
17 sense that you -- what I think the Court needs to do is take a
18 very hard look at the jurisdictional extension that's being
19 granted here. I think the exculpation provision, in and of
20 itself, just by the mere inclusion of Pachulski and the
21 Debtor's professionals and the Committee professionals, is
22 just unconfirmable. It has to be stricken.

23 And I think the injunction and the juris... the gatekeeper
24 provision are not allowed by applicable law. If this plan
25 merely said, we will enforce the Barton Doctrine, we will

1 abide -- and this order the Court has entered stands, the
2 injunction that's provided and the rights that we have under
3 1141 stand, nobody would be objecting. That's why the U.S.
4 Trustee has objected, because of the expansive nature of what
5 the -- what's been done in this plan.

6 And with that, I'll turn it over to Mr. Taylor or Davor.

7 THE COURT: All right. Who's next?

8 MR. RUKAVINA: Your Honor, Davor Rukavina. Can you
9 hear me?

10 THE COURT: I can.

11 CLOSING ARGUMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

12 MR. RUKAVINA: Your Honor, thank you. I'll try not
13 to repeat the arguments from Mr. Draper, but I do want to
14 point out a couple bigger-picture issues, I think.

15 One, the issue today is not Mr. Dondero, what he has been
16 alleged to have done, what he is alleged to do in the future.
17 The Debtor has gone out of its way to create the impression
18 that we're all tentacles, we're vexatious litigants, we're
19 frivolous litigants. The issue today is whether this plan is
20 confirmable under 1129(a) and 1129(b). And I think that that
21 has to be the focus.

22 Nor is the issue, I think, today any motivation behind my
23 objection or Mr. Draper's or anything else.

24 And I do take issue that my motivation or my client's
25 motivation has some ulterior motive for a competing plan or

1 burning down the house or anything like that. It's very, very
2 simple. My clients do not want \$140 million of their money
3 and their investors' money, to whom they owe fiduciary duties,
4 to be managed by a liquidating debtor under new management
5 without proper staffing and with an obvious conflict of
6 interest in the form of Mr. Seery wearing two hats.

7 I respect very much that Mr. Seery wants to monetize
8 estate assets for the benefit of the estate creditors. That's
9 his job. That's incompatible with his job under the Advisers
10 Act and, as he said, to maximize value to my clients and over
11 a billion dollars of investments in these CLOs.

12 That should not be, Your Honor, a controversial
13 proposition. I should not be described as a tentacle or
14 vexatious because my clients don't want their money managed by
15 someone that they, in effect, did not contract with. I may be
16 -- I may lose that argument. The CLOs have obviously
17 consented to the assumption. But my argument should not be
18 controversial. It should not be painted with a broad brush of
19 somehow being done in bad faith by Mr. Dondero.

20 And in fact, Mr. Seery has admitted that the Debtor and he
21 are fiduciaries to us. The fact that today they call us
22 things like tentacles and serial litigants and vexatious
23 litigants -- we all know what a vexatious litigant is. We've
24 all dealt with those. The fact that our fiduciary would call
25 us that just reconfirms that it should have no business

1 managing our or other people's money.

2 And then for what? Mr. Seery has basically said that the
3 Debtor will make some \$8.5 million in revenue from these
4 contracts, net out \$4 million of expenses. That's net profit
5 of \$4.5 million. But then they have to pay \$3.5 million for
6 D&O insurance and \$525,000 in cure claims. But it's the
7 Debtor's business decision, not ours.

8 Your Honor, the second issue is the cram-down of Class 8.
9 There are two problems here: the disparate treatment between
10 Class 7 and Class 8, which also raises classification, and
11 then the absolute priority rule. Class 7 is a convenience
12 class claim -- is a convenience claim, Your Honor, with a \$1
13 million threshold. Objectively, that is not for
14 administrative convenience, as the Code allows. And the only
15 evidence as to how that million dollars was arrived at was,
16 oh, it was a negotiation of the Committee.

17 There is no evidence justifying administrative
18 convenience. Therefore, there is no evidence justifying
19 separate classification. And on cram-down, the treatment has
20 to be fair and equitable, which *per se* it is not if there is
21 unfair discrimination. And there is unfair discrimination,
22 because Class 8 will be paid less.

23 On the absolute priority rule, Your Honor, I think that
24 it's very simple. I think that the Code is very clear that
25 equity cannot retain anything -- I'm sorry, equity cannot

1 retain any property or be given any property. Property is the
2 key word in 1129(b), not value. It doesn't matter that this
3 property may not have any value, although Mr. Seery said that
4 it might. What matters is whether these unvested contingent
5 interests in the trust are property. And Your Honor, they are
6 property. They have to be property. They are trust
7 interests.

8 So the absolute priority rule is violated on its face.
9 There is no evidence that unsecured creditors in Class 8 will
10 receive hundred-cent dollars. The only evidence is that
11 they'll receive 71 cents. Mr. Seery said there's a potential
12 upside from litigation. He never quantified that upside. And
13 there is zero evidence that Class 8 creditors are likely to be
14 paid hundred-cent dollars. So, again, you have the absolute
15 priority rule issue.

16 And this construct where, okay, well, equity won't be in
17 the money unless everyone higher above is paid in full, that
18 is just a way to try to get around the dictate of the absolute
19 priority rule. If that logic flies, then the next time I have
20 a hotel client or a Chapter 11 debtor-in-possession client
21 where my equity wants to retain ownership, I'll just create
22 something like, well, here's a trust, creditors own the trust,
23 I won't distribute any money to equity, and equity can just
24 stay in control.

25 The point again is that this is property and it's being

1 received on account of prepetition equity.

2 And there's also the control issue. The absolute priority
3 rule, the Supreme Court is clear that control of the post-
4 confirmation equity is also subject to the absolute priority
5 rule. Here you have the same prepetition management
6 postpetition controlling the Debtor and the assets.

7 Your Honor, the Rule 2015.3 issue, someone's going to say
8 that it's trivial. Someone's going to accuse me of pulling
9 out nothing to make something. Your Honor, it's not trivial.
10 That's part of the problem in this case, that this Debtor owns
11 other entities that own assets, and there's been precious
12 little window given into that during the case, during this
13 confirmation hearing, and in the disclosure statement.

14 Rule 2015.3 is mandatory. It's a shall. I respect very
15 much Mr. Seery's explanation that there was a lot going on
16 with the COVID and with everything and that it just fell
17 through the cracks. That's an honest explanation. But the
18 Rule has not been complied with. And 1107(a) requires that
19 the debtor-in-possession comply with a trustee's duties under
20 704(a)(8). Those duties include filing reports required by
21 the Rules.

22 So we have an 1129(a)(3) problem, Your Honor, because this
23 plan proponent has not complied with Chapter 11 and Title 11.
24 I'll leave it at that, because I suspect, again, someone will
25 accuse me of being trivial on that. It is not trivial. It is

1 a very important rule.

2 On the releases and exculpations, Your Honor, I'm not
3 going to try -- I'm not going to hopefully repeat Mr. Draper.
4 But there's a couple of huge things here with this exculpation
5 that takes it outside of any possible universe of *Pacific*
6 *Lumber*.

7 First, you have a nondebtor entity that is being
8 exculpated. I understand the proposition that, during a
9 bankruptcy case, the professionals of a bankruptcy case might
10 be afforded some protection. I understand that proposition.
11 But here you have Strand and its board that's a nondebtor.

12 The other thing you have that takes this outside of any
13 plausible case law is that the Debtor is exculpated from
14 business decisions, including post-confirmation. I understand
15 that professionals in a case make decisions, and
16 professionals, at the end of the case, especially if the Court
17 is making findings about a plan's good faith, that
18 professionals making decisions on how to administer an estate
19 ought to have some protection.

20 That does not hold true for whether a debtor and its
21 professionals should have protection for how they manage their
22 business. GM cannot be exculpated for having manufactured a
23 defective product and sold it during its bankruptcy case.

24 Here, I asked Mr. Seery whether this language in these
25 provisions, talking about whether the administration of the

1 estate and the implementation of the plan includes the
2 Debtor's management of those contracts and funds. He said
3 yes. He said yes. So if you look at the exculpation
4 provision, it is not limited in time. It affects, Your Honor,
5 I'm quoting, it affects the implementation of the plan.
6 That's going forward.

7 So you are exculpating the Debtor and its professionals
8 from business decisions, including post-confirmation, from
9 negligence. Well, isn't negligence the number one protection
10 that people that have invested a billion dollars with the
11 Debtor have? It's cold comfort to hear, well, you can come
12 after us for gross negligence or theft. I get that. What
13 about negligence? Isn't that what professionals do? Isn't
14 that why professionals have insurance, liability insurance?
15 It's called professional negligence for malpractice.

16 So this exculpation, let there be no mistake -- I heard
17 Your Honor's view and discussion -- this is a different
18 universe, both in space and in time.

19 And we don't have to worry about *Pacific Lumber* too much
20 because we have the *Dropbox* opinion in *Thru, Inc.* We have
21 that opinion. Whether it's sound law or not, I don't wear the
22 robe. But the exculpation provision in that case was
23 virtually identical. And Your Honor, that's a 2018 U.S. Dist.
24 LEXIS 179769. In that opinion, Judge Fish -- I don't think
25 anyone could say that Judge Fish was not a very experienced

1 district court judge -- Judge Fish found that the exculpation
2 violated Fifth Circuit precedent. That exculpation covered
3 the debtor's attorneys, the debtor, the very people that Mr.
4 Pomerantz is now saying, well, maybe the Fifth Circuit would
5 allow an exculpation for.

6 THE COURT: Well, I think he is relying heavily on
7 the analogy of independent directors to Creditors' Committee
8 members, saying that's a different animal, if you will, than
9 prepetition officers and directors. And he thinks, given the
10 little bit of policy analysis put out there by the Fifth
11 Circuit, they might agree that that's analogous and worthy of
12 an exculpation.

13 MR. RUKAVINA: And they might. And they might. And
14 again, I usually do debtor cases. You know that. I'd love to
15 be exculpated.

16 THE COURT: But --

17 MR. RUKAVINA: And I think, again, I do -- I do --

18 THE COURT: -- I really want people to give me their
19 best argument of why, you know, that's just flat wrong. And
20 Mr. Draper just said it's, you know, there's a categorical --

21 MR. RUKAVINA: Yeah.

22 THE COURT: -- rejection of exculpations except for
23 Committee members and Committee in *Pacific Lumber*. And I'm
24 scratching my head on that one. And partly the reason I am,
25 while 524(e) was thrown out there, the fact is there's nothing

1 explicitly in the Bankruptcy Code, right, that explicitly
2 permits exculpation to a Committee or Committee members.
3 There's just sort of this notion, you know, allegedly embodied
4 in 1103(c), or maybe there are cases you want to cite to me,
5 that they're fiduciaries, they're voluntary fiduciaries, they
6 ought to have qualified immunity.

7 And again, I see it as more of a policy rationale the
8 Fifth Circuit gave than pointing to a certain statute. So if
9 it's really a policy rationale, then I think the analogy given
10 here to a newly-appointed independent board is pretty darn
11 good.

12 So tell me why I'm all wrong, why Mr. Pomerantz is all
13 wrong.

14 MR. RUKAVINA: I am not going to tell you that you're
15 all wrong. I'm not going to tell Mr. Pomerantz that he's all
16 wrong. Although I am, I guess, a Dondero tentacle, I am not a
17 Mr. Draper tentacle, and I happen to disagree with him.
18 That's my right. I respect the man very much. I thought he
19 did a very honorable and ethical job explaining his position
20 to Your Honor. I believe that the Fifth Circuit would approve
21 exculpations for postpetition pre-confirmation matters taken
22 by estate fiduciaries. I do believe that they would. And I
23 do believe that that should be the case.

24 But again, I'm telling you that this one is different.
25 It's -- Mr. Pomerantz is misdirecting you. The estate

1 professionals manage the estate. The Debtor manages its
2 business. It goes out into the world and it manages business.
3 And as Your Honor knows, under that 1969 Supreme Court case,
4 of course I blanked, and under 28 U.S. 959, a debtor must
5 comply, when it's out there, with all applicable law.

6 So if the Debtor -- and I'm making this up, okay? I am
7 making this up. I'm not alleging anything. But if the
8 Debtor, through actionable neglect, lost \$500 million of its
9 clients' or its investor clients' money, I'm telling you that
10 under no theory can that be exculpated, and I'm telling you
11 that that's what this provision does.

12 The estate and the Debtor can release their claims. It
13 happens all the time. Whatever -- whatever claims the estate
14 may have against professionals, those can be released. It's a
15 9019. I'm not complaining about that. Although I do think
16 that it's premature in this case, because we don't know
17 whether there's any liability for the \$100 million that Mr.
18 Seery told you Mr. Dondero lost. But in no event can business
19 -- business --

20 THE COURT: I don't understand what you just said.

21 MR. RUKAVINA: Your Honor, I --

22 THE COURT: Mr. Dondero is not released --

23 MR. RUKAVINA: -- went through Mr. Seery's --

24 THE COURT: -- by the estate.

25 MR. RUKAVINA: I understand. I understand. But we

1 all have to also understand that a board of directors and
2 officers can be liable, breaches of fiduciary duty by not
3 properly managing an employee. So I'm not suggesting -- I
4 mean, I know that there's been an examiner motion filed. I'm
5 not suggesting that we have a mini-trial. I'm not suggesting
6 there's actionable conduct. What I'm telling you is that the
7 evidence shows that there's a large postpetition loss. And
8 it's premature to prevent third parties that might have claims
9 from bringing those.

10 And then I think -- I'm not sure that Your Honor
11 understood my point. Let me try to make it again. This
12 exculpation is not limited in time. This exculpation is
13 expressly not limited in time and applies to the
14 administration of the plan post-confirmation. I don't think
15 under any theory would the Fifth Circuit or any court at the
16 appellate level allow an exculpation for purely post-
17 reorganization post-bankruptcy matters. I have nothing more
18 to tell Your Honor on exculpation.

19 THE COURT: Well, again, I -- perhaps I go down some
20 roads I really don't need to go down here, but I'm not sure I
21 read it the way you did. I thought we were just talking about
22 pre -- postpetition, pre-confirmation. Or pre-effective date.

23 MR. RUKAVINA: Your Honor, Page --

24 THE COURT: The --

25 MR. RUKAVINA: Page 48 of the plan, Section C,

1 Exculpation. Romanette (iv). The implementation of the plan.
2 And I -- and that's -- that's part of why I asked Mr. Seery
3 that yesterday. Does the implementation of the plan, in his
4 understanding, include the Reorganized Debtor's management and
5 wind-down of the Funds, and he said yes.

6 THE COURT: Okay.

7 MR. RUKAVINA: So that's right there in black and
8 white.

9 It also includes the administration of the Chapter 11
10 case. If that is defined broadly, as Mr. Seery wants it to
11 be, to define business decisions, then that also exceeds any
12 permissible exculpation.

13 So, again, I'm telling Your Honor, with due respect to you
14 and to Mr. Pomerantz, that the focus of Your Honor's
15 questioning is wrong. The focus of Your Honor's questioning
16 should be on exculpation from what? From business -- i.e., GM
17 manufacturing and selling the car -- or from management of the
18 bankruptcy case? Management of the bankruptcy case? Okay.
19 Postpetition pre-confirmation managing business, never okay.

20 Your Honor, on the channeling -- and let me add, I think
21 it's very clear, there is no Barton Doctrine here. This is
22 not a Chapter 11 trustee. The Barton Doctrine does not
23 extend to debtors-in-possession. And I can cite you to a
24 recent case, *In re Zaman*, 2020 Bankr. LEXIS 2361, that
25 confirms that the Barton Doctrine does not apply to a debtor-

1 in-possession.

2 I want to --

3 THE COURT: Remind me of that --

4 MR. RUKAVINA: -- discuss, Your Honor, the --

5 THE COURT: Remind me of the facts of that case. I
6 feel like I read it, but -- or saw it in the advance sheets,
7 maybe.

8 MR. RUKAVINA: I honestly do not recall. I read it a
9 few days ago, and since then, I hope Your Honor can
10 appreciate, I've been up very late trying to negotiate
11 something good in this case.

12 THE COURT: I'd like to know --

13 MR. RUKAVINA: So, I mean, I have the case in front
14 of me.

15 THE COURT: I'd like to know about a holding that
16 says Barton Doctrine can't be applied in a Chapter 11 post-
17 confirmation context, if that's --

18 MR. RUKAVINA: Well, I have it --

19 THE COURT: -- indeed the holding.

20 MR. RUKAVINA: I have it right in front of me here,
21 Your Honor, and I can certainly -- all I know is that this
22 case held that -- it rejected the notion that the Barton
23 Doctrine applies to a debtor-in-possession.

24 THE COURT: Okay.

25 MR. RUKAVINA: And maybe --

1 THE COURT: That --

2 MR. RUKAVINA: There it is, right there.

3 THE COURT: What judge?

4 MR. RUKAVINA: Your Honor, it is the Southern
5 District of Florida, and it is the Honorable -- Your Honor, it
6 is the Honorable Mindy Mora.

7 THE COURT: Okay.

8 MR. RUKAVINA: M-O-R-A.

9 THE COURT: Okay.

10 MR. RUKAVINA: I have not had the pleasure of being
11 in front of that judge.

12 Your Honor, let me discuss the channeling injunction.
13 This is the big one for me. This is the big one. And I think
14 we have to begin -- and it's the big one, as I'll get to,
15 because Your Honor knows that the CLO management agreements
16 give my clients certain rights, and this injunction would
17 prevent those rights from being exercised post-confirmation.
18 It's not dissimilar from the PI hearing that we're in the
19 middle of in an adversary.

20 But I begin my analysis, again, with 28 U.S.C. 959. Your
21 Honor, that -- the first sentence of that statute makes it
22 very clear that when it comes to carrying on a business, a
23 debtor-in-possession may be sued without leave of the court
24 appointing them.

25 So the first thing that this channel -- gatekeeper,

1 channeling, I don't mean to miscall it -- the first thing that
2 this gatekeeping injunction does is it stands directly
3 opposite to 28 U.S.C. 959.

4 28 U.S.C. 959 also says that jury rights must be
5 preserved. As I'll argue in a moment, this injunction also
6 affects those rights.

7 In addition to 959, we have the fundamental issue of post-
8 confirmation jurisdiction. As Mr. Draper said, here, this
9 channeling injunction applies to post-confirmation matters.
10 Similar to my answer to you on exculpation, I can see there
11 being a place for a channeling injunction during the pendency
12 of a case or for claims that might have arisen during the
13 pendency of a case. I cannot see that, and I don't know of
14 any court that, at least at a circuit level, that would agree
15 that this can apply post-confirmation.

16 It is, again, the equivalent of GM manufacturing a car
17 post-confirmation and having to go to bankruptcy court because
18 someone's wanting to sue it for product negligence or
19 liability. It's unthinkable. The reason why a debtor exits
20 bankruptcy is to go back out into the community. It's no
21 longer under the protection of the bankruptcy court. That's
22 what the media calls Chapter 11, it calls it the protection of
23 the court. There's no such protection post-reorganization.
24 So, --

25 THE COURT: Is that really analogous, Mr. Rukavina?

1 Let's get real. Is this really analogous --

2 MR. RUKAVINA: It is.

3 THE COURT: -- to GM --

4 MR. RUKAVINA: It is.

5 THE COURT: -- manufacturing thousands of cars?

6 MR. RUKAVINA: It absolutely is analogous. Because
7 this Debtor is going to assume these contracts and it is going
8 to go out there and it is going to make daily decisions
9 affecting a billion dollars of other people's money. Each of
10 those decisions hopefully will be done correctly and make
11 everyone a lot of money, but each of those decisions is the
12 potential for claims and causes of action.

13 So it is analogous, Your Honor. They want my clients and
14 others to come to you for purely post-confirmation matters.
15 The Court will not have that jurisdiction. There will be no
16 bankruptcy estate, nor can the Court's limited jurisdiction to
17 ensure the implementation of the plan go to and affect a post-
18 confirmation business decision.

19 That's the distinction. The Debtor's post-confirmation
20 business is not the implementation of a plan. As Mr. Draper
21 said, there's a new entity. There's a new general partner.
22 There's a new structure. Go out there and do business,
23 Debtor. That's what they're telling you. They're telling you
24 this is not a liquidation because they're going to be in
25 business. Okay. Well, the consequence of that is that

1 there's no post-confirmation jurisdiction.

2 Now, Mr. Pomerantz says, and I think you asked Mr. Draper,
3 well, the jurisdiction to adjudicate whether something is
4 colorable is different from the jurisdiction to adjudicate the
5 underlying matter. Your Honor, I don't understand that
6 argument, and I don't see a distinction. If the Court has no
7 jurisdiction to decide the underlying matter, then how can the
8 Court have any jurisdiction to pass on any aspect of that
9 underlying matter?

10 And whether something is colorable is a fundamental issue
11 in every matter. That's the thing that courts look at in a
12 12(b)(6), in a Rule 11 issue, in a 1927 issue. So they're
13 going to come -- or someone is going to have to come to Your
14 Honor and present evidence and law that something is
15 colorable. Let's say that we've said there's a breach of
16 contract. Aren't we going to have to show you, here's the
17 contract, here's the language, here's the facts giving rise to
18 the breach, here's the elements? And Your Honor is going to
19 have to pass on that. And if Your Honor decides that
20 something is not colorable, then there ain't no step two.

21 And if Your Honor decides that something is colorable,
22 then isn't that going to be binding on the future proceeding?
23 And if it's going to be binding on the future proceeding, then
24 of course you're exercising jurisdiction to adjudicate an
25 aspect of that lawsuit.

1 I don't think that that -- I don't know I can be clearer
2 than that, Your Honor, unless the Debtor has some other
3 understanding of what a colorable claim or cause of action is
4 that I'm misunderstanding.

5 And Your Honor, I would ask, when Your Honor is in
6 chambers, to look at one of these CLO management agreements.
7 I'm sure Your Honor has already. I just pulled one out of the
8 Debtor's exhibits, Exhibit J as in Jason. And Section 14, 14
9 talks about termination for cause. Most of these contracts
10 are for cause. So, Your Honor, cause includes willfully
11 breaching the agreement or violating the law, cause includes
12 fraud, cause includes a criminal matter, such as indictment.

13 So let's imagine, Your Honor, that I come to you a year
14 from now and I say, I would like to terminate this agreement
15 because I don't want the Debtor managing my \$140 million
16 because of one of these causes. What am I going to argue to
17 Your Honor? I'm going to argue to Your Honor that those
18 causes exist. And Your Honor is going to have to pass on
19 that.

20 And if Your Honor says they don't exist, again, I'm done.
21 I just got an effective final ruling from a federal judge that
22 my claim is without merit. I'm done. Your Honor has decided
23 the matter effectively, legally, and finally.

24 That's why, when Mr. Pomerantz says that the jurisdiction
25 to adjudicate the colorableness of a claim is different from

1 adjudicating that claim, it's not correct. They're part of
2 the same thing, Your Honor.

3 We strenuously object to that injunction, we think it's
4 unprecedented, and we strenuously object to that injunction
5 because we are not Mr. Dondero.

6 I understand the January 9th order. I'll let Mr.
7 Dondero's counsel talk about why that was never intended to be
8 a perpetual order. I'll let Mr. Dondero's counsel argue as to
9 why the extension of that order *ad infinitum* in the plan is
10 illegal.

11 But even if Mr. Dondero is enjoined in perpetuity from
12 causing the related parties to terminate these agreements,
13 Your Honor, the related parties themselves are not subject to
14 that injunction. That's why you have the preliminary
15 injunction proceeding impending in front of you on ridiculous
16 allegations of tortious interference.

17 So whether the Court enjoins Mr. Dondero or not in
18 perpetuity is a separate matter. The question is, as you've
19 heard, at least my retail clients, they have boards. Those
20 boards are the final decision-makers. Mr. Dondero is not on
21 those boards.

22 In other words, it is wrong to conclude *a priori* that
23 anything that my clients do has to be at the direction of Mr.
24 Dondero. There is no evidence of that. The evidence is to
25 the contrary.

1 Yes, a couple of my clients, the Advisors are controlled
2 by Mr. Dondero. Mr. Norris testified to that. You'll not
3 find Mr. Norris anywhere testifying in that transcript that
4 Your Honor allowed into evidence that the funds, my retail
5 fund clients are controlled by Mr. Dondero. You won't find
6 that evidence. There was no evidence yesterday or today that
7 Mr. Dondero controls those retail funds. The only evidence is
8 that they have independent boards.

9 So I ask the Court to see that it's a little bit of a
10 sleight of hand by the Debtor. If I am to be enjoined or if I
11 am to have to come to Your Honor in the future as a vexatious
12 litigant or a tentacle or a frivolous litigant, whatever else
13 I've been called today, then let it be because of something
14 that I've done or failed to do, something that my client has
15 done to warrant such a serious remedy, not something that Mr.
16 Dondero is alleged to have done.

17 And what have my clients done, Your Honor? What have we
18 done to be called vexatious litigants and serial litigants?
19 We've done nothing in this case, pretty much, until December
20 16th, when we filed a motion that was a poor motion,
21 unfortunately, the Court found it to be frivolous, and the
22 Court read us the riot act.

23 We refused, on December 22nd, we, my clients' employees,
24 to execute two trades that Mr. Dondero wanted us to execute.
25 We had no obligation to execute them. We knew nothing about

1 them. And Mr. Seery -- I'm sorry. Not Mr. Dondero, that Mr.
2 Seery wanted to execute. And Mr. Seery closed those
3 transactions that same day. And then a professional lawyer at
4 K&L Gates, a seasoned bankruptcy lawyer, sent three letters to
5 a seasoned professional lawyer at Pachulski, and the letters
6 were basically ignored.

7 Okay. Those are the things that we've done. Other than
8 that, we've defended ourselves against a TRO, we've defended
9 ourselves against a preliminary injunction, we will continue
10 to defend ourselves against a preliminary injunction, and we
11 defend ourselves against this plan because it takes away our
12 rights. Is that vexatious litigation? Is that, other than
13 the frivolous motion, is that frivolous litigation?

14 And we heard you loud and clear when you read us the riot
15 act on December 16th. And I will challenge any of these
16 colleagues here today to point me to something that we have
17 filed since then that is in any way, shape, or form arguably
18 meritless.

19 So where is the evidence that my retail funds are
20 tentacles or vexatious litigants or anything else? There is
21 no evidence, Your Honor, and the Debtor is doing its best to
22 give you smoke and mirrors to just make that mental jump from
23 Mr. Dondero to my clients, effectively an alter ego, without a
24 trial on alter ego.

25 Once these contracts are assumed, the Debtor must live

1 with their consequences. It's as simple as that. Your Honor
2 has so held. Your Honor has so held forcefully in the *Texas*
3 *Ballpark* case. And the Court, I submit respectfully, cannot
4 excise by an injunction a provision of a contract.

5 Also, this injunction will -- is a permanent injunction.
6 We know from *Zale* and other cases the Fifth Circuit does
7 permit certain limited plan injunctions that are temporary in
8 hundred-cent plans. This is a permanent one. It doesn't even
9 pretend to be a temporary one.

10 It's also a permanent one because the Debtor knows and I
11 think the Debtor is banking on me being unable to get relief
12 in the Fifth Circuit before Mr. Seery is finished liquidating
13 these CLOs.

14 So what we are talking about today is effectively excising
15 valuable and important negotiated provisions of these
16 contracts, provisions that, although my clients are not
17 counterparties to these contracts, you've heard from at least
18 three of them we do control the requisite vote, the voting
19 percentages, to cause a termination, to remove the Debtor, or
20 to seek to enforce the Debtor's obligations under those
21 contracts.

22 And again, Your Honor, it's very simple. Where those
23 contracts require cause, there either is cause or is not
24 cause. If there is not cause, the Debtor has its remedies.
25 If there is cause, I'll have my remedies. But it's not for

1 this Court post-confirmation to be making that determination.
2 That's not my decision. That's Congress's decision.

3 So, Your Honor, for those reasons, we object, and we
4 continue to object, and we'd ask that the Court not confirm
5 this plan because it is patently unconfirmable. Or if the
6 Court does confirm the plan, that it excise those provisions
7 of the releases, exculpations, and injunction that I just
8 mentioned as being not in line with the Fifth Circuit or
9 Supreme Court precedent.

10 Thank you.

11 THE COURT: All right. Can I -- I meant to ask Mr.
12 Draper this. Can we all agree that we do not have third-party
13 releases *per se* in this plan? Can we all agree on that?

14 MR. DRAPER: I don't know. I have to look at that.
15 I think what you have are exculpations and channeling
16 injunctions for third parties who have not paid for those
17 channeling injunctions or those exculpations.

18 THE COURT: All right.

19 MR. RUKAVINA: Your Honor, was that question -- was
20 that question solely to Mr. Draper?

21 THE COURT: Well, no, it was to all of you. I
22 thought we could all agree that we don't have third party
23 releases *per se*. Okay. There was --

24 MR. RUKAVINA: Your Honor, we --

25 THE COURT: -- a little bit of glossing over that in

1 some of the briefing, I can't remember whose. But we have
2 Debtor releases, we have --

3 MR. RUKAVINA: Yes.

4 THE COURT: -- exculpations that deal with
5 postpetition negligence only, we have injunctions, which I
6 guess the Debtor would say merely serve to implement the plan
7 provisions and are commonplace, but Mr. Draper would say maybe
8 are tantamount to third-party releases. Is that --

9 MR. RUKAVINA: Your Honor, I don't think --

10 THE COURT: -- where we are?

11 MR. RUKAVINA: -- there's any question -- I don't
12 think there's any question that the exculpation is a third-
13 party release, and that that's also what Judge Fish held in
14 the *Dropbox* case. It says that none of the exculpated parties
15 shall have any liability on any claim. So, --

16 THE COURT: All right.

17 MR. RUKAVINA: -- that necessarily --

18 THE COURT: I get what you're saying, but I just
19 think, in common bankruptcy lingo, most people regard a third-
20 party release as when third parties are releasing -- third
21 parties meaning, for example, creditors, interest holders --
22 are releasing officers and directors and other third parties
23 for anything and everything.

24 Exculpation, I get it, it's worded in a passive voice, but
25 it is third parties releasing third parties, but for a narrow

1 thing, postpetition conduct that is negligent. Okay. So I
2 think -- while there's technically something like a third-
3 party release there, it's not in bankruptcy lingo what we call
4 a third-party release. It's an exculpation means no liability
5 of the exculpated parties for postpetition conduct that's
6 negligent. So I -- anyway, I think we all agree that, I mean,
7 can we all agree there aren't any *per se* third-party releases
8 as that term is typically used in bankruptcy parlance?

9 MR. RUKAVINA: I apologize, Your Honor, and I'm not
10 trying to try your patience, but I cannot agree to that.
11 Whatever claims my client, a nondebtor, has against Strand, a
12 nondebtor, are gone. Whether it's a release or exculpations,
13 they're gone. So I apologize, I cannot agree to that, Your
14 Honor.

15 MR. DRAPER: Your Honor, this is Douglas Draper. I
16 can't agree, either. I think it's definitional. And quite
17 frankly, I think I'm looking at the functional effect of
18 what's here, and they appear to be third-party releases.

19 THE COURT: Okay. All right. Who is making the
20 argument for Mr. Dondero?

21 MR. TAYLOR: Your Honor, Clay Taylor appearing on
22 behalf of Mr. Dondero.

23 THE COURT: Okay.

24 CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

25 MR. TAYLOR: Your Honor, first of all, as this Court

1 is well aware, this Court sits, as a bankruptcy court, as a
2 court of equity. It has many different tools available to it.
3 One of those, of course, is denying confirmation of this plan
4 because of the laws that we have discussed today and that we
5 believe the evidence has shown, and I won't go into those. Of
6 course, of course, Your Honor could confirm that plan. Yet
7 another tool available to this Court is it can take it under
8 advisement.

9 To the extent that this Court decides to confirm this plan
10 and decides to confirm it today, it certainly takes a lot of
11 options off the table for all parties. There are ongoing
12 discussions, I'm not going to go into any of the particulars
13 of those discussions, but a ruling on confirmation today would
14 effectively end that, because, absent, then, an order vacating
15 confirmation, there's a lot of eggs that can't become
16 unscrambled after a confirmation order is entered.

17 So we would respectfully ask that, to the extent that the
18 Court is even considering confirmation, we don't believe it to
19 be appropriate, but at least take it under advisement for 30
20 days, or at least, in the very alternative, that it announce
21 some date which it is going to give a ruling, so that we kind
22 of know when that is going to come down, to see if any
23 positive ongoing discussions can result in more of a global
24 resolution that all parties can agree upon.

25 Addressing more the merits of the case, Your Honor, Mr.

1 Dondero does indeed object to the nondebtor releases, the
2 exculpations, the injunction. I believe those have been
3 covered rather extensively in the prior argument, so I wasn't
4 going to go into those here because they've been addressed.
5 Of course, I will endeavor to answer any questions that Your
6 Honor may have on those.

7 I will say I think Your Honor asked for everybody's best
8 shot as to why this is different for a Committee member versus
9 the independent trustees here. I will say my best shot is,
10 first of all, *Pacific Lumber* says what it says. I believe Mr.
11 Pomerantz has indicated their position that that language is
12 dicta and therefore not binding upon this Court. I
13 respectfully disagree with that. But to the extent, more
14 directly answering Your Honor's question, to me, the
15 difference is clear. Chapter 7 trustees are a creature of
16 statute. So are Chapter 11 trustees. And -- as are members
17 of a Committee that are seated pursuant to the Bankruptcy
18 Code. Those are all creatures of statute. And the
19 independent board of trustees, while there are certainly --
20 there are some analogies that can be made, undoubtedly, but
21 they are not a creature of statute. There is no provision for
22 them under the Bankruptcy Code. And therefore I don't believe
23 that they should and can receive the same protections under
24 *Pacific Lumber*.

25 And so hopefully that -- that is my best shot at

1 answering, directly answering the question that Your Honor
2 posed.

3 THE COURT: Okay.

4 MR. DRAPER: Mr. Dondero also has issue with the
5 overbroad continuing jurisdiction of this Court. I believe
6 Mr. Rukavina has stated that rather succinctly, too. Merely
7 ruling upon whatever claim is colorable or not certainly has
8 definite impacts. If this Court has jurisdiction to do that
9 when it otherwise wouldn't have jurisdiction, it enacts an
10 expansion, a potentially impermissible expansion of this
11 Court's jurisdiction. And for that reason, the plan should --
12 confirmation should be denied.

13 Getting into the particulars of 1129, Your Honor, there is
14 problems under 1129(a)(2). Those are the solicitation
15 problems. Let's just kind of look at what the evidence
16 showed. On November 28th, there was a disclosure statement,
17 it was published to all creditors, and it said, under this
18 plan, you're going to get 87 cents. It wasn't a range. Now,
19 there was some assumptions that went in there, but they said,
20 under a liquidation of all these assets, you're going to get
21 62 cents.

22 The Debtors came back approximately two months later, on
23 January 28th, and said, oh, wait, we missed the boat here, and
24 actually, under the plan, you're going to get 61 cents. And
25 under a liquidation, though, you'd only get 48.

1 Well, the problem is, already, two months later, they've
2 already told you they missed the boat on what the liquidation
3 analysis was just two months ago. And two months ago, they
4 told you under a liquidation you'd get 62 cents, and now we're
5 telling you you're going to get less. That's at least some
6 very good evidence that the best interests of the creditors
7 isn't being met, and potentially a liquidation is much better.

8 They then came back, potentially maybe realizing that
9 problem, also because some new information came in with the
10 employees, and also with UBS, which adjusted the overall
11 general unsecured claims pool, and said, well, under the plan
12 you're going to get 71 cents, and under a liquidation you're
13 going to get 55 cents.

14 In between those iterations from November to February,
15 they found \$67 million more in assets. So Mr. Seery testified
16 he believed some of that's as to market increases in values,
17 and some (garbling) investment, market -- securities. And
18 some were just in these private equity investments.

19 There are indeed some rollups behind all of these numbers.
20 I do understand why they wouldn't want to make some of these
21 numbers public, because they might not be able to get --
22 create the upside for any particular asset class that they're
23 seeking to monetize.

24 However, we and others, including Mr. Draper, asked for
25 those rollups to be provided, and we certainly could have

1 taken those under seal or a confidentiality agreement, could
2 have also put those before this Court under seal and the
3 Debtor could have put those rollups before this Court under
4 seal. It elected not to do so.

5 So, rather, what you have is the naked assumptions of this
6 is what we think we can monetize the assets, or we're not
7 going to tell you what it is, but trust me, Creditors, and
8 cool, we found \$67 million worth of value in the past two
9 months, so therefore we're going to beat the liquidation
10 analysis that we previously told you just two months ago.

11 They also acknowledge that, in those two months, that
12 there was going to be about \$26 million in increased costs
13 from their November analysis to their February analysis. And
14 they included that in their projections.

15 Finally, they acknowledged, in those two months, that we
16 had previously estimated -- and they even have it in their
17 assumptions in November liquidation and plan analysis -- that
18 UBS, HarbourVest, and I believe it was Acis, were all going to
19 be valued at zero dollars, and that's what the claims were
20 going to be. Well, they kind of missed the boat on those, and
21 they missed it by a lot. They -- it increased all the claims
22 in the pool from \$195 million to \$273 million, or sorry, I
23 don't -- look at that again, but it was an increase of \$95
24 million. I'm sorry, 190 -- the claims pool increased from
25 \$194 million to -- I'm sorry, Your Honor, I have too many

1 papers in front of me -- on November, the claims pool was 176
2 and it increased by February 1st to 273. Therefore,
3 approximately \$95, almost \$100 million worth of claims that
4 they weren't anticipating that actually came in.

5 That tells you about the quality of the assumptions that
6 went into the analysis to begin with. They missed it by 50
7 percent on what the overall claims pool was going to be.
8 That's significant. It's material.

9 There is a lot of other assumptions that could go into
10 this document, and one of those assumptions are how much are
11 we going to be able to monetize these assets for? One other
12 assumption is, well, how much is it going to cost during the
13 two-year life of this wind-down? Another assumption is going
14 to be, are we actually going to be able to wind down in two
15 years? Because if we're not, well, guess what, all those
16 costs are going to go up. Another assumption is, well, how
17 much are those fee claims going to be over the two-year
18 period? Again, if it goes over two years, they're going to be
19 significantly higher. Moreover, you might have just missed
20 what the burn rate is.

21 So I think it's rather telling that the assumptions made
22 of -- all the way back of over two -- of only two months ago
23 were off by \$100 million, and therefore it skewed all of the
24 plan-versus-liquidation analysis all over the board.

25 That's the only evidence that the Debtor has put forth as

1 to why it's in the best interest of the creditors. And quite
2 frankly, we don't believe they have met their burden. And it
3 is their burden to prove to Your Honor that the plan is better
4 than what a Chapter 7 trustee will -- can do.

5 What the evidence does show, as far as what the plan would
6 do as compared to a hypothetical Chapter 7 trustee, is that we
7 know for sure that the Claimant Trust base fee, just over the
8 two years, is going to be \$3.6 million.

9 (Interruption.)

10 MR. TAYLOR: I'm sorry.

11 THE COURT: Someone needs to put their device on
12 mute. I don't know who that was.

13 MR. TAYLOR: Oh, I'm sorry. I thought you said
14 something, Your Honor.

15 THE COURT: No.

16 MR. TAYLOR: So what we do know is the Claimant
17 Trustee base fee is going to be \$3.6 million. What we don't
18 know and what was not put into evidence because they are still
19 negotiating it is there's going to be a bonus fee on top of
20 that that's going to be paid to Mr. Seery. Is that \$2
21 million? Is that \$4 million? Is that \$10 million? Well, we
22 don't know. We can't perform that analysis as compared to
23 what a hypothetical Chapter 7 trustee could be. Nor can Your
24 Honor, based upon the evidence presented.

25 And quite frankly, I don't see how one could ever conclude

1 -- and there are some other unknowns that we're about to go
2 over, including the Litigation Trust base fee and there are
3 collection fees, contingency fees. Those are also to be
4 negotiated. To be negotiated and unknown. You can't perform
5 the analysis. The Debtor couldn't perform the analysis
6 because those are to be negotiated, so you can't tell whether
7 a Chapter -- hypothetical Chapter 7 trustee might come out
8 better because he's not going to incur all these costs. We
9 know that they're going to incur D&O costs.

10 THE COURT: Let me interject right now.

11 MR. TAYLOR: Sure.

12 THE COURT: Again, I'm going to go back to
13 understanding who your client is arguing for. Okay? Again,
14 as we've said before, Mr. Pomerantz did not technically say no
15 standing, but he thought it was important to point out the
16 economic interests that our Objectors either have or don't
17 have. Okay?

18 So I'm looking through my notes to see exactly what the
19 Dondero economic interest is. I have something written in my
20 notes, but I'm going to let you tell me. Tell me what his
21 economic interests are with regard to this Debtor, this
22 reorganization.

23 MR. TAYLOR: Your Honor, I believe he has been placed
24 into Class 9, Subordinated Claims. So to the extent that
25 there is recovery available to Class 9, he can recover on

1 those claims.

2 THE COURT: But what proof of claim --

3 MR. TAYLOR: We also have --

4 THE COURT: What proof of claim does he have pending
5 at this juncture?

6 MR. TAYLOR: Your Honor, I would have to go back and
7 look. I don't have the proofs of claim register in front of
8 me. And I'm sorry, if I tried to speculate, I would be doing
9 a disservice to my client and this Court by trying to
10 speculate. I did not prepare those proofs of claim. People
11 in my firm did. But I would be merely speculating if I tried
12 to give you an answer off the spot. And I apologize. I'm
13 happy to submit a post-confirmation hearing letter --

14 THE COURT: No, no, no.

15 MR. TAYLOR: -- as to that.

16 THE COURT: I'm not going to allow one more piece of
17 paper in connection with confirmation. I thought you would be
18 able to answer that.

19 MR. TAYLOR: I'm sorry. I just don't want to lie to
20 Your Honor.

21 THE COURT: What about his -- what would be an
22 indirect equity interest?

23 MR. TAYLOR: Well, again, there are a lot of people
24 that know this org chart a lot better than me. This is me
25 going on hearsay myself. But I understand he also owns a lot

1 of indirect interests in subsidiaries, some of which are
2 majority, some of which are minority, and some of which he
3 owns maybe directly, some of which through other entities. So
4 the way in which these assets could be monetized at the sub-
5 debtor level could certainly impact his economic rights and
6 could impact him greatly. For instance, if the --

7 THE COURT: I really wanted an exact answer.

8 MR. TAYLOR: Mr. Seery --

9 THE COURT: I really wanted an exact answer, not just
10 he has an indirect interest in, you know, some of the 2,000 --
11 I'm not going to say tentacles, but --

12 I'm going to interrupt briefly, because I really want to
13 nail down the answer as best I can. Mr. Pomerantz, can you
14 just remind me of what your answer was or statement was
15 regarding Mr. Dondero, individually, his economic stake in all
16 this?

17 MR. POMERANTZ: He has an indemnification claim
18 that's been objected to, --

19 THE COURT: That's the one and only --

20 MR. POMERANTZ: -- although it's not before --

21 THE COURT: That's the one and only pending proof of
22 claim, right?

23 MR. POMERANTZ: That's my understanding. And while
24 it's not before the Court, we could all imagine whether Mr.
25 Dondero's going to be entitled to indemnification.

1 He has an interest in Strand, which is the general
2 partner.

3 THE COURT: Right.

4 MR. POMERANTZ: And Strand owns a quarter-percent --
5 a quarter of one percent of the equity. I believe that is all
6 of Mr. Dondero's economic interest in the Debtor.

7 THE COURT: Okay. So, again, I'm just trying to, you
8 know, understand who he's looking out for, for lack of a
9 better way of saying it, Mr. Taylor, in making these
10 arguments.

11 MR. TAYLOR: So, there is also, and this is -- I'm
12 not involved in what are these going to be filed collection
13 suits, or some of which have been filed, some of which have
14 not been filed, none of which I believe the answer date has
15 been -- has passed or come to be yet.

16 But he is also a defendant in collection suits on these
17 notes, as you are undoubtedly aware.

18 THE COURT: Okay. He's a defendant in adversary
19 proceedings. Okay? That makes him a party in interest to --
20 well, I keep -- that makes him have standing to make an
21 1129(a)(7) argument? That's why I'm going down this trail.
22 Because you've spent the last five minutes talking about, you
23 know, creditors could do better in a Chapter 7 liquidation.
24 I'm not sure he has standing to make that argument, so I'm
25 wanting you to address that squarely.

1 MR. TAYLOR: Your Honor, I believe he has economic
2 interests up and down the capital structure. And I cannot
3 describe to you, without wildly speculating and potentially
4 lying to this Court, which I'm not going to do, without some
5 time to have looked at that, because I was -- I was not
6 involved in the proofs of claim and I am not his accountant.
7 So I could not do that without wildly speculating, so I just
8 -- I would like to more directly answer your question, Your
9 Honor. I am not trying to avoid the question. But I can't
10 honestly answer your question with true facts as we sit here
11 right now.

12 THE COURT: All right. But do you agree or disagree
13 with me that only parties -- the only parties that really can
14 make an 1129(a) (7) argument are holders of claims or interests
15 in impaired classes?

16 MR. TAYLOR: Your Honor, I believe that Mr. Dondero
17 has standing to do so by virtue of claims for indemnification
18 --

19 THE COURT: Okay.

20 MR. TAYLOR: -- if these -- if these -- if this
21 Debtor (indecipherable) able to meet its obligations to
22 indemnify him. And some of those are significant claims that
23 are being brought against him that could total millions, if
24 not tens of millions of dollars, just in defense costs alone,
25 that I do believe give some standing.

1 THE COURT: Okay. So, assuming you're right, you
2 think the evidence does not show this is better than a Chapter
3 7 liquidation where we would have a stranger trustee come in
4 and just, yeah, I guess, cold-turkey liquidate it all.

5 MR. TAYLOR: Your Honor, I do believe that the
6 evidence shows that the Debtor hasn't met its burden as to
7 this. A Chapter 7 trustee doesn't necessarily have to
8 liquidate immediately. It can run these -- these assets. I
9 mean, Mr. Seery is going to do it with ten people. At one
10 time, just two months ago, he said he was going to do it with
11 three people. A Chapter 7 trustee could certainly have a
12 limited runway, or even an extended runway, if it so asked for
13 it, to liquate these Debtors.

14 Moreover, there would be at least the requirements that
15 the Chapter 7 trustee would request the sale, tell creditors
16 about it. And, as many courts have said, the competitive
17 bidding process is the best way to make sure that you ensure
18 the highest and best offer that you can get.

19 Mr. Seery has not committed to providing notice of sales
20 to creditors and other parties in interest, potentially
21 bringing them in as bidders. They -- he could name a stalking
22 horse, but he has not indicated any desire to do so. A
23 Chapter 7 trustee would endeavor to do so.

24 So I do believe that there are some advantages. And
25 you've heard no testimony that they've performed any analysis

1 or conducted any interviews with any Chapter 7 trustees as to
2 whether or not this was possible or not. They just made the
3 naked assumption that they would do work based upon what they
4 said was their experience. And Mr. Seery's deposition, when
5 it was taken and noticed as a 30(b)(6) deposition, and I
6 believe it has been entered into evidence here, he said the
7 last time he dealt with a Chapter 7 trustee was 11 or 13 years
8 ago, and it was the *Lehman* case, and that was the -- a SIPC
9 trustee. So --

10 THE COURT: Well, --

11 MR. TAYLOR: -- that's the last time he had any
12 experience with it.

13 THE COURT: -- again, I don't mean to belabor this
14 point, just like I didn't mean to belabor a few others. But,
15 you know, there is a mechanism, yes, in Chapter 7, Section
16 704, for a trustee to seek court authority to operate a
17 business. But it's not a statute that contemplates long-term
18 operation. Okay? It's just, oh, we've got a little bit of --
19 you know, we have some assets here that really require a
20 short-term operation here.

21 If it's long-term, then you convert to Chapter 11. Okay?
22 It's just a temporary tool, Section 704. Right? Would you
23 agree with me?

24 MR. TAYLOR: That's typically how it has been used.

25 THE COURT: Okay.

1 MR. TAYLOR: But that's not to say that it's limited
2 in time by the statute itself. It doesn't say that it can't
3 go for one year or two years. That can be a short wind-down
4 period.

5 THE COURT: But hasn't your client's argument been
6 this past several weeks that Mr. Seery is moving too fast,
7 he's wanting to sell things and he needs to hold them longer?
8 I mean, these two argument seem inconsistent to me.

9 MR. TAYLOR: So, just because a Chapter 7 trustee has
10 been appointed doesn't mean that he has to sell them any
11 faster than Mr. Seery.

12 I think what the -- the problem with the process that has
13 been going on with Mr. Seery, my client's problem with it, is
14 not necessarily the timing but the process that Mr. Seery is
15 going through with these sales. Provide notice, allow more
16 bidders to come in, make sure that he's getting the highest
17 and best price. And if that happens to be Mr. Dondero who
18 offers the highest and best price, great. And if Mr. Dondero
19 gets outbid by somebody, well, that's all the more better for
20 the estate.

21 THE COURT: Okay. Continue your argument.

22 MR. TAYLOR: I believe we covered a lot of it, Your
23 Honor, and the plan analysis is all based upon their
24 assumptions that there's \$257 million worth of value. Again,
25 there's no rollup provided as to how that asset allocation is

1 broken out, but they consist of a couple of items.

2 First, there's the notes; and second, there's the assets.
3 The notes are either long-term or demand notes. Those long-
4 term notes, Mr. Seery will tell you some have been validly
5 accelerated and therefore are now due and payable. I think
6 there's arguments to the contrary. But those long-term notes
7 probably have some both time value of money and collection
8 costs. And then, of course, you have to discount them by
9 collectability issues, too.

10 I don't believe any analysis went into it, or at least the
11 Court was not provided any data or analysis as to what
12 discounts were applied to those notes. And, therefore, I
13 don't think that this Court can make any determination that
14 the best interests of the creditors have been met.

15 As far as the assets that are to be monetized, again,
16 there's two sub-buckets of those assets. There's securities
17 that are to be sold. Some of those are semi-public securities
18 that have markets. Those are somewhat more readily
19 ascertained. The others are holdings in private equity
20 companies, and sometimes holdings in companies that own other
21 companies.

22 There's no evidence of the value -- empirical evidence of
23 the value of those companies, nor of the assumptions that went
24 into as to when they should be sold, how much they'd be sold
25 for.

1 Again, I do realize the sensitive nature of such
2 information, but that could have been placed under seal. And
3 without that information, I don't believe that the Court can
4 conduct the due diligence it's necessary to say the best
5 interest of the creditors have been met.

6 To sum up, Your Honor -- oh, I'm sorry. One other point
7 that I did want to talk about before I summed up is, you know,
8 Mr. Pomerantz and I were listening to a different record or I
9 was totally confused as to the testimony that was put forth
10 regarding the directors and officers. I believe the testimony
11 in the record is extremely clear that the Debtor made no
12 effort to go out and find out if it could obtain directors and
13 officers insurance without a gatekeeping injunction or a
14 channeling injunction, whatever you want to call it. I
15 believe that his testimony was extremely clear. He didn't
16 shop it. He doesn't know. And that's what the record is
17 before this Court.

18 To the extent that the Debtor wants to rely upon we can't
19 get Debtor -- or, directors and officers insurance because
20 without this gatekeeping function we just can't get it, I
21 believe the record just wholly does not support that. The
22 testimony was at least extremely clear, as how I heard it.
23 Your Honor will have to review the record herself, but I don't
24 believe that there was much argument about it.

25 I'm sure -- as I stated in the beginning, Your Honor, this

1 is a court of equity. It could deny confirmation, as I
2 believe Your Honor should, based upon the flaws in the plan.

3 If Your Honor finds that the plan as written is
4 impermissible because of any of the exculpation or the
5 gatekeeping functions that they're asking, the testimony is
6 equally clear that the independent directors would not serve
7 in -- as officers of the Reorganized Debtor. Any plan that is
8 put forth by the Debtor has to tell the people who are going
9 to be officers going forward. And with that naked testimony
10 before the Court, that it's simply not feasible, and I don't
11 think it is one of the possible -- where the Court can come
12 back and say, well, I can't confirm this plan as written, but
13 if you change it and rewrite it to get rid of the certain
14 offensive parts of the exculpation or the gatekeeping
15 functions, then we can confirm this plan. And I think the
16 evidence before this Court is it's not feasible because none
17 of the directors will serve in that capacity, and therefore
18 this plan should be dead on arrival if Your Honor agrees the
19 proposed provisions do not meet *Pacific Lumber*.

20 We would ask the Court to deny confirmation, but in the
21 alternative, to at least take this under advisement. Give us
22 a time frame -- we'd ask for 30 days -- but give us a time
23 frame of when the Court is going to rule, to allow the
24 positive conversations to move forward.

25 To that end, Your Honor, there is, indeed, a hearing on

1 the extension of a temporary injunction and contempt that is
2 scheduled for Friday. I understand that the parties, at least
3 the joint parties, will not -- will agree to, I'm sorry, will
4 agree to the extension of the temporary injunction until such
5 time as the Court can rule on confirmation. I do see that
6 there could be a lot of harm done at the Friday hearing. We
7 would ask that the Court additionally continue that hearing on
8 that motion and on the injunction, and contempt, until such
9 time as confirmation has been ruled upon. It will be both
10 efficient and allow discussions to continue regarding
11 potential global resolution.

12 And so that is the end of my argument, Your Honor.

13 THE COURT: All right. Thank you. All right. Mr.
14 Pomerantz, do you have any rebuttal?

15 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

16 MR. POMERANTZ: Yes, I do, Your Honor. I want to
17 address a couple of comments that Mr. Taylor made towards the
18 end. First of all -- and, actually, the beginning.

19 We think Your Honor should rule on confirmation. Ruling
20 on confirmation and having an entered confirmation order are
21 two separate things. We understand that a new offer was made.
22 Whether that's acceptable to the Committee -- I actually think
23 it will enhance the ability of the parties to see if they
24 could reach a deal if there's (audio gap) that Your Honor is
25 going to confirm the plan.

1 Again, doesn't mean a confirmation order has to be
2 entered, but I think, based upon my personal experience in
3 negotiating with Mr. Dondero, that your clear communication to
4 the parties that, unless something happens, you will enter a
5 confirmation order, I think will change things. Okay?
6 Without getting into settlement discussions, things have
7 changed over the last several days, and we wish you would have
8 -- wish things would have happened sooner. But we totally
9 disagree that Your Honor should hold your ruling for 30 days
10 or any other period of time.

11 Part of the reason I think they are making that argument
12 is because they have an examiner motion and they recognize
13 that, upon confirmation, the examiner motion is moot. So I
14 think there's strategic reasons as well.

15 We don't think there should be a continuance of the TRO
16 hearing and of the contempt hearing. As Your Honor recalls,
17 the contempt motion was specifically set for this time to give
18 Mr. Dondero enough time to prepare. Your Honor was sensitive
19 to his due process concerns. We set the TRO, the preliminary
20 injunction hearing against the Advisors and the Funds, we set
21 that, again, knowing that it would be after confirmation.

22 So we do not agree that either should be continued.
23 Again, we think the more direct, unequivocal answers Your
24 Honor can give to the parties, the better off we'll be.

25 I guess -- Mr. Taylor and I do agree that the record was

1 clear. I guess we just disagree on the clarity of it. I
2 heard Mr. Tauber testify that when he went out to people, to
3 insurance carriers, after he and Aon were engaged, they all
4 talked about a Dondero exclusion. Okay? They weren't
5 convinced into a gatekeeper provision because it was provided
6 as part of the normal materials you would provide in a
7 bankruptcy court and trying to get D&O liability in the
8 context of a bankruptcy case. Mr. Tauber's testimony was
9 pretty clear, that carriers wanted to have a Dondero
10 exclusion. And, in fact, the only reason we were able to get
11 any coverage was because of the gatekeeper.

12 So, yes, the record was clear. We just disagree.

13 I'd like to go back to Mr. Draper's comments going -- and
14 a couple of things, obviously, overlap. I guess one of the
15 things here, it's great that everyone is coming in here as
16 different interests and different parties or whatnot. But as
17 I mentioned, Your Honor, at the outset, and I've repeated a
18 few times, these are all -- the only people we have not been
19 able to resolve issues with are the Dondero parties and the
20 related parties. And I recall the tentacles. Mr. Davor
21 questioned that. Mr. Clemente, his comments. But the fact of
22 the matter is, Your Honor, Your Honor has heard testimony.
23 Your Honor has had hearings. Mr. Rukavina represents the
24 Advisors and the Funds. Your Honor has never seen the
25 independent board member testify in this case to demonstrate

1 how these entities are really different. So while Mr.
2 Rukavina does -- you know, tries his best, and I think he has
3 limited stuff to work with, but I give him credit for doing
4 the best he can, these are all Dondero-related entities and
5 Your Honor has seen that.

6 So, Your Honor, going to the resolicitation argument, it
7 actually has taken up a lot more time than the argument is
8 worth, for one very simple reason. As I said in my argument,
9 and as Mr. Taylor and Mr. Draper totally ignored, there were
10 17 creditors who voted yes, 17 creditors who were apparently
11 misled, that Mr. Draper is looking out for the little guy and
12 Mr. Taylor is fumbling over his reason for why that's
13 important to Dondero. And of those 17 creditors that voted
14 yes, Your Honor, they were either the employees related to
15 HarbourVest, UBS, Redeemer, or Acis, except for two. And you
16 know the other two? One was Contrarian, a claim buyer, who,
17 yeah, elected to be in Class 7, and the other was an employee
18 with a dollar claim.

19 So the whole argument that there should be a
20 resolicitation is preposterous, Your Honor. But to go to some
21 of the specifics in what they argued, we didn't require
22 creditors to monitor recovery. The footnote -- as I
23 indicated, the UBS 3018 was in the disclosure statement that
24 went out. It didn't make it to the projections. It was
25 clearly -- and they characterize it, I think Mr. Draper

1 characterized it as buried in the document. There is a
2 section that every disclosure statement is required to have
3 called Risk Factors. This disclosure statement had that. And
4 in the disclosure statement, it talked about the amount of
5 claims being a risk factor.

6 Mr. Draper also said that the Debtor totally changed its
7 business model from the first to the second analysis. That is
8 incorrect. The Debtor was always going to manage funds. Yes,
9 did they add the CLOs? But before, they were going to manage
10 Multi-Strat, they were going to manage Restoration Capital,
11 they were going to oversee Korea, they were going to be doing
12 the management of the funds. So there wasn't a big change in
13 the business model, Your Honor.

14 Mr. Taylor, on the solicitation issue, says we found \$67
15 million in assets. You know, that's a disingenuous statement.
16 I think over \$20 million was found because his client and
17 related entities didn't make a payment on notes and they got
18 accelerated. So while before we would have had to wait over
19 time if they were paid, it's not surprising that Mr. Dondero
20 and his related entities just failed to basically pay the
21 notes.

22 So that was, I think, over \$20 million. And then there
23 was the HCLOF asset. That was acquired in the HarbourVest
24 settlement. And then there was basically an increase in some
25 value to some assets.

1 So there wasn't anything mysterious here. There wasn't
2 anything that the Debtor was trying to hide. There weren't
3 any found assets. It was based upon different circumstances.

4 Mr. Taylor complains about the lack of rollup of assets,
5 the lack of evidence on the best interests of creditors test.
6 Your Honor, you've had extensive testimony from Mr. Seery
7 about what would happen in a Chapter 7 and what would happen
8 in a Chapter 11. And you know why we didn't provide the
9 information to Mr. Taylor and his client on what the rollup of
10 the assets would be, and do you know why he wants them? He
11 wants to know what the assets are so he can try to bid.

12 And there also was the allegation that the failure to
13 allow them to bid means we're going to get less in a Chapter
14 11 than a 7. Two comments to that, Your Honor. Number one,
15 if that was the case, a debtor would never be able to satisfy
16 the best interests of creditors test. If the existence of a
17 public process *de facto* meant you would get more value than
18 outside, you would never be able to satisfy that. And, quite
19 honestly, that's just not the law, Your Honor.

20 You have an Oversight Committee with over \$200 million of
21 creditors who are going to watch Mr. Seery like a hawk, like
22 they have watched him during the case. And the concern that
23 somehow, because these assets are not put into full view to
24 sell, that they will get less value, it's just not -- it's not
25 supported by the evidence at all, Your Honor. And Mr. Seery

1 will make the determination. If it makes sense to notice up
2 and provide Mr. Dondero with notice, he will. If he doesn't,
3 he won't.

4 Your Honor, going -- oh, and then the last comment on the
5 -- that I'll make on the resolicitation and the liquidation
6 analysis is Mr. Taylor chides us and we've been criticized for
7 not disclosing more about the HarbourVest and the UBS
8 settlements and that we were off substantially. Your Honor,
9 you've heard testimony that we were in pending litigation with
10 HarbourVest and UBS at the time. What kind of litigant would
11 we be if we came in and said, you know, Your Honor, you know,
12 Creditors, we think the UBS claim is going to be allowed at
13 \$60 million and we think the HarbourVest claim is going to be
14 allowed at \$30 million? Would that really have benefited
15 creditors and this estate, to basically, after we took the
16 position, hard negotiations and hard pleadings that we
17 prepared, and in some cases filed, that we didn't have any
18 liability? It would have made no sense, and it would have
19 been a dereliction of our duty to actually come out and say
20 what the claims -- the claims were, or what we thought they
21 could be settled for.

22 Your Honor, going back to Mr. Draper's comments. He
23 started with the exculpation. First he made a comment that I
24 don't think he intended what he said, but he said that the
25 exculpation order, the January 9th order, cuts off when the

1 independent directors go away. I think what he meant to say
2 is that since the three people are not going to be independent
3 directors anymore, that basically any actions going forward by
4 any of those three are not covered. But let's be clear. The
5 January 9th order is in effect, and if at some point in the
6 future somebody has a claim against those three gentleman, or
7 their agents, for what they did as independent directors or
8 their agents, that order will apply.

9 Your Honor, we next had a discussion, or Mr. Draper and
10 you had a discussion on professionals. I'm aware of the Fifth
11 Circuit law that says *res judicata*, fee applications. I think
12 that only applies to claims that the Debtor and estate would
13 have. It doesn't really apply to an exculpation. But there's
14 Texas state law that I identified in our brief and we cited to
15 that limits third parties' ability to go after professionals.

16 But the bottom line is the Fifth Circuit, in *Pacific*
17 *Lumber*, didn't deal with professionals. Your Honor was
18 correct in pushing both Mr. Taylor and Mr. Rukavina. What
19 really that was was a policy case. And professionals have
20 nothing to do with 524(e). So the *Palco* and the *Pacific*
21 *Lumber* reference and explanation of 524(e) doesn't have
22 anything to do with professionals. And we would submit, Your
23 Honor, that an exculpation, especially in a case like this, is
24 important for professionals.

25 I understand Your Honor's comments that maybe it's much

1 ado about nothing, but I'm not really sure it's much ado about
2 nothing when we have Mr. Dondero and his affiliates who,
3 notwithstanding their efforts to just claim that all they are
4 doing is trying to get a fair shake, Your Honor knows better.
5 Your Honor knows better from the years you've been litigating
6 with them, and we know better and the Debtor knows better from
7 what the independent directors have been dealing with.

8 THE COURT: Let me ask you this, though. I came into
9 the hearing with the impression we were just talking about
10 postpetition pre-confirmation, or pre-effective date maybe I
11 should say, was the expanse of time covered by exculpation.
12 And Mr. Rukavina said no, no, no, go back, look at, I don't
13 know, Subsection 4 of something. It is a post-confirmation
14 concept. What is your response to that?

15 MR. POMERANTZ: I believe it's implementation. And,
16 again, --

17 THE COURT: Implementation? Yes.

18 MR. POMERANTZ: -- I think Mr. Rukavina -- right. I
19 think Mr. Rukavina and Mr. Taylor and Mr. Draper have done a
20 great job trying to muddy the issues. They talk about our
21 sleight of hand and how we're trying to do things that are way
22 beyond the bankruptcy court's jurisdiction. We are not. I
23 think they are trying -- what they have done throughout the
24 case is throw up enough mud. And here's, here's the answer to
25 that question, Your Honor. Implementation. Okay? We know

1 what implementation means. The plan says implementation is
2 cancelation of the equity interests, creation of new general
3 partners, restatement of the limited partners, establishment
4 of the Claimant Trust and Litigation Sub-Trust. That's the
5 implementation.

6 We are not trying to get exculpation for post-confirmation
7 activity. Actually, my partner, Mr. Kharasch, in specifically
8 addressing Mr. Rukavina's concern, said, look, if you have a
9 problem with cause, if you have a problem, want to exercise
10 your rights, we're only asking you to come back to the Court.
11 We are not stopping you.

12 So the whole argument that the exculpation is really broad
13 and is not really -- does not really cover just the plan, the
14 approved plan, I think is a red herring. Implementation is
15 implementation in the context of the plan.

16 And also Mr. Rukavina tries to argue that, well, it's
17 administration, it's not really you acting any operation of
18 business. I just don't think there's any support in the case
19 law. Your Honor has overseen this case, overseen this
20 Debtor's activities, overseen the independent directors'
21 activities, overseen Strand's activities, overseen the
22 employees' activities. And those activities have been
23 (indecipherable) administration of the case. And his attempt
24 to create a different category for, well, it's not
25 administration, it's operation and so it doesn't apply, I just

1 think is wrong.

2 Your Honor made a couple of comments about what was
3 *Pacific Lumber* doing. It was a policy decision. If there was
4 a bright-line rule, then nobody would be entitled to
5 exculpation. The very fact that the Fifth Circuit said that
6 Committee members are different made -- makes it clear it was
7 -- it was policy.

8 And Mr. Taylor's comments that, well, their creation of
9 statute, Chapter 11 trustees and Committee members, that's not
10 what basically the case said. If you look at the citation to
11 touters in the case, it was we want people to volunteer and
12 who are needed for the process. Committee members are needed
13 for the process. We don't want to discourage them from coming
14 in. And the only testimony you have on the independent
15 directors is from Mr. Dubel, and he testified the importance
16 of independent directors to modern-day Chapter 11 practice,
17 the importance of exculpation, indemnification, and D&O
18 insurance. And his testimony: uncontroverted. The Objectors
19 could have brought in someone to say something different, but
20 the only testimony before Your Honor is, if Your Honor does
21 not approve exculpations in cases like this, you will not get
22 independent directors and it will have an adverse effect on
23 the Chapter 11 process.

24 So, while I appreciate all the Objectors trying to say
25 bright line, trying to say *Pacific Lumber*, that is the gut

1 reaction, right? That's -- it's easy to say. But Your Honor
2 will know better, from reading the cases, that's not what
3 *Pacific Lumber* says. And for the several reasons I gave, it's
4 the reason why *Pacific Lumber* does not govern the decision in
5 this case.

6 Your Honor, Mr. Draper then started to talk about *Craig*.
7 And everyone cites *Craig* as this, you know, limiting
8 jurisdiction. Now, we acknowledge that *Craig* and the Fifth
9 Circuit has a more limited post-confirmation jurisdiction
10 approach than the other Circuits, but it's not nonexistent.
11 And just because the Debtor is going out post-confirmation and
12 acting does not mean that the conduct that they are engaging
13 in is not -- and disputes that arise, doesn't come within the
14 Court's jurisdiction. If that was the case, and I think Your
15 Honor recognized this, in your case it was the *TXMS* case,
16 while it's limited, more limited after confirmation, and I
17 think you even, in the case -- or, in one case of yours, said
18 that even after the case is closed there could be
19 jurisdiction. So their just trying to argue *Craig* is just --
20 is just too much.

21 Going out of the gatekeeper, Mr. Draper tried to say we
22 are *Barton*, and that's it, and *Barton* has its limitations, et
23 cetera. First of all, with respect to *Barton*, it is not
24 limited and doesn't include debtors-in-possession. We have
25 cited cases in our materials where it has been applied to

1 debtors-in-possession.

2 So, you know, look, maybe this is a provision -- this is a
3 proposition like many in bankruptcy, you could find a
4 bankruptcy court to agree with a proposition, but there's
5 cases all over the place on that. There's cases applying to
6 post-confirmation. The trend has been to expand *Barton*. But
7 the beauty of it is, Your Honor, you don't have to rely on
8 *Barton*. *Barton* was one of our arguments. We gave *Barton* as,
9 you know, somewhat of an analogy but somehow applying because
10 in the -- because the independent directors were like the
11 trustees.

12 But we recognize it may be going farther than *Barton* has
13 previously gone. But the case law is clear, it is being
14 extended. But we -- I gave you several provisions of the
15 Bankruptcy Code that authorized you to enter a gatekeeper
16 order. None of the Objectors objected on any of those
17 grounds. They didn't say the statutes that I cited. And it
18 wasn't only 105, I know bankruptcy practitioners love to cite
19 105, but there were three or four others that I mentioned, and
20 they're in our brief. There's no case that they cited that
21 said that there is no authority on the gatekeeper.

22 But what was the argument that was raised? And I think
23 Mr. Rukavina raised it, saying, you know, look, I don't
24 understand the argument of no jurisdiction, of jurisdiction
25 for a gatekeeper but no jurisdiction for underlying cause of

1 action. Well, Mr. Rukavina should read and Your Honor should
2 read, when you're considering the plan, the case, the *Villegas*
3 case in the Fifth Circuit as it dealt with *Stern*. That was
4 particularly a case. Does *Barton* -- is *Barton* impacted from
5 *Stern*? By *Stern*? And *Stern*, we know, limits the bankruptcy
6 court's jurisdiction. But, no, the Fifth Circuit said, in
7 that case, no. Even though the bankruptcy court's
8 jurisdiction is limited to hear the claim, there is nothing
9 inconsistent with that and allowing the bankruptcy court to
10 act as a gatekeeper.

11 So Mr. Rukavina's argument that, well, he'll present to
12 you that there's cause and you'll find there's no cause and
13 then he will be without a remedy by someone that had
14 jurisdiction, that really sounds good but it just doesn't
15 withstand analytic scrutiny. There is a distinction. They
16 are glossing over the distinction. They don't like the
17 distinction.

18 And why is that distinction -- and why is it important in
19 this case? Again, we're not talking about garden-variety
20 people who are just involved with a debtor and will get caught
21 up in a bankruptcy. We narrowly tailored the gatekeeper to
22 enjoined parties. Enjoined parties are the people before Your
23 Honor, some of the people that have made the Debtor's life
24 miserable over the last few months.

25 We have every interest and desire, as does the Committee,

1 to go out post-confirmation and monetize these assets. But we
2 see the clouds on the horizon. We see all the pleadings that
3 have been filed by the Objectors saying how, if there's no
4 deal, there will be an unending amount of costs and appeals.
5 It's, you know, the point, not too subtle. It wasn't lost on
6 us.

7 Your Honor, going to Mr. Rukavina's arguments on Class 8
8 cram down, again, it's really a hard argument to understand,
9 but first I want to make a point. He sort of mentioned -- and
10 I'm not sure if he intends to preserve this on appeal, but it
11 was not objected to and I'll ask for a ruling on it, Your
12 Honor -- he said that there was inappropriate separate
13 classification. That was not raised in any of the objections.
14 We don't think it was properly before the Court. We
15 understand there's a component of that in unfair
16 discrimination in connection with a cram down, but there is no
17 objection, there was no filed objection, to the separate
18 classification of the deficiency claims and the Class 8
19 unsecured claims.

20 And if you look at the voting, you realize it wasn't done
21 for gerrymandering, because if you put both claims together,
22 both classes together, you would have had one class that voted
23 yes.

24 So I don't believe the separate classification under the
25 1129 standards is appropriate for Your Honor to consider,

1 other than in connection with the cram down.

2 Now, Mr. Rukavina complains that the only way the
3 convenience class was decided was by way of negotiation. Your
4 Honor, how else do provisions like that get decided? And who
5 was the negotiation between? It was between the Committee.
6 And one of the benefits of a Committee process, and I
7 represent a lot of Committees, you put people in a Committee
8 that have diverse interests and they can come up with an
9 appropriate result. And here you have that. You had one
10 creditor who was a convenience creditor. You have three other
11 creditors who would lose liquidity if convenience payments are
12 made.

13 Do you think that UBS, Acis and Redeemer, do you think
14 they had a desire just to pay people off? No. It was part of
15 a collaborative process. So to say that there was no basis
16 and no testimony on the appropriateness to have -- and how the
17 convenience class was put together just would be wrong.

18 And with respect to the absolute priority rule, Your
19 Honor, again, there's a missing link here, okay? These are
20 contingent interests. They are property. No doubt they are
21 property. But if I did not allow those creditors or those
22 equity to have a contingent interest, the argument would have
23 been made that the plan violates the absolute priority rule.
24 And I said that in my argument. And why would it have
25 violated the absolute priority rule? Because there's a

1 potential that creditors could get over a hundred cents on the
2 dollar, plus interest. So it's a game of gotcha, right?

3 And why do they really care? Mr. Dugaboy said in his --
4 Mr. Draper said in his brief that Dugaboy cares because they
5 may have wanted to buy the interest. Well, I'm sure they can
6 go to Hunter Mountain, you know, Mr. Dondero's left hand can
7 go to his right hand, and I'm sure he'd be happy to sell the
8 contingent interests.

9 And with respect to the argument that Mr. Rukavina made
10 about control, equity be in control, yeah, control is a right.
11 No doubt. You've got -- if you're giving control to the post-
12 confirmation Debtor, that could be a right and implicate the
13 absolute priority rule. But what is the control here? Equity
14 is not given any rights. Your Honor heard how the post-
15 confirmation entity is structured. It's going to be Mr.
16 Seery, overseen by an Oversight Board. So I really don't
17 understand the concept of control. There just is no violation
18 of the absolute priority rule.

19 Your Honor, Mr. Rukavina then took us to task for 2000 --
20 or, for not filing the 2015.3 statement. And if you take his
21 argument to the logical conclusion -- well, we didn't file it,
22 we didn't comply with that Rule, so we're not in compliance
23 with the Bankruptcy Code, so we can never basically get our
24 plan confirmed, right, because it's a violation and we didn't
25 file and seek an extension.

1 That's just a preposterous argument, Your Honor. Mr.
2 Seery poignantly told the Court, in the rush of things that
3 were going on, it wasn't filed. Did Mr. Rukavina, before
4 yesterday, having Mr. Dubel on the stand, did he ever ask
5 where is our 2015.3 report? He probably didn't ask it because
6 the answer -- when I told him the reason why it wasn't filed
7 before January 9 was because I don't think Mr. Dondero wanted
8 it filed, and I think that's why, as Mr. Seery testified, we
9 were having a challenging time getting that information from
10 the in-house -- in-house.

11 But, yes, should it have been filed? Yes. But if that is
12 all they could point to through the course of the case that
13 Mr. Seery or Mr. -- or the rest of the board did wrong, you
14 know, I think that just demonstrates they did a fine job.

15 THE COURT: All right.

16 MR. POMERANTZ: Your Honor?

17 THE COURT: You've got four minutes left.

18 MR. POMERANTZ: Oh. Okay. Your Honor, going to Mr.
19 Rukavina and the Strand argument that it's a nondebtor entity,
20 as I explained in my argument, the Strand -- Strand needs to
21 get exculpation or else that's a backdoor way to the Debtor.
22 Forget about the independent directors, it's a backdoor way to
23 the Debtor. Because Mr. Dondero will be in control. If
24 Strand is sued for post-January 9th activities, he will assert
25 an administrative claim. And one thing from *Pacific Lumber* is

1 clear, the Debtor is entitled to an exculpation as part of the
2 injunction and the -- and the discharge.

3 Your Honor, Mr. Kharasch adequately addressed Mr.
4 Rukavina's comments with the gatekeeper and the gatekeeper
5 problem. We are not seeking to stop his clients, however
6 related they may be, from exercising their rights. We are
7 seeking a process that will not embroil the Debtor in
8 litigation going forward. There is no problem with Your Honor
9 acting as the gatekeeper to do so. And to the extent that
10 they are bound by the January 9th order is not really an issue
11 for today. That'll be an issue at the temporary -- the
12 temporary -- at the preliminary injunction hearing.

13 I -- just one minute, Your Honor.

14 (Pause.)

15 MR. POMERANTZ: Your Honor, I think I covered a lot.
16 If there's anything that any of the Objectors have mentioned
17 that I failed to respond to, I'd be happy to answer questions
18 Your Honor has.

19 THE COURT: All right. I guess there's, what, about
20 two minutes left, if Mr. Clemente had anything.

21 Mr. Clemente, have you drifted off? I doubt it. But
22 anything else from you, Mr. Clemente?

23 MR. TAYLOR: Your Honor, I show him talking -- this
24 is Clay Taylor -- but no one's hearing him.

25 THE COURT: Okay. Mr. Clemente, we are not hearing

1 you, or I'm not seeing you. Make sure you're not on mute.

2 THE CLERK: He's not on mute, Judge.

3 THE COURT: He's not on mute? So we must have a
4 bandwidth issue or something else.

5 All right. Mr. Clemente, still not hearing or seeing you.
6 We'll give him another 30 seconds.

7 THE CLERK: He's coming up.

8 THE COURT: He's coming up? Ah, I see his name now.

9 MR. CLEMENTE: Your Honor, can you hear me?

10 THE COURT: I can hear you now.

11 MR. CLEMENTE: Okay, Your Honor. I don't know what
12 happened. I just switched another camera, so you may not be
13 able to see me, but can you hear me? I'll be very quick.

14 THE COURT: Okay. I can hear you.

15 MR. CLEMENTE: Can you hear me?

16 THE COURT: Yes.

17 MR. CLEMENTE: Okay. Thank you, Your Honor.

18 CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

19 MR. CLEMENTE: Two things I want to say. First, just
20 on Class 8, I think what's important, as my comments
21 emphasized earlier, the structure of Class 8. We must
22 remember what it is. It's really designed so that Class 8
23 holders receive their pro rata share of what's left after
24 prior claims are paid. That's really what Class 8 creditors
25 voted on. That's what the disclosure provided. They did not

1 vote on receiving a specific dollar or a specific recovery
2 percentage.

3 And regarding the projections and estimates, Your Honor,
4 we're talking about large litigation claims that were asserted
5 and then settled. And given the nature of these assets, the
6 values fluctuate. It's perfectly expected, Your Honor, and
7 indeed disclosed, that there could be wide swings in the
8 amount of claims. That does not lead to the conclusion that
9 the plan needs to be resolicited.

10 And then, finally, Your Honor, again, Mr. Pomerantz
11 adequately addressed all the points, as he did with his
12 earlier presentation, so I'm not going to touch on them, but I
13 did want to respond to one thing that Mr. Taylor said. And I,
14 of course, agree with Mr. Pomerantz. The Committee believes
15 there's no reason for you to delay a ruling and would in fact
16 urge you to rule as soon as Your Honor is ready to rule.
17 Confirmation of the plan, to the extent that there are
18 conversations occurring, is not going to prevent those
19 conversations from taking place, and they can continue after
20 the plan is confirmed. There's simply nothing inherent in
21 Your Honor confirming the plan that would prevent those
22 conversations from occurring or would ultimately prevent
23 parties from pivoting to a deal on the off-chance that one
24 should be reached.

25 So I just wanted to emphasize, Your Honor, again, Your

1 Honor is going to rule when Your Honor rules, but the
2 Committee would urge you to rule, and certainly the idea that
3 there may or may not be discussions with Mr. Dondero should
4 not at all in any way lead you to the conclusion that you
5 shouldn't rule or that those conversations cannot continue
6 after plan confirmation.

7 Thank you, Your Honor. Unless you have questions for me.
8 And my apologies with the technology.

9 THE COURT: No problem. All right. Here's what I'm
10 going to do. We can see you now, Mr. Clemente.

11 MR. CLEMENTE: Oh. I'm sorry, Your Honor. I
12 switched to another camera again because it wasn't working.
13 So, I apologize.

14 THE COURT: All right. I am going to call you back
15 Monday. What day of the week will that be? Is that -- I
16 mean, Monday, what date, I should say. That'll be the 8th,
17 right? I am going to call you back Monday, this coming
18 Monday, February 8th, at 9:30 Central time, and I am going to
19 give you my ruling. It will be a detailed oral bench ruling.
20 And I'm not going to leave you hanging on the edge of your
21 seat over the next few days. I will tell you I'm inclined to
22 confirm this plan. I think it meets all of the requirements
23 of 1129 and 1123 and 1122.

24 The thing that I am going to spend some time thinking
25 about between now and Monday morning is, no surprise, the

1 propriety of the exculpations, the propriety of the plan
2 injunctions, the propriety of the gatekeeper provisions. I
3 certainly am duty-bound to go back and reread *Pacific Lumber*,
4 to go back and read *Thru, Inc.*, and to really think hard about
5 what is happening here.

6 So, I'm pretty much down, I think, to just those three
7 issues here. I'll talk to my law clerk. He may remind me of
8 something else that I'm not articulating right now. But I
9 think I'm just down to those issues. Okay? So it's not going
10 to be a mystery very long. We will come back Monday, 9:30.
11 My courtroom deputy will post on the docket the WebEx
12 connection instructions as usual, and we'll go from there.

13 Now, --

14 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
15 Pomerantz. I have a question, and it's going to sound odd
16 coming from someone on the West Coast, but I was wondering if
17 you could do it earlier. And the only reason I say that is,
18 the night before, I have to call in to see if I'm on jury duty
19 on Monday, and it would be helpful to me -- I assume your
20 reading the ruling would be within a half hour, 45 minutes.
21 That if you started at 9:00, if that was possible, I could
22 then get in a car, and if I'm actually called to jury duty, I
23 can get there. Of course, I don't know if I will be called,
24 but I'd hate to miss it.

25 THE COURT: Okay. Well, I don't want to make you

1 miss jury duty. Okay. We will do 9:00 o'clock.

2 MR. POMERANTZ: Thank you, Your Honor.

3 THE COURT: Hopefully no one will be, you know, hung
4 over from watching the Super Bowl. Personally, I don't like
5 Tom Brady, so I may be boycotting the Super Bowl. But maybe
6 I'll watch it. Maybe I'll -- I'll watch it. So we'll do it
7 9:00 o'clock. So 9:00 o'clock next Monday.

8 Now, let's talk about next the currently-set hearing this
9 Friday, February 5th, on the injunction and contempt of court
10 motion as to Mr. Dondero and the other entities. I want to
11 continue that, and here is what I am struggling with. The
12 only day I have next week is Friday, the 12th, and I would
13 rather not use that date because I'm pretty jam-packed Monday
14 through Thursday, unless stuff has been settled that I haven't
15 become aware of. So let me ask two things. First, when is
16 the examiner motion set? I'm just wondering if there's a
17 block of time we have coming up that --

18 MR. POMERANTZ: I believe that's March 2nd, Your
19 Honor, so that's not for another month.

20 THE COURT: Oh, that's not for another month? All
21 right.

22 Traci, are you on the line? I want to ask you --

23 THE CLERK: Yes, I am.

24 THE COURT: What about the following week? I know
25 Monday, the 15th, is a federal holiday, but do we have

1 availability for -- I fear a full day is going to be needed
2 for continuing this Friday setting.

3 THE CLERK: Wednesday, February 17th, is available.

4 THE COURT: We've got all day on Wednesday, February
5 17th?

6 THE CLERK: Yes.

7 THE COURT: All right. What about that? I think I
8 heard Mr. Rukavina, I think he's the one who threw it out
9 there -- or maybe it was Mr. Taylor; I'm getting mixed up --
10 the possibility that they would agree to a continuation of the
11 preliminary injunction through -- well, I think you said
12 through confirmation. Until the Court enters a confirmation
13 order. And if I were to rule and approve confirmation Monday,
14 then we're talking about an order that might be entered sooner
15 than the 17th. So, do you all have any --

16 MR. RUKAVINA: Your Honor?

17 THE COURT: -- mutually-agreeable suggestions? If
18 not, I'm just going to set it the 12th and I'll, you know, I'm
19 killing myself, but I'll --

20 MR. TAYLOR: Your Honor?

21 MR. RUKAVINA: No, Your Honor. I think Your Honor is
22 wise to do what's she's proposing. The agreed TRO against my
23 clients expires on the 15th of February.

24 THE COURT: Uh-huh.

25 MR. RUKAVINA: We can easily move that back a week or

1 a sufficient amount of time so that there's no prejudice by
2 going on the 17th, if that would be acceptable to the Debtor,
3 and then we can just pick a date that's sufficiently after the
4 PI hearing so that there's protection for everyone.

5 THE COURT: All right. Mr. Taylor, do you agree?

6 MR. TAYLOR: Yes, Your Honor. That is acceptable to
7 Mr. Dondero.

8 THE COURT: Okay.

9 MR. TAYLOR: We can also push it back. Can you hear
10 me?

11 THE COURT: Yes, I can. Uh-huh.

12 MR. TAYLOR: Okay.

13 THE COURT: All right.

14 MR. POMERANTZ: I just want to make -- I just want to
15 make sure Mr. Morris, John Morris, is on, since he's taking
16 the lead in those matters. I don't see his picture.

17 MR. MORRIS: I am, Jeff, and I appreciate that. I'm
18 available, Your Honor. We were supposed to take the
19 depositions of Mr. Leventon and Mr. Ellington tomorrow. I
20 don't know if their counsel is on the phone. But given Your
21 Honor's decision to adjourn the hearing from Friday, I would
22 respectfully request at this time that counsel for those two
23 individuals work with me to find a date next week in order to
24 take those depositions.

25 THE COURT: All right. That's --

1 MS. DANDENEAU: Debra Dandeneau from --

2 THE COURT: Go ahead.

3 MS. DANDENEAU: This is Debra Dandeneau from Baker
4 McKenzie. We agree, and we're happy to work with you on a
5 rescheduled time.

6 MR. MORRIS: Thank you very much.

7 THE COURT: All right. All right. So, someone had
8 filed a motion to continue Friday's hearing. I think it was
9 your firm, Mr. Taylor. I already had a motion pending for a
10 few days now. So I'm going to direct you to upload an order,
11 Mr. Taylor, or someone at your firm, continuing the hearing to
12 the 17th at 9:30, with language in there that your -- the
13 injunction is continuing at least through that date. And,
14 again, it's a continuance of the motion for contempt as well
15 as the setting on the preliminary injunction. And, of course,
16 run that by Mr. Morris and Mr. Rukavina.

17 MR. TAYLOR: Sure. Your Honor, this is -- I'm not
18 handling the injunction hearing, or at least I don't think I
19 am. But just so that I'm clear, should maybe the injunction
20 continue through the next day or something, so depending on
21 how Your Honor rules, there's not a rush to try and get an
22 order to you?

23 MR. RUKAVINA: Your Honor, I think that Mr. Morris
24 and I can work this out. Mr. Taylor is not involved in that
25 adversary, that's true, but Mr. Morris and I will be able to

1 very quickly enter a proposed agreed order that extends that
2 TRO for some period of time.

3 THE COURT: Okay.

4 MR. RUKAVINA: I'm not going to be difficult.

5 THE COURT: Okay. So we'll shift to you and Mr.
6 Morris to be the scriveners. I just -- I suggested that
7 because I thought there was a motion to link the order to that
8 had been filed by Bonds Ellis. I may be --

9 MR. MORRIS: There was, Your Honor. There was an
10 emergency motion to continue. We filed an opposition, and
11 Your Honor has not yet ruled on that motion. You're exactly
12 right.

13 THE COURT: Okay. All right.

14 MR. TAYLOR: Your Honor, this is Clay Taylor. I will
15 make sure the right people confer with Davor and John, and
16 we'll get -- we'll link it to that motion, because that makes
17 sense, to have something to link it to.

18 THE COURT: Okay. Yes. And it can be a two-
19 paragraph order, I would think.

20 All right. And then so I'm going to see you Monday at
21 9:00 o'clock Central time with the ruling.

22 Please, don't anyone file anymore paper. I threw that out
23 earlier today. I've got all the paper I need. And I will see
24 you Monday at 9:00 o'clock. Okay? We're adjourned.

25 MR. POMERANTZ: Thank you, Your Honor.

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THE CLERK: All rise.
MR. MORRIS: Thank you, Your Honor.
(Proceedings concluded at 4:34 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling

02/05/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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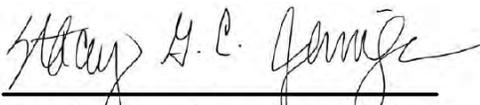
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 22, 2021


United States Bankruptcy Judge

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

_____)
In re:) Chapter 11
)
HIGHLAND CAPITAL MANAGEMENT, L.P.,¹) Case No. 19-34054-sgj11
)
Debtor.)
_____)

**ORDER (I) CONFIRMING THE FIFTH AMENDED
PLAN OF REORGANIZATION OF HIGHLAND CAPITAL
MANAGEMENT, L.P. (AS MODIFIED) AND (II) GRANTING RELATED RELIEF**

The Bankruptcy Court² having:

- a. entered, on November 24, 2020, the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling A Hearing to Confirm the Fifth Amended Plan of Reorganization (C) Establishing Deadline for Filing Objections to Confirmation of Plan, (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures, and (E) Approving Form and Manner of Notice* [Docket No. 1476] (the "Disclosure Statement Order"), pursuant to which the Bankruptcy Court approved the adequacy of the *Disclosure Statement Relating to the Fifth*

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

² Capitalized terms used but not otherwise defined herein have the meanings given to them in the Plan (as defined below). The rules of interpretation set forth in Article I of the Plan apply to this Confirmation Order.



Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1473] (the “Disclosure Statement”) under section 1125 of the Bankruptcy Code and authorized solicitation of the Disclosure Statement;

- b. set January 5, 2021, at 5:00 p.m. prevailing Central Time (the “Objection Deadline”), as the deadline for filing objections to confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, supplemented or modified, the “Plan”);
- c. set January 5, 2021, at 5:00 p.m. prevailing Central Time, as the deadline for voting on the Plan (the “Voting Deadline”) in accordance with the Disclosure Statement Order;
- d. initially set January 13, 2021, at 9:30 a.m. prevailing Central Time, as the date and time to commence the hearing to consider confirmation of the Plan pursuant to Bankruptcy Rules 3017 and 3018, sections 1126, 1128, and 1129 of the Bankruptcy Code, and the Disclosure Statement Order, which hearing was continued to January 26, 2021, at 9:30 a.m. prevailing Central Time and further continued to February 2, 2021;
- e. reviewed: (i) the Plan; (ii) the Disclosure Statement; and (iii) *Notice of (I) Entry of Order Approving Disclosure Statement; (II) Hearing to Confirm; and (III) Related Important Dates* (the “Confirmation Hearing Notice”), the form of which is attached as Exhibit 1-B to the Disclosure Statement Order;
- f. reviewed: (i) the *Debtor’s Notice of Filing of Plan Supplement for the Third Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1389] filed November 13, 2020; (ii) *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1606] filed on December 18, 2020; (iii) the *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1656] filed on January 4, 2021; (iv) *Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* dated January 22, 2021 [Docket No. 1811]; and (v) *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)* on February 1, 2021 [Docket No. 1875]; (collectively, the documents listed in (i) through (v) of this paragraph, the “Plan Supplements”);
- g. reviewed: (i) the *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* filed on December 30, 2020 [Docket No. 1648]; (ii) 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 filed on January 11, 2021 [Docket No.1719]; (iii) the *Third 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* filed on January 15, 2021 [Docket No. 1749]; (iv) the *Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan* [Docket No. 1791]; (v) the *Fourth 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) Released Procedures in Connection Therewith* filed on January 27, 2021 [Docket No. 1847]; (vi) the *Notice of Hearing on Agreed Motion to (I) Assume Nonresidential Real Property Lease with Crescent TC Investors, L.P. Upon Confirmation of Plan and (II) Extend Assumption Deadline* filed on January 28, 2021 [Docket No. 1857]; and (vii) the *Fifth 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) Released Procedures in Connection Therewith* filed on February 1, 2021 [Docket No. 1873] (collectively, the documents referred to in (i) to (vii) are referred to as “List of Assumed Contracts”);

- h. reviewed: (i) the *Debtor’s Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1814] (the “Confirmation Brief”); (ii) the *Debtor’s Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management*; [Docket No. 1807]; and (iii) the *Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1772] and *Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1887] filed on February 3, 2021 (together, the “Voting Certifications”).
- i. reviewed: (i) the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505]; (ii) the *Certificate of Service* dated December 23, 2020 [Docket No. 1630]; (iii) the *Supplemental Certificate of Service* dated December 24, 2020 [Docket No. 1637]; (iv) the *Second Supplemental Certificate of Service* dated December 31, 2020 [Docket No. 1653]; (v) the *Certificate of Service* dated December 23, 2020 [Docket No. 1627]; (vi) the *Certificate of Service* dated January 6, 2021 [Docket No. 1696]; (vii) the *Certificate of Service* dated January 7, 2021 [Docket No. 1699]; (viii) the *Certificate of Service* dated January 7, 2021 [Docket No 1700]; (ix) the *Certificate of Service* dated January 15, 2021 [Docket No. 1761]; (x) the *Certificate of Service* dated January 19, 2021 [Docket No. 1775]; (xi) the

Certificate of Service dated January 20, 2021 [Docket No. 1787]; (xii) the *Certificate of Service* dated January 26, 2021 [Docket No. 1844]; (xiii) the *Certificate of Service* dated January 27, 2021 [Docket No. 1854]; (xiv) the *Certificate of Service* dated February 1, 2021 [Docket No. 1879]; (xv) the *Certificates of Service* dated February 3, 2021 [Docket No. 1891 and 1893]; and (xvi) the *Certificates of Service* dated February 5, 2021 [Docket Nos. 1906, 1907, 1908 and 1909] (collectively, the “Affidavits of Service and Publication”);

- j. reviewed all filed³ pleadings, exhibits, statements, and comments regarding approval of the Disclosure Statement and confirmation of the Plan, including all objections, statements, and reservations of rights;
- k. conducted a hearing to consider confirmation of the Plan, which commenced on February 2, 2021, at 9:30 a.m. prevailing Central Time and concluded on February 3, 2021, and issued its oral ruling on February 8, 2021 (collectively, the “Confirmation Hearing”);
- l. heard the statements and arguments made by counsel in respect of confirmation of the Plan and having considered the record of this Chapter 11 Case and taken judicial notice of all papers and pleadings filed in this Chapter 11 Case; and
- m. considered all oral representations, testimony, documents, filings, and other evidence regarding confirmation of the Plan, including (a) all of the exhibits admitted into evidence;⁴ (b) the sworn testimony of (i) James P. Seery, Jr., the Debtor’s Chief Executive Officer and Chief Restructuring Officer and a member of the Board of Directors of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner; (ii) John S. Dubel, a member of the Board of Strand; (iii) Marc Tauber, a Vice President at Aon Financial Services; and (iv) Robert Jason Post, the Chief Compliance Officer of NexPoint Advisors, LP (collectively, the “Witnesses”); (c) the credibility of the Witnesses; and (d) the Voting Certifications.

NOW, THEREFORE, after due deliberation thereon and good cause appearing therefor, the Bankruptcy Court hereby makes and issues the following findings of fact and conclusions of law:

³ Unless otherwise indicated, use of the term “filed” herein refers also to the service of the applicable document filed on the docket in this Chapter 11 Case, as applicable.

⁴ The Court admitted the following exhibits into evidence: (a) all of the Debtor’s exhibits lodged at Docket No. 1822 (except TTTT, which was withdrawn by the Debtor); (b) all of the Debtor’s exhibits lodged at Docket No. 1866; (c) all of the Debtor’s exhibits lodged at Docket No. 1877; (d) all of the Debtor’s exhibits lodged at Docket No. 1895; and (e) Exhibits 6-12 and 15-17 offered by Mr. James Dondero and lodged at Docket No. 1874.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Findings of Fact and Conclusions of Law.** The findings and conclusions set forth herein, together with the findings of fact and conclusions of law set forth in the record during the Confirmation Hearing, constitute the Bankruptcy Court’s findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable to this proceeding pursuant to Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. **Introduction and Summary of the Plan.** Prior to addressing the specific requirements under the Bankruptcy Code and Bankruptcy Rules with respect to the confirmation of the Plan, the Bankruptcy Court believes it would be useful to first provide the following background of the Debtor’s Chapter 11 Case, the parties involved therewith, and some of the major events that have transpired culminating in the filing and solicitation of the Plan of this very unusual case. Before the Bankruptcy Court is the *Debtor’s Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, filed on November 24, 2020, as modified on January 22, 2021 and again on February 1, 2021. The parties have repeatedly referred to the Plan as an “asset monetization plan” because it involves the orderly wind-down of the Debtor’s estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board. The Plan provides for a Claimant Trust to, among other things, manage and monetize the Claimant Trust Assets for the benefit of the Debtor’s economic stakeholders. The Claimant Trustee is responsible

for this process, among other duties specified in the Plan's Claimant Trust Agreement. There is also anticipated to be a Litigation Sub-trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of the Debtor's economic constituents.

3. **Confirmation Requirements Satisfied.** The Plan is supported by the Committee and all claimants with Convenience Claims (*i.e.*, general unsecured claims under \$1 million) who voted in Class 7. Claimants with Class 8 General Unsecured Claims, however, voted to reject the Plan because, although the Plan was accepted by 99.8% of the amount of Claims in that class, only 17 claimants voted to accept the Plan while 27 claimants voted to reject the Plan. As a result of such votes, and because Mr. Dondero and the Dondero Related Entities (as defined below) objected to the Plan on a variety of grounds primarily relating to the Plan's release, exculpation and injunction provisions, the Bankruptcy Court heard two full days of evidence on February 2 and 3, 2021, and considered testimony from five witnesses and thousands of pages of documentary evidence in determining whether the Plan satisfies the confirmation standards required under the Bankruptcy Code. The Bankruptcy Court finds and concludes that the Plan meets all of the relevant requirements of sections 1123, 1124, and 1129, and other applicable provisions of the Bankruptcy Code, as more fully set forth below with respect to each of the applicable confirmation requirements.

4. **Not Your Garden Variety Debtor.** The Debtor's case is not a garden variety chapter 11 case. The Debtor is a multibillion-dollar global investment adviser registered with the SEC, pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mark Okada resigned from his role with Highland prior to the

bankruptcy case being filed on October 16, 2019 (the “Petition Date”). Mr. Dondero controlled the Debtor as of the Petition Date but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Committee, as described below. Although Mr. Dondero remained with the Debtor as an unpaid employee/portfolio manager after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and/or control numerous non-debtor entities in the complex Highland enterprise.

5. **The Debtor.** The Debtor is headquartered in Dallas, Texas. As of the Petition Date, the Debtor employed approximately 76 employees. The Debtor is privately-owned: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; (c) 0.0627% by Mark Okada, personally and through family trusts; and (d) 0.25% by Strand, the Debtor’s general partner.

6. **The Highland Enterprise.** Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including collateralized loan obligation vehicles (“CLOs”), and other investments. Some of these assets are managed by the Debtor pursuant to shared services agreements with certain affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the byzantine complex of entities under the Highland umbrella. None of these affiliated entities filed for chapter 11 protection. Most, but not all, of these entities are not subsidiaries (direct or indirect) of the Debtor. Many of the Debtor’s affiliated companies are

offshore entities, organized in jurisdictions such as the Cayman Islands and Guernsey. *See* Disclosure Statement, at 17-18.

7. **Debtor's Operational History.** The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates. For additional liquidity, the Debtor, prior to the Petition Date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at non-Debtor subsidiaries and cause those proceeds to be distributed to the Debtor in the ordinary course of business. The Debtor's current Chief Executive Officer, James P. Seery, Jr., credibly testified at the Confirmation Hearing that the Debtor was "run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits." The Bankruptcy Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation—as further addressed below.

8. **Not Your Garden Variety Creditor's Committee.** The Debtor and this chapter 11 case are not garden variety for so many reasons. One of the most obvious standouts in this case is the creditor constituency. The Debtor did not file for bankruptcy because of any of the typical reasons that large companies file chapter 11. For example, the Debtor did not have a large, asset-based secured lender with whom it was in default; it only had relatively insignificant secured indebtedness owing to Jeffries, with whom it had a brokerage account, and one other entity, Frontier State Bank. The Debtor also did not have problems with its trade vendors or landlords.

The Debtor also did not suffer any type of catastrophic business calamity. In fact, the Debtor filed for Chapter 11 protection six months before the onset of the COVID-19 pandemic. Rather, the Debtor filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world. The Committee in this case has referred to the Debtor—under its former chief executive, Mr. Dondero—as a “serial litigator.” The Bankruptcy Court agrees with that description. By way of example, the members of the Committee (and their history of litigation with the Debtor and others in the Highland complex) are as follows:

- a. **The Redeemer Committee of the Highland Crusader Fund (the “Redeemer Committee”).** This Committee member obtained an arbitration award against the Debtor in the amount of \$190,824,557, inclusive of interest, approximately five months before the Petition Date, from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the Petition Date, after years of disputes that started in late 2008 (and included legal proceedings in Bermuda). This creditor’s claim was settled during this Chapter 11 Case in the amount of approximately \$137,696,610 (subject to other adjustments and details not relevant for this purpose).
- b. **Acis Capital Management, L.P., and Acis Capital Management GP, LLC (“Acis”).** Acis was formerly in the Highland complex of companies, but was not affiliated with Highland as of the Petition Date. This Committee member and its now-owner, Joshua Terry, were involved in litigation with the Debtor dating back to 2016. Acis was forced by Mr. Terry (who was a former Highland portfolio manager) into an involuntary chapter 11 bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division before the Bankruptcy Court in 2018, after Mr. Terry obtained an approximately \$8 million arbitration award and judgment against Acis. Mr. Terry ultimately was awarded the equity ownership of Acis by the Bankruptcy Court in the Acis bankruptcy case. Acis subsequently asserted a multi-million dollar claim against Highland in the Bankruptcy Court for Highland’s alleged denuding of Acis to defraud its creditors—primarily Mr. Terry. The litigation involving Acis and Mr. Terry dates back to mid-2016 and has

continued on with numerous appeals of Bankruptcy Court orders, including one appeal still pending at the Fifth Circuit Court of Appeals. There was also litigation involving Mr. Terry and Acis in the Royal Court of the Island of Guernsey and in a state court in New York. The Acis claim was settled during this Chapter 11 Case, in Bankruptcy Court-ordered mediation, for approximately \$23 million (subject to other details not relevant for this purpose), and is the subject of an appeal being pursued by Mr. Dondero.

- c. **UBS Securities LLC and UBS AG London Branch (“UBS”).** UBS is a Committee member that filed a proof of claim in the amount of \$1,039,957,799.40 in this Chapter 11 Case. The UBS Claim was based on a judgment that UBS received from a New York state court in 2020. The underlying decision was issued in November 2019, after a multi-week bench trial (which had occurred many months earlier) on a breach of contract claim against non-Debtor entities in the Highland complex. The UBS litigation related to activities that occurred in 2008 and 2009. The litigation involving UBS and Highland and affiliates was pending for more than a decade (there having been numerous interlocutory appeals during its history). The Debtor and UBS recently announced an agreement in principle for a settlement of the UBS claim (which came a few months after Bankruptcy Court-ordered mediation) which will be subject to a 9019 motion to be filed with the Bankruptcy Court on a future date.
- d. **Meta-E Discovery (“Meta-E”).** Meta-E is a Committee member that is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the Petition Date of more than \$779,000.

It is fair to say that the members of the Committee in this case all have wills of steel. They fought hard before and during this Chapter 11 Case. The members of the Committee, all of whom have volunteered to serve on the Claimant Trust Oversight Board post-confirmation, are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

9. **Other Key Creditor Constituents.** In addition to the Committee members who were all embroiled in years of litigation with Debtor and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of the Debtor, for many years in both Delaware and Texas state courts. Mr. Daugherty filed an amended

proof of claim in this Chapter 11 Case for \$40,710,819.42 relating to alleged breaches of employment-related agreements and for defamation arising from a 2017 press release posted by the Debtor. The Debtor and Mr. Daugherty recently announced a settlement of Mr. Daugherty's claim pursuant to which he will receive \$750,000 in cash on the Effective Date of the Plan, an \$8.25 million general unsecured claim, and a \$2.75 million subordinated claim (subject to other details not relevant for this purpose). Additionally, entities collectively known as "HarbourVest" invested more than \$70 million with an entity in the Highland complex and asserted a \$300 million proof of claim against the Debtor in this case, alleging, among other things, fraud and RICO violations. HarbourVest's claim was settled during the bankruptcy case for a \$45 million general unsecured claim and a \$35 million subordinated claim, and that settlement is also being appealed by a Dondero Entity.

10. **Other Claims Asserted.** Other than the Claims just described, most of the other Claims in this Chapter 11 Case are Claims asserted against the Debtor by: (a) entities in the Highland complex—most of which entities the Bankruptcy Court finds to be controlled by Mr. Dondero; (b) employees who contend that are entitled to large bonuses or other types of deferred compensation; and (c) numerous law firms that worked for the Debtor prior to the Petition Date and had outstanding amounts due for their prepetition services.

11. **Not Your Garden Variety Post-Petition Corporate Governance Structure.** Yet another reason this is not your garden variety chapter 11 case is its post-petition corporate governance structure. Immediately from its appointment, the Committee's relationship with the Debtor was contentious at best. First, the Committee moved for a change of venue from

Delaware to Dallas. Second, the Committee (and later, the United States Trustee) expressed its then-desire for the appointment of a chapter 11 trustee due to its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

12. **Post-Petition Corporate Governance Settlement with Committee.** After spending many weeks under the threat of the potential appointment of a trustee, the Debtor and Committee engaged in substantial and lengthy negotiations resulting in a corporate governance settlement approved by the Bankruptcy Court on January 9, 2020.⁵ As a result of this settlement, among other things, Mr. Dondero relinquished control of the Debtor and resigned his positions as an officer or director of the Debtor and its general partner, Strand. As noted above, Mr. Dondero agreed to this settlement pursuant a stipulation he executed,⁶ and he also agreed not to cause any Related Entity (as defined in the Settlement Motion) to terminate any agreements with the Debtor. The January 9 Order also (a) required that the Bankruptcy Court serve as “gatekeeper” prior to the commencement of any litigation against the three independent board members appointed to oversee and lead the Debtor’s restructuring in lieu of Mr. Dondero and (b) provided for the exculpation of those board members by limiting claims subject to the “gatekeeper” provision to those alleging willful misconduct and gross negligence.

⁵ This order is hereinafter referred to as the “January 9 Order” and was entered by the Court on January 9, 2020 [Docket No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”).

⁶ See *Stipulation in Support of 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 Ordinary Course* [Docket No. 338] (the “Stipulation”).

13. **Appointment of Independent Directors.** As part of the Bankruptcy Court-approved settlement, three eminently qualified independent directors were chosen to lead Highland through its Chapter 11 Case. They are: James P. Seery, Jr., John S. Dubel (each chosen by the Committee), and Retired Bankruptcy Judge Russell Nelms. These three individuals are each technically independent directors of Strand (Mr. Dondero had previously been the sole director of Strand and, thus, the sole person in ultimate control of the Debtor). The three independent board members' resumes are in evidence. The Bankruptcy Court later approved Mr. Seery's appointment as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. Suffice it to say that this settlement and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee. The Bankruptcy Court and the Committee each trusted the independent directors. They were the right solution at the right time. Because of the unique character of the Debtor's business, the Bankruptcy Court believed the appointment of three qualified independent directors was a far better outcome for creditors than the appointment of a conventional chapter 11 trustee. Each of the independent directors brought unique qualities to the table. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large complex businesses and serving on boards in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries. By way of comparison, in the chapter 11 case of Acis, the former affiliate of Highland that the Bankruptcy Court presided over and which company was

much smaller in size and scope than Highland (managing only 5-6 CLOs), the creditors elected a chapter 11 trustee who was not on the normal trustee rotation panel in this district but, rather, was a nationally known bankruptcy attorney with more than 45 years of large chapter 11 experience. While the Acis chapter 11 trustee performed valiantly, he was sued by entities in the Highland complex shortly after he was appointed (which the Bankruptcy Court had to address). The Acis trustee was also unable to persuade the Debtor and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of Acis' chapter 11 plan over the objections of the Debtor and its affiliates on his fourth attempt (which confirmation was promptly appealed).

14. **Conditions Required by Independent Directors.** Given the experiences in Acis and the Debtor's culture of constant litigation, it was not as easy to get such highly qualified persons to serve as independent board members and, later, as the Debtor's Chief Executive Officer, as it would be in an ordinary chapter 11 case. The independent board members were stepping into a morass of problems. Naturally, they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this Case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland. The Bankruptcy Court heard credible testimony that none of the independent directors would have taken on the role of independent director without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation for mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the independent directors without the Bankruptcy Court's prior authority. This gatekeeper provision was also

included in the Bankruptcy Court’s order authorizing the appointment of Mr. Seery as the Debtor’s Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative entered on July 16, 2020.⁷ The gatekeeper provisions in both the January 9 Order and July 16 Order are precisely analogous to what bankruptcy trustees have pursuant to the so-called “Barton Doctrine” (first articulated in an old Supreme Court case captioned *Barton v. Barbour*, 104 U.S. 126 (1881)). The Bankruptcy Court approved all of these protections in the January 9 Order and the July 16 Order, and no one appealed either of those orders. As noted above, Mr. Dondero signed the Stipulation that led to the settlement that was approved by the January 9 Order. The Bankruptcy Court finds that, like the Committee, the independent board members have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and in good faith, which culminated in the proposal of the Plan currently before the Bankruptcy Court. As noted previously, they completely changed the trajectory of this case.

15. **Not Your Garden Variety Mediators.** And still another reason why this was not your garden variety case was the mediation effort. In the summer of 2020, roughly nine months into the chapter 11 case, the Bankruptcy Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Bankruptcy Court selected co-mediators because mediation among these parties seemed like such a Herculean task—especially during COVID-19 where people could not all be in the same room. Those co-mediators were: Retired

⁷ See *Order Approving the Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 (the “July 16 Order”)

Bankruptcy Judge Alan Gropper from the Southern District of New York, who had a distinguished career presiding over complex chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner at a preeminent law firm working on complex chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas. As noted earlier, the Redeemer Committee and Acis claims were settled during the mediation—which seemed nothing short of a miracle to the Bankruptcy Court—and the UBS claim was settled several months later and the Bankruptcy Court believes the ground work for that ultimate settlement was laid, or at least helped, through the mediation. And, as earlier noted, other significant claims have been settled during this case, including those of HarbourVest (who asserted a \$300 million claim) and Patrick Daugherty (who asserted a \$40 million claim). The Bankruptcy Court cannot stress strongly enough that the resolution of these enormous claims—and the acceptance by all of these creditors of the Plan that is now before the Bankruptcy Court—seems nothing short of a miracle. It was more than a year in the making.

16. **Not Your Garden Variety Plan Objectors (That Is, Those That Remain).** Finally, a word about the current, remaining objectors to the Plan before the Bankruptcy Court. Once again, the Bankruptcy Court will use the phrase “not your garden variety”, which phrase applies to this case for many reasons. Originally, there were over a dozen objections filed to the Plan. The Debtor then made certain amendments or modifications to the Plan to address some of these objections, none of which require further solicitation of the Plan for reasons set forth in more detail below. The only objectors to the Plan left at the time of the Confirmation Hearing

were Mr. Dondero [Docket No. 1661] and entities that the Bankruptcy Court finds are owned and/or controlled by him and that filed the following objections:

- a. *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust and The Dugaboy Investment Trust) [Docket No. 1667];
- b. *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670];
- c. *A Joinder to the Objection filed at 1670 by: NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., NexPoint Real Estate Advisors VIII, L.P., and any funds advised by the foregoing* [Docket No. 1677];
- d. *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; and
- e. *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676]. The entities referred to in (i) through (v) of this paragraph are hereinafter referred to as the "Dondero Related Entities").

17. Questionability of Good Faith as to Outstanding Confirmation

Objections. Mr. Dondero and the Dondero Related Entities technically have standing to object to the Plan, but the remoteness of their economic interests is noteworthy, and the Bankruptcy Court

questions the good faith of Mr. Dondero's and the Dondero Related Entities' objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors. Mr. Dondero wants his company back. This is understandable, but it is not a good faith basis to lob objections to the Plan. As detailed below, the Bankruptcy Court has slowed down plan confirmation multiple times and urged the parties to talk to Mr. Dondero in an attempt to arrive at what the parties have repeatedly referred to as a "grand bargain," the ultimate goal to resolve the Debtor's restructuring. The Debtor and the Committee represent that they have communicated with Mr. Dondero regarding a grand bargain settlement, and the Bankruptcy Court believes that they have.

18. **Remote Interest of Outstanding Confirmation Objectors.** To be specific about the remoteness of Mr. Dondero's and the Dondero Related Entities' interests, the Bankruptcy Court will address them each separately. First, Mr. Dondero has a pending objection to the Plan. Mr. Dondero's only economic interest with regard to the Debtor is an unliquidated indemnification claim (and, based on everything the Bankruptcy Court has heard, his indemnification claims would be highly questionable at this juncture). Mr. Dondero owns no equity in the Debtor directly. Mr. Dondero owns the Debtor's general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Second, a joint objection has been filed by The Dugaboy Trust ("Dugaboy") and the Get Good Trust ("Get Good"). The Dugaboy Trust was created to manage the assets of Mr. Dondero and his family and owns a 0.1866% limited partnership interest in the Debtor. *See* Disclosure Statement at 7, n.3. The Bankruptcy Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero. Get Good

filed three proofs of claim relating to a pending federal tax audit of the Debtor's 2008 return, which the Debtor believes arise from Get Good's equity security interests and are subject to subordination as set forth in its Confirmation Brief. Dugaboy filed three claims against the Debtor: (a) an administrative claim relating to the Debtor's alleged postpetition management of Multi-Strat Credit Fund, L.P., (b) a prepetition claim against a subsidiary of the Debtor for which it seeks to pierce the corporate veil, each of which the Debtor maintains are frivolous in the Confirmation Brief, and (c) a claim arising from its equity security interest in the Debtor, which the Debtor asserts should be subordinated. Another group of objectors that has joined together in one objection is what the Bankruptcy Court will refer to as the "Highland Advisors and Funds." *See* Docket No. 1863. The Bankruptcy Court understands they assert disputed administrative expense claims against the estate that were filed shortly before the Confirmation Hearing on January 23, 2021 [Docket No. 1826], and during the Confirmation Hearing on February 3, 2021 [Docket No. 1888]. At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero. Moreover, Dustin Norris, a witness in a prior proceeding (whose testimony was made part of the record at the Confirmation Hearing), recently

testified on behalf of the Highland Advisors and Funds in another proceeding that Mr. Dondero owned and/or controlled these entities. Finally, various NexBank entities objected to the Plan. The Bankruptcy Court does not believe they have liquidated claims against the Debtor. Mr. Dondero appears to be in control of these entities as well.

19. **Background Regarding Dondero Objecting Parties.** To be clear, the Bankruptcy Court has allowed all these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero. In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of the Debtor in specific ways that were supported by evidence. Around the time that this all came to light and the Bankruptcy Court began setting hearings on the alleged interference, Mr. Dondero's company phone, which he had been asked to turn in to Highland, mysteriously went missing. The Bankruptcy Court merely mentions this in this context as one of many reasons that the Bankruptcy Court has to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

20. **Other Confirmation Objections.** Other than the objections filed by Mr. Dondero and the Dondero Related Entities, the only other pending objection to the Plan is the *United States Trustee's Limited Objection to Confirmation of Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1671], which objected to the Plan's exculpation, injunction, and

Debtor release provisions. In juxtaposition, to these pending objections, the Bankruptcy Court notes that the Debtor resolved the following objections to the Plan:

- a. *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph VV of the Confirmation Order;
- b. *Objection of Dallas County, City of Allen, Allen ISD, City of Richardson, and Kaufman County to Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1662]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph QQ of the Confirmation Order;
- c. *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon)* [Docket No. 1669]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph 82 and paragraphs RR and SS of the Confirmation Order;
- d. *Limited Objection of Jack Yang and Brad Borud to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1666] and the amended joinder filed by Davis Deadman, Paul Kauffman and Todd Travers [Docket No. 1679]. This Objection and the amended joinder were resolved by agreement of the parties pursuant to modifications to the Plan filed by the Debtor;
- e. *United States' (IRS) Limited Objection to Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1668]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraphs TT and UU of the Confirmation Order; and
- f. *Patrick Hagaman Daugherty's Objection to Confirmation of Fifth Amended Plan of Reorganization* [Docket No. 1678]. This objection was resolved by the parties pursuant to the settlement of Mr. Daugherty's claim announced on the record of the Confirmation Hearing.

21. **Capitalized Terms.** Capitalized terms used herein, but not defined herein, shall have the respective meanings attributed to such terms in the Plan and the Disclosure Statement, as applicable.

22. **Jurisdiction and Venue.** The Bankruptcy Court has jurisdiction over the Debtor's Chapter 11 Case pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Chapter 11 Case is proper in this district and in the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23. **Chapter 11 Petition.** On the Petition Date, the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, which case was transferred to the Bankruptcy Court on December 19, 2019. The Debtor continues to operate its business and manage its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. The Office of the United States Trustee appointed the Committee on October 29, 2019.

24. **Judicial Notice.** The Bankruptcy Court takes judicial notice of the docket in this Chapter 11 Case maintained by the clerk of the Bankruptcy Court and the court-appointed claims agent, Kurtzman Carson Consultants LLC ("KCC"), including, without limitation, all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at the hearings held before the Bankruptcy Court during this Chapter 11 Case, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing, as well as all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at hearings held before the Bankruptcy Court or the District Court for the Northern District of Texas in

connection with an adversary proceeding or appellate proceeding, respectively, related to this Chapter 11 Case.

25. **Plan Supplement Documents.** Prior to the Confirmation Hearing, the Debtor filed each of the Plan Supplements. The Plan Supplements contain, among other documents, the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Senior Employee Stipulation, the Related Entity List, the Schedule of Employees, the Reorganized Limited Partnership Agreement, supplements to the Liquidation Analysis/Financial Projections, the Schedule of Contracts and Leases to be Assumed, and the other Plan Documents set forth therein (collectively, the “Plan Supplement Documents”).

26. **Retained Causes of Action Adequately Preserved.** The Bankruptcy Court finds that the list of Retained Causes of Action included in the Plan Supplements sufficiently describes all potential Retained Causes of Action, provides all persons with adequate notice of any Causes of Action regardless of whether any specific claim to be brought in the future is listed therein or whether any specific potential defendant or other party is listed therein, and satisfies applicable law in all respects to preserve all of the Retained Causes of Action. The definition of the Causes of Action and Schedule of Retained Causes of Action, and their inclusion in the Plan, specifically and unequivocally preserve the Causes of Action for the benefit of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust, as applicable.

27. **Plan Modifications Are Non-Material.** In addition to the Plan Supplements, the Debtor made certain non-material modifications to the Plan, which are reflected in (i) the *Redline of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*

(as Modified) filed on January 22, 2021 [Docket No. 1809], and (ii) Exhibit B to the *Debtor's Notice of Filing of Plan Supplement to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on February 1, 2021 [Docket No. 1875] (collectively, the "Plan Modifications"). Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation so long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. None of the modifications set forth in the Plan Supplements or the Plan Modifications require any further solicitation pursuant to sections 1125, 1126, or 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditors or interest holders who have not accepted, in writing, such supplements and modifications. Among other things, there were changes to the projections that the Debtor filed shortly before the Confirmation Hearing (which included projected distributions to creditors and a comparison of projected distributions under the Plan to potential distributions under a hypothetical chapter 7 liquidation). The Plan Supplements and Plan Modifications did not mislead or prejudice any creditors or interest holders nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast votes to accept or reject the Plan. Specifically, the Amended Liquidation Analysis/Financial Projections filed on February 1, 2021 [Docket No. 1875] do not constitute any material adverse change to the treatment of any creditors or interest holders but, rather, simply update the estimated distributions based on Claims that were settled in the interim and provide updated financial data. The filing and notice of the Plan Supplements and Plan Modifications were appropriate and complied with the requirements of

section 1127(a) of the Bankruptcy Code and the Bankruptcy Rules, and no other solicitation or disclosure or further notice is or shall be required. The Plan Supplements and Plan Modifications each became part of the Plan pursuant section 1127(a) of the Bankruptcy Code. The Debtor or Reorganized Debtor, as applicable, is authorized to modify the Plan or Plan Supplement Documents following entry of this Confirmation Order in a manner consistent with section 1127(b) of the Bankruptcy Code, the Plan, and, if applicable, the terms of the applicable Plan Supplement Document.

28. **Notice of Transmittal, Mailing and Publication of Materials.** As is evidenced by the Voting Certifications and the Affidavits of Service and Publication, the transmittal and service of the Plan, the Disclosure Statement, Ballots, and Confirmation Hearing Notice were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to the confirmation of the Plan) have been given due, proper, timely, and adequate notice in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required. The publication of the Confirmation Hearing Notice, as set forth in the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505], complied with the Disclosure Statement Order.

29. **Voting.** The Bankruptcy Court has reviewed and considered the Voting Certifications. The procedures by which the Ballots for acceptance or rejection of the Plan were

distributed and tabulated, including the tabulation as subsequently amended to reflect the settlement of certain Claims to be Allowed in Class 7, were fairly and properly conducted and complied with the Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

30. **Bankruptcy Rule 3016(a).** In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtor as the proponent of the Plan.

31. **Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)).** As set forth below, the Plan complies with all of the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

32. **Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1122 of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between Holders of Claims and Equity Interests.

33. **Classification of Secured Claims.** Class 1 (Jefferies Secured Claim) and Class 2 (Frontier Secured Claim) each constitute separate secured claims held by Jefferies LLC and Frontier State Bank, respectively, and it is proper and consistent with section 1122 of the Bankruptcy Code to separately classify the claims of these secured creditors. Class 3 (Other

Secured Claims) consists of other secured claims (to the extent any exist) against the Debtor, are not substantially similar to the Secured Claims in Class 1 or Class 2, and are also properly separately classified.

34. **Classification of Priority Claims.** Class 4 (Priority Non-Tax Claims) consists of Claims entitled to priority under section 507(a), other than Priority Tax Claims, and are properly separately classified from non-priority unsecured claims. Class 5 (Retained Employee Claims) consists of the potential claims of employees who may be retained by the Debtor on the Effective Date, which claims will be Reinstated under the Plan, are not substantially similar to other Claims against the Debtor, and are properly classified.

35. **Classification of Unsecured Claims.** Class 6 (PTO Claims) consists solely of the claims of the Debtor's employees for unpaid paid time off in excess of the \$13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims in Class 7 and Class 8. Class 7 (Convenience Claims) allows holders of eligible and liquidated Claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's Claim or such holder's *pro rata* share of the Convenience Claims Cash Pool. Class 7 (Convenience Claims) are provided for administrative convenience purposes in order to allow creditors, most of whom are either trade creditors or holders of professional claims, to receive treatment provided under Class 7 in lieu of the treatment of Class 8 (General Unsecured Claims). The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims. Class 8 creditors primarily constitute the litigation claims of the Debtor. Class 8 Creditors

will receive Claimant Trust Interests which will be satisfied pursuant to the terms of the Plan. Class 8 also contains an “opt out” mechanism to allow holders of liquidated Class 8 Claims at or below a \$1 million threshold to elect to receive the treatment of Class 7 Convenience Claims. The Claims in Class 7 (primarily trade and professional Claims against the Debtor) are not substantially similar to the Claims in Class 8 (primarily the litigation Claims against the Debtor), and are appropriately separately classified. Valid business reasons also exist to classify creditors in Class 7 separately from creditors in Class 8. Class 7 creditors largely consist of liquidated trade or service providers to the Debtor. In addition, the Claims of Class 7 creditors are small relative to the large litigation claims in Class 8. Furthermore, the Class 8 Claims were overwhelmingly unliquidated when the Plan was filed. The nature of the Class 7 Claims as being largely liquidated created an expectation of expedited payment relative to the largely unliquidated Claims in Class 8, which consists in large part of parties who have been engaged in years, and in some cases over a decade of litigation with the Debtor. Separate classification of Class 7 and Class 8 creditors was the subject of substantial arm’s-length negotiations between the Debtor and the Committee to appropriately reflect these relative differences.

36. **Classification of Equity Interests.** The Plan properly separately classifies the Equity Interests in Class 10 (Class B/C Limited Partnership Interests) from the Equity Interests in Class 11 (Class A Limited Partnership Interests) because they represent different types of equity security interests in the Debtor and different payment priorities.

37. **Elimination of Vacant Classes.** Section III.C of the Plan provides for the elimination of Classes that do not have at least one holder of a Claim or Equity Interest that is

Allowed in an amount greater than zero for purposes of voting to accept or reject the Plan, and are disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. The purpose of this provision is to provide that a Class that does not have voting members shall not be included in the tabulation of whether that Class has accepted or rejected the Plan. Pursuant to the Voting Certifications, the only voting Class of Claims or Equity Interests that did not have any members is Class 5 (Retained Employees). As noted above, Class 5 does not have any voting members because any potential Claims in Class 5 would not arise, except on account of any current employees of the Debtor who may be employed as of the Effective Date, which is currently unknown. Thus, the elimination of vacant Classes provided in Article III.C of the Plan does not violate section 1122 of the Bankruptcy Code. Class 5 is properly disregarded for purposes of determining whether or not the Plan has been accepted under Bankruptcy Code section 1129(a)(8) because there are no members in that Class. However, the Plan properly provides for the treatment of any Claims that may potentially become members of Class 5 as of the Effective Date in accordance with the terms of the Plan. The Plan therefore satisfies section 1122 of the Bankruptcy Code.

38. **Classification of Claims and Designation of Non-Classified Claims (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1123(a)(1) of the Bankruptcy Code requires that the Plan specify the classification of claims and equity security interests pursuant to section 1122 of the Bankruptcy Code, other than claims specified in sections 507(a)(2), 507(a)(3), or 507(a)(8) of the Bankruptcy Code. In addition to Administrative Claims, Professional Fee Claims, and Priority Tax Claims, each of which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy

Code, the Plan designates eleven (11) Classes of Claims and Equity Interests. The Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

39. **Specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2)).** Article III of the Plan specifies that each of Class 1 (Jefferies Secured Claim), Class 3 (Other Secured Claims), Class 4 (Priority Non-Tax Claims), Class 5 (Retained Employee Claims), and Class 6 (PTO Claims) are Unimpaired under the Plan. Thus, the requirement of section 1123(a)(2) of the Bankruptcy Code is satisfied.

40. **Specification of Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)).** Article III of the Plan designates each of Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), Class 8 (General Unsecured Claims), Class 9 (Subordinated Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) as Impaired and specifies the treatment of Claims and Equity Interests in such Classes. Thus, the requirement of section 1123(a)(3) of the Bankruptcy Code is satisfied.

41. **No Discrimination (11 U.S.C. § 1123(a)(4)).** The Plan provides for the same treatment by the Plan proponent for each Claim or Equity Interest in each respective Class unless the Holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest. The Plan satisfies this requirement because Holders of Allowed Claims or Equity Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such holder's respective class, subject only to the voluntary "opt out" options afforded to members of Class 7 and Class 8 in accordance with the terms of the Plan. Thus, the requirement of section 1123(a)(4) of the Bankruptcy Code is satisfied.

42. **Implementation of the Plan (11 U.S.C. § 1123(a)(5)).** Article IV of the Plan sets forth the means for implementation of the Plan which includes, but is not limited to, the establishment of: (i) the Claimant Trust; (ii) the Litigation Sub-Trust; (iii) the Reorganized Debtor; and (iv) New GP LLC, in the manner set forth in the Plan Documents, the forms of which are included in the Plan Supplements.

- a. **The Claimant Trust.** The Claimant Trust Agreement provides for the management of the Claimant Trust, as well as the Reorganized Debtor with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust that will manage the Reorganized Debtor as its general partner). The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee. Additionally, the Plan provides for the transfer to the Claimant Trust of all of the Debtor's rights, title, and interest in and to all of the Claimant Trust Assets in accordance with section 1141 of the Bankruptcy Code and for the Claimant Trust Assets to automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements.
- b. **The Litigation Sub-Trust.** The Plan and the Litigation Sub-Trust Agreement provide for the transfer to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims (as transferred to the Claimant Trust by the Debtor) in accordance with section 1141 of the Bankruptcy Code and for the Estate Claims to automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and the Litigation Sub-Trust Expenses, as provided for in the Litigation Sub-Trust Agreement. The Litigation Trustee is charged with investigating, pursuing, and otherwise resolving any Estate Claims (including those with respect to which the Committee has standing to pursue prior to the Effective Date pursuant to the January 9 Order) pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, regardless of whether any litigation with respect to any Estate Claim was commenced by the Debtor or the Committee prior to the Effective Date.

- c. **The Reorganized Debtor.** The Reorganized Debtor will administer the Reorganized Debtor Assets, which includes managing the wind down of the Managed Funds.

The precise terms governing the execution of these restructuring transactions are set forth in greater detail in the applicable definitive documents included in the Plan Supplements, including the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, and the Schedule of Retained Causes of Action. The Plan, together with the documents and forms of agreement included in the Plan Supplements, provides a detailed blueprint for the transactions contemplated by the Plan. The Plan's various mechanisms provide for the Debtor's continued management of its business as it seeks to liquidate the Debtor's assets, wind down its affairs, and pay the Claims of the Debtor's creditors. Upon full payment of Allowed Claims, plus interest as provided in the Plan, any residual value would then flow to the holders of Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests). Finally, Mr. Seery testified that the Debtor engaged in substantial and arm's length negotiations with the Committee regarding the Debtor's post-Effective Date corporate governance, as reflected in the Plan. Mr. Seery testified that he believes the selection of the Claimant Trustee, Litigation Trustee, and members of the Claimant Trust Oversight Board are in the best interests of the Debtor's economic constituents. Thus, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

43. **Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).** The Debtor is not a corporation and the charter documents filed in the Plan Supplements otherwise comply with section 1123(a)(6) of the Bankruptcy Code. Therefore, the requirement of section 1123(a)(6) of the Bankruptcy Code is satisfied.

44. **Selection of Officers and Directors (11 U.S.C. § 1123(a)(7)).** Article IV of the Plan provides for the Claimant Trust to be governed and administered by the Claimant Trustee. The Claimant Trust, the management of the Reorganized Debtor, and the management and monetization of the Claimant Trust Assets and the Litigation Sub-Trust will be managed by the Claimant Trust Oversight Board. The Claimant Trust Oversight Board will consist of: (1) Eric Felton, as representative of the Redeemer Committee; (2) Joshua Terry, as representative of Acis; (3) Elizabeth Kozlowski, as representative of UBS; (4) Paul McVoy, as representative of Meta-E Discovery; and (5) David Pauker. Four of the members of the Claimant Trust Oversight Committee are the holders of several of the largest Claims against the Debtor and/or are current members of the Committee. Each of these creditors has actively participated in the Debtor's case, both through their fiduciary roles as Committee members and in their individual capacities as creditors. They are therefore intimately familiar with the Debtor, its business, and assets. The fifth member of the Claimant Trustee Oversight Board, David Pauker, is a disinterested restructuring advisor and turnaround manager with more than 25 years of experience advising public and private companies and their investors, and he has substantial experience overseeing, advising or investigating troubled companies in the financial services industry and has advised or managed such companies on behalf of boards or directors, court-appointed trustees, examiners and special masters, government agencies, and private investor parties. The members of the Claimant Trust Oversight Board will serve without compensation, except for Mr. Pauker, who will receive payment of \$250,000 for his first year of service, and \$150,000 for subsequent years.

45. **Selection of Trustees.** The Plan Supplements disclose that Mr. Seery will serve as the Claimant Trustee and Marc Kirschner will serve as the Litigation Trustee. As noted above, Mr. Seery has served as an Independent Board member since January 2020, and as the Chief Executive Officer and Chief Restructuring Officer since July 2020, and he has extensive management and restructuring experience, as evidenced from his curriculum vitae which is part of the record. The evidence shows that Mr. Seery is intimately familiar with the Debtor's organizational structure, business, and assets, as well as how Claims will be treated under the Plan. Accordingly, it is reasonable and in the Estate's best interests to continue Mr. Seery's employment post-emergence as the Claimant Trustee. Mr. Seery, upon consultation with the Committee, testified that he intends to employ approximately 10 of the Debtor's employees to enable him to manage the Debtor's business until the Claimant Trust effectively monetizes its remaining assets, instead of hiring a sub-servicer to accomplish those tasks. Mr. Seery testified that he believes that the Debtor's post-confirmation business can most efficiently and cost-effectively be supported by a sub-set of the Debtor's current employees, who will be managed internally. Mr. Seery shall initially be paid \$150,000 per month for services rendered after the Effective Date as Claimant Trustee; however, Mr. Seery's long-term salary as Claimant Trustee and the terms of any bonuses and severance are subject to further negotiation by Mr. Seery and the Claimant Trust Oversight Board within forty-five (45) days after the Effective Date. The Bankruptcy Court has also reviewed Mr. Kirschner's curriculum vitae. Mr. Kirschner has been practicing law since 1967 and has substantial experience in bankruptcy litigation matters, particularly with respect to his prior experience as a litigation trustee for several litigation trusts, as set forth on the record of the

Confirmation Hearing and in the Confirmation Brief. Mr. Kirschner shall be paid \$40,000 per month for the first three months and \$20,000 per month thereafter, plus a success fee related to litigation recoveries. The Committee and the Debtor had arm's length negotiations regarding the post-Effective Date corporate governance structure of the Reorganized Debtor and believe that the selection of the Claimant Trustee, the Litigation Trustee, and the Claimant Trust Oversight Committee are in the best interests of the Debtor's economic stakeholders. Section 1123(a)(7) of the Bankruptcy Code is satisfied.

46. Debtor's Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

Pursuant to section 1129(a)(2) of the Bankruptcy Code, the Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1122, 1123, 1124, 1125, and 1126 of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan, the Disclosure Statement, the Plan Supplements, and all other matters considered by the Bankruptcy Court in connection with this Chapter 11 Case.

47. Debtor's Solicitation Complied with Bankruptcy Code and Disclosure Statement Order. Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order. In accordance with the Disclosure Statement Order and evidenced by the Affidavits of Service and Publication, the Debtor appropriately served (i) the Solicitation Packages (as defined in the Disclosure Statement Order) on the Holders of Claims in Classes 2, 7, 8 and 9 and Holders of Equity Interests in Classes 10 and 11 who were entitled to vote on the Plan; and (ii) the Notice of Nonvoting Status (as defined in the Disclosure Statement Order) and the

Confirmation Hearing Notice to the Holders of Claims in Classes 1, 3, 4, 5 and 6, who were not entitled to vote on the Plan pursuant to the Disclosure Statement Order. The Disclosure Statement Order approved the contents of the Solicitation Packages provided to Holders of Claims and Equity Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan. The Debtor and KCC each complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code, as evidenced by the Affidavits of Service and Publication. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. The Debtor caused the same Disclosure Statement to be transmitted to all holders of Claims and Equity Interests entitled to vote on the Plan. The Debtor has complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order. The Bankruptcy Court rejects the arguments of the Mr. Dondero and certain Dondero Related Entities that the changes made to certain assumptions and projections from the Liquidation Analysis annexed as Exhibit C to the Disclosure Statement (the “Liquidation Analysis”) to the Amended Liquidation Analysis/Financial Projections require resolicitation of the Plan. The Bankruptcy Court heard credible testimony from Mr. Seery regarding the changes to the Liquidation Analysis as reflected in the Amended Liquidation Analysis/Financial Projections. Based on the record, including the testimony of Mr. Seery, the Bankruptcy Court finds that the changes between the Liquidation Analysis and the Amended Liquidation Analysis/Financial Projections do not constitute materially adverse change to the treatment of Claims or Equity

Interests. Instead, the changes served to update the projected distributions based on Claims that were settled after the approval of the Disclosure Statement and to otherwise incorporate more recent financial data. Such changes were entirely foreseeable given the large amount of unliquidated Claims at the time the Disclosure Statement was approved and the nature of the Debtor's assets. The Bankruptcy Court therefore finds that holders of Claims and Equity Interests were not misled or prejudiced by the Amended Liquidation Analysis/Financial Projections and the Plan does not need to be resolicited.

48. **Plan Proposed in Good Faith and Not by Means Forbidden by Law (11 U.S.C. § 1129(a)(3)).** The Debtor has proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Bankruptcy Court has examined the totality of the circumstances surrounding the filing of this Chapter 11 Case, the Plan itself, and the extensive, un rebutted testimony of Mr. Seery in which he described the process leading to Plan's formulation. Based on the totality of the circumstances and Mr. Seery's testimony, the Bankruptcy Court finds that the Plan is the result of extensive arm's-length negotiations among the Debtor, the Committee, and key stakeholders, and promotes the objectives and purposes of the Bankruptcy Code. Specifically, the Debtor's good faith in proposing the Plan is supported by the following facts adduced by Mr. Seery:

- a. The Independent Board determined that it should consider all potential restructuring alternatives, including pursuit of a traditional restructuring and the continuation of the Debtor's business, a potential sale of the Debtor's assets in one or more transactions, an asset monetization plan similar to that described in the Plan, and a so-called "grand bargain" plan that would involve Mr. Dondero's sponsorship of a plan with a substantial equity infusion.

- b. The Debtor subsequently engaged in arm's-length, good faith negotiations with the Committee over an asset monetization Plan commencing in June 2020, which negotiations occurred over the next several months.
- c. Negotiations between the Debtor and the Committee were often contentious over disputes, including, but not limited to, the post-confirmation corporate governance structure and the scope of releases contemplated by the Plan.
- d. While negotiations with the Committee progressed, the Independent Board engaged in discussions with Mr. Dondero regarding a potential "grand bargain" plan which contemplated a significant equity infusion by Mr. Dondero, and which Mr. Seery personally spent hundreds of hours pursuing over many months.
- e. On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [Docket No. 912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation. As a result of this mediation, the Debtor negotiated the settlement of the claims of Acis and Mr. Terry, which the Bankruptcy Court approved on October 28, 2020 [Docket No. 1302].
- f. On August 12, 2020, the Debtor filed its *Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] (the "Initial Plan") and related disclosure statement (the "Initial Disclosure Statement") which were not supported by either the Committee or Mr. Dondero. The Independent Board filed the Initial Plan and Initial Disclosure Statement in order to act as a catalyst for continued discussions with the Committee while it simultaneously worked with Mr. Dondero on the "grand bargain" plan.
- g. The Bankruptcy Court conducted a contested hearing on the Initial Disclosure Statement on October 27, 2020. The Committee and other parties objected to approval of the Disclosure Statement at the Initial Disclosure Statement hearing, which was eventually continued to November 23, 2020.
- h. Following the Initial Disclosure Statement hearing, the Debtor continued to negotiate with the Committee and ultimately resolved the remaining material disputes and led to the Bankruptcy Court's approval of the Disclosure Statement on November 23, 2020.
- i. Even after obtaining the Bankruptcy Court's approval of the Disclosure Statement, the Debtor and the Committee continued to negotiate with Mr. Dondero and the Committee over a potential "pot plan" as an alternative to the Plan on file with the Bankruptcy Court, but such efforts were unsuccessful. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of section 1129(a)(3).

49. **Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).**

Article II.B of the Plan provides that Professionals will file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such claims. The procedures set forth in the Plan for the Bankruptcy Court's approval of the fees, costs, and expenses to be paid in connection with this chapter 11 Case, or in connection with the Plan and incident to this Chapter 11 Case, satisfy the objectives of and are in compliance with section 1129(a)(4) of the Bankruptcy Code.

50. **Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).** Article IV.B

of the Plan provides for the appointment of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee and the members thereto. For the reasons more fully explained in paragraphs 44-45 of this Confirmation Order with respect to the requirement of section 1123(a)(7) of the Bankruptcy Code, the Debtor has disclosed the nature of compensation of any insider to be employed or retained by the Reorganized Debtor, if applicable, and compensation for any such insider. The appointment of such individuals is consistent with the interests of Claims and Equity Interests and with public policy. Thus, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

51. **No Rate Changes (11 U.S.C. § 1129(a)(6)).** The Plan does not provide for

any rate change that requires regulatory approval. Section 1129(a)(6) of the Bankruptcy Code is thus not applicable.

52. **Best Interests of Creditors (11 U.S.C. § 1129(a)(7)).** The “best interests” test is satisfied as to all Impaired Classes under the Plan, as each Holder of a Claim or Equity Interest in such Impaired Classes will receive or retain property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Holder would so receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code. On October 15, 2020, the Debtor filed the Liquidation Analysis [Docket 1173], as prepared by the Debtor with the assistance of its advisors and which was attached as Exhibit C to the Disclosure Statement. On January 29, 2021, in advance of Mr. Seery’s deposition in connection with confirmation of the Plan, the Debtor provided an updated version of the Liquidation Analysis to the then-objectors of the Plan, including Mr. Dondero and the Dondero Related Entities. On February 1, 2021, the Debtor filed the Amended Liquidation Analysis/Financial Projections. The Amended Liquidation Analysis/Financial Projections included updates to the Debtor’s projected asset values, revenues, and expenses to reflect: (1) the acquisition of an interest in an entity known as “HCLOF” that the Debtor will acquire as part of its court-approved settlement with HarbourVest and that was valued at \$22.5 million; (2) an increase in the value of certain of the Debtor’s assets due to changes in market conditions and other factors; (3) expected revenues and expenses arising in connection with the Debtor’s continued management of the CLOs pursuant to management agreements that the Debtor decided to retain; (4) increases in projected expenses for headcount (in addition to adding two or three employees to assist in the management of the CLOs, the Debtor also increased modestly the projected headcount as a result of its decision not to engage a Sub-Servicer) and professional fees; and (5) an increase in projected recoveries on notes resulting from the

acceleration of term notes owed to the Debtor by the following Dondero Related Entities: NexPoint Advisors, L.P.; Highland Capital Management Services, Inc.; and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC). Under the Plan, as of the Confirmation Date, (a) Class 7 General Unsecured Creditors are projected to receive 85% on account of their claims; and (b) Class 8 General Unsecured Creditors are projected to receive at least approximately 71% on account of their Claims. Under a hypothetical chapter 7 liquidation, all general unsecured creditors are projected to receive approximately 55% on account of their Claims. The Bankruptcy Court finds that the distributions that Class 7 and 8 General Unsecured Creditors are projected to receive under the Plan substantially exceeds that which they would receive under a chapter 7 liquidation based on Mr. Seery's testimony, including the following credible reasons he posited, among others:

- a. The nature of the Debtor's assets is complex. Certain assets relate to complicated real estate structures and private equity investments in operating businesses. Mr. Seery's extensive experience with the Debtor during the thirteen months since his appointment as an Independent Director and later Chief Executive Officer and Chief Restructuring Officer, provides him with a substantial learning curve in connection with the disposition of the Debtor's assets and are reasonably expected to result in him being able to realize tens of millions of dollars more value than would a chapter 7 trustee.
- b. Assuming that a hypothetical chapter 7 trustee could even operate the Debtor's business under chapter 7 of the Bankruptcy Code and hire the necessary personnel with the relevant knowledge and experience to assist him or her in selling the Debtor's assets, a chapter 7 trustee would likely seek to dispose of the Debtor's assets in a forced sale liquidation which would generate substantially less value for the Debtor's creditors than the asset monetization plan contemplated by the Plan.
- c. A chapter 7 trustee would be unlikely to retain the Debtor's existing professionals to assist in its efforts to monetize assets, resulting in delays, increased expenses, and reduced asset yields for the chapter 7 estate.

- d. The chapter 7 estate would be unlikely to maximize value as compared to the asset monetization process contemplated by the Plan because potential buyers are likely to perceive a chapter 7 trustee as engaging in a quick, forced “fire sale” of assets; and
- e. The Debtor’s employees, who are vital to its efforts to maximum value and recoveries for stakeholders, may be unwilling to provide services to a chapter 7 trustee.

Finally, there is no evidence to support the objectors’ argument that the Claimant Trust Agreement’s disclaimed liability for ordinary negligence by the Claimant Trustee compared to a chapter 7 trustee’s liability has any relevance to creditor recoveries in a hypothetical chapter 7 liquidation. Thus, section 1129(a)(7) of the Bankruptcy Code is satisfied.

53. **Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).** Classes 1, 3, 4, 5 and 6 are Unimpaired under the Plan. Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 9 (Subordinated Claims) have each voted to accept the Plan in accordance with the Bankruptcy Code, thereby satisfying section 1129(a)(8) as to those Classes. However, Class 8 (General Unsecured Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) have not accepted the Plan. Accordingly, section 1129(a)(8) of the Bankruptcy Code has not been satisfied. The Plan, however, is still confirmable because it satisfies the nonconsensual confirmation provisions of section 1129(b), as set forth below.

54. **Treatment of Administrative, Priority, Priority Tax Claims, and Professional Fee Claims (11 U.S.C. § 1129(a)(9)).** The treatment of Administrative Claims, Priority Claims, and Professional Fee Claims pursuant to Article III of the Plan, and as set forth below with respect to the resolution of the objections filed by the Internal Revenue Service and

certain Texas taxing authorities satisfies the requirements of sections 1129(a)(9) of the Bankruptcy Code.

55. **Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)).** Class 2 (Frontier Secured Claims) and Class 7 (Convenience Claims) are each Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code is satisfied.

56. **Feasibility (11 U.S.C. § 1129(a)(11)).** Article IV of the Plan provides for the implementation of the Plan through the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Plan provides that the Claimant Trust, among other things, will monetize and distribute the Debtor's remaining assets. The Disclosure Statement, the Amended Liquidation Analysis/Financial Projections, and the other evidence presented at the Confirmation Hearing provide a reasonable probability of success that the Debtor will be able to effectuate the provisions of the Plan. The Plan contemplates the establishment of the Claimant Trust upon the Effective Date, which will monetize the Estate's assets for the benefit of creditors. Mr. Seery testified that the Class 2 Frontier Secured Claim will be paid over time pursuant to the terms of the New Frontier Note and the Reorganized Debtor will have sufficient assets to satisfy its obligations under this note. The Claims of the Holders of Class 7 Claims (as well as those Class 8 creditors who validly opted to receive the treatment of Class 7 Claims) are expected to be satisfied shortly after the Effective Date. Holders of Class 8 Claims (including any holders of Class 7 Claims who opted to receive the treatment provided to Class 8 Claims) are not guaranteed any recovery and will

periodically receive pro rata distributions as assets are monetized pursuant to the Plan and the Claimant Trust Agreement. Thus, section 1129(a)(11) of the Bankruptcy Code is satisfied.

57. **Payment of Fees (11 U.S.C. § 1129(a)(12)).** All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on or before the Effective Date pursuant to Article XII.A of the Plan, thus satisfying the requirement of section 1129(a)(12) of the Bankruptcy Code. The Debtor has agreed that the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case.

58. **Retiree Benefits.** The Plan provides for the assumption of the Pension Plan (to the extent such Pension Plan provides “retiree benefits” and is governed by section 1114 of the Bankruptcy Code). Thus, the Plan complies with section 1129(a)(13) of the Bankruptcy Code, to the extent applicable.

59. **Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)).** Sections 1129(a)(14)-(16) of the Bankruptcy Code are inapplicable as the Debtor (i) has no domestic support obligations (section 1129(a)(14)), (ii) is not an individual (section 1129(a)(15)), and (iii) is not a nonprofit corporation (section 1129(a)(16)).

60. **No Unfair Discrimination; Fair and Equitable Treatment (11 U.S.C. § 1129(b)).** The classification and treatment of Claims and Equity Interests in Classes 8, 10 and 11, which have not accepted the Plan, is proper pursuant to section 1122 of the Bankruptcy Code, does

not discriminate unfairly, and is fair and equitable pursuant to section 1129(b)(1) of the Bankruptcy Code.

- a. Class 8. The Plan is fair and equitable with respect to Class 8 General Unsecured Claims. While Equity Interests in Class 10 and Class 11 will receive a contingent interest in the Claimant Trust under the Plan (the “Contingent Interests”), the Contingent Interests will not vest unless and until holders of Class 8 General Unsecured Claims and Class 9 Subordinated Claims receive distributions equal to 100% of the amount of their Allowed Claims plus interest as provided under the Plan and Claimant Trust Agreement. Accordingly, as the holders of Equity Interests that are junior to the Claims in Class 8 and Class 9 will not receive or retain under the Plan on account of such junior claim interest any property unless and until the Claims in Class 8 and Class 9 are paid in full plus applicable interest, the Plan is fair and equitable with respect to holders of Class 8 General Unsecured Claims pursuant to section 1129(b)(2)(B) of the Bankruptcy Code and the reasoning of *In re Introgen Therapeutics* 429 B.R. 570 (Bankr. W.D. Tex. 2010).
- b. Class 10 and Class 11. There are no Claims or Equity Interests junior to the Equity Interests in Class 10 and Class 11. Equity Interests in Class 10 and 11 will neither receive nor retain any property under the Plan unless Allowed Claims in Class 8 and Class 9 are paid in full plus applicable interest pursuant to the terms of the Plan and Claimant Trust Agreement. Thus, the Plan does not violate the absolute priority rule with respect to Classes 10 and 11 pursuant to Bankruptcy Code section 1129(b)(2)(C). The Plan does not discriminate unfairly as to Equity Interests. As noted above, separate classification of the Class B/C Partnership Interests from the Class A Partnerships Interests is appropriate because they constitute different classes of equity security interests in the Debtor, and each are appropriately separately classified and treated.

Accordingly, the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to each Class that has rejected the Plan. Thus, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to Classes 8, 10, and 11.

61. **Only One Plan (11 U.S.C. § 1129(c)).** The Plan is the only chapter 11 plan confirmed in this Chapter 11 Case, and the requirements of section 1129(c) of the Bankruptcy Code are therefore satisfied.

62. **Principal Purpose (11 U.S.C. § 1129(d)).** Mr. Seery testified that the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to the confirmation of the Plan on any such grounds. Accordingly, section 1129(d) of the Bankruptcy Code is inapplicable.

63. **Satisfaction of Confirmation Requirements.** Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and should be confirmed.

64. **Good Faith Solicitation (11 U.S.C. § 1125(e)).** The Debtor, the Independent Directors, and the Debtor's employees, advisors, Professionals, and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all of their respective activities relating to the solicitation of acceptances of the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and they are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

65. **Discharge (11 U.S.C. § 1141(d)(3)).** The Debtor is entitled to a discharge of debts pursuant to section 1141(d)(3)(B) of the Bankruptcy Code. Under the Plan, the Claimant Trust or Reorganized Debtor, as applicable, will continue to manage funds and conduct business

in the same manner as the Debtor did prior to Plan confirmation, which includes the management of the CLOs, Multi-Strat, Restoration Capital, the Select Fund and the Korea Fund. Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets, there is no specified time frame by which this process must conclude. Mr. Seery's credible testimony demonstrates that the Debtor will continue to engage in business after consummation of the Plan, within the meaning of Section 1141(d)(3)(b) and that the Debtor is entitled to a discharge pursuant to section 1141(d)(1) of the Bankruptcy Code.

66. **Retention of Jurisdiction.** The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article XI of the Plan and/or section 1142 of the Bankruptcy Code to the maximum extent under applicable law.

67. **Additional Plan Provisions (11 U.S.C. § 1123(b)).** The Plan's provisions are appropriate, in the best interests of the Debtor and its Estate, and consistent with the applicable provisions of the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

68. **Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).** The Debtor has exercised reasonable business judgment with respect to the rejection of the Executory Contracts and Unexpired Leases pursuant the terms of the Plan and this Confirmation Order, and such rejections are justified and appropriate in this Chapter 11 Case. The Debtor also filed the List of Assumed Contracts, which contain notices to the applicable counterparties to the contracts set forth on Exhibit "FF" to Plan Supplement filed on February 1, 2021 [Docket No. 1875] and which exhibit sets forth the list of executory contracts and unexpired leases to be

assumed by the Debtor pursuant to the Plan (collectively, the “Assumed Contracts”). With respect to the Assumed Contracts, only one party objected to the assumption of any of the Assumed Contracts, but that objection was withdrawn.⁸ Any modifications, amendments, supplements, and restatements to the Assumed Contracts that may have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the perpetuation nature of the Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of any Assumed Contract pursuant to the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, 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 Executory Contract or Unexpired Lease at any time prior to the effective date of assumption.

69. **Compromises and Settlements Under and in Connection with the Plan (11 U.S.C. § 1123(b)(3)).** All of the settlements and compromises pursuant to and in connection with the Plan, comply with the requirements of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019.

70. **Debtor Release, Exculpation and Injunctions (11 U.S.C. § 1123(b)).** The Debtor Release, Exculpation, and Injunction provisions provided in the Plan (i) are within the jurisdiction of the Bankruptcy Court under 28 U.S.C. § 1334; (ii) are integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan; (iii) confer material benefit on, and are in the best interests of, the Debtor, its Estate, and its

⁸ See Notice of Withdrawal of James Dondero’s Objection Debtor’s Proposed Assumption of Contracts and Cure Amounts Proposed in Connection Therewith [Docket No. 1876]

creditors; (iv) are fair, equitable, and reasonable; (v) are given and made after due notice and opportunity for hearing; (vi) satisfy the requirements of Bankruptcy Rule 9019; and (vii) are consistent with the Bankruptcy Code and other applicable law, and as set forth below.

71. **Debtor Release.** Section IX.D of the Plan provides for the Debtor's release of the Debtor's and Estate's claims against the Released Parties. Releases by a debtor are discretionary and can be provided by a debtor to persons who have provided consideration to the Debtor and its estate pursuant to section 1123(b)(3)(A) of the Bankruptcy Code. Contrary to the objections raised by Mr. Dondero and certain of the Dondero Related Entities, the Debtor Release is appropriately limited to release claims held by the Debtor and does not purport to release the claims held by the Claimant Trust, Litigation Sub-Trust, or other third parties. The Plan does not purport to release any claims held by third parties and the Bankruptcy Court finds that the Debtor Release is not a "disguised" release of any third party claims as asserted by certain objecting parties. The limited scope of the Debtor Release in the Plan was extensively negotiated with the Committee, particularly with the respect to the Debtor's conditional release of claims against employees, as identified in the Plan, and the Plan's conditions and terms of such releases. The Plan does not release (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual

fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. The Debtor Release also contains conditions to such releases as set forth in Article X.D of the Plan with respect to employees (the “Release Conditions”). Until the an employee satisfies the Release Conditions or the Release Conditions otherwise terminate, any claims against such employee will be tolled so that if the Release Conditions are not met the Litigation Trustee may pursue claims against an employee at a later date. The evidence before the Bankruptcy Court, including, but not limited to Mr. Seery’s testimony, demonstrates that the Debtor is not aware of any claims against any of the Released Parties, that the Released Parties have been instrumental in assisting the Debtor’s efforts toward confirmation of the Plan and that, therefore, the releases are a *quid pro quo* for the Released Parties’ significant contributions to a highly complex and contentious restructuring. The Committee, whose members hold approximately \$200 million in claims against the Estate, is highly sophisticated and is represented by highly sophisticated professionals, and has actively and vigorously negotiated the terms of the Debtor Release, which was the subject of significant controversy at the Initial Disclosure Statement hearing held by the Bankruptcy Court on October 27, 2020.

72. **Exculpation.** Section IX.C of the Plan provides for the exculpation of certain Exculpated Parties to the extent provided therein (the “Exculpation Provision”). As explained below, the Exculpation Provision is appropriate under the unique circumstances of this litigious Chapter 11 Case and consistent with applicable Fifth Circuit precedent. First, with respect to the Independent Directors, their agents, and their advisors, including any employees acting at

their direction, the Bankruptcy Court finds and concludes that it has already exculpated these parties for acts other than willful misconduct and gross negligence pursuant to the January 9 Order. The January 9 Order was specifically agreed to by Mr. Dondero, who was in control of the Debtor up until entry of the January 9 Order. The January 9 Order was not appealed. In addition to the appointment of the Independent Directors in an already contentious and litigious case, the January 9 Order set the standard of care for the Independent Directors and specifically exculpated them for negligence. Mr. Seery and Mr. Dubel each testified that they had input into the contents of the January 9 Order and would not have agreed to their appointment as Independent Directors if the January 9 Order did not include the protections set forth in paragraph 10 of the January 9 Order. Paragraph 10 of the January 9 Order (1) requires that parties wishing to sue the Independent Directors or their agents and advisors must first seek approval from the Bankruptcy Court before doing so; (2) sets the standard of care for the Independent Directors during the Chapter 11 Case and exculpated the Independent Directors for acts other than willful misconduct or gross negligence; (3) only permits suits against the Independent Directors to proceed for colorable claims of willful misconduct and gross negligence upon order of the Bankruptcy Court; and (4) does not expire by its terms.

73. **Existing Exculpation of Independent Directors.** The Bankruptcy Court also finds and concludes that it has already exculpated Mr. Seery acting in the capacity as Chief Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order. The Bankruptcy Court concludes its previous approval of the exculpation of the Independent Directors, their agents, advisors and employees working at their direction pursuant to the January 9 Order, and the Chief

Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order constitutes the law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir.1987). The January 9 Order and July 16 Order cannot be collaterally attacked based on the objectors' objection to the exculpation of the Independent Directors, their agents, and advisors, including any employees acting at their direction, as well as the Chief Executive Officer and Chief Restructuring Officer, that the Bankruptcy Court already approved pursuant to the January 9 Order and the July 16 Order.

74. **The Exculpation Provision Complies with Applicable Law.** Separate and apart from the *res judicata* effect of the January 9 Order and the July 16 Order, the Bankruptcy Court also finds and concludes that the Exculpation Provision is consistent with applicable law, including *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), for several reasons:

- a. First, the statutory basis for *Pacific Lumber's* denial of exculpation for certain parties other than a creditors' committee and its members is that section 524(e) of the Bankruptcy Code "only releases the debtor, not co-liable third parties." *Pacific Lumber*, 253 F.3d. at 253. However, *Pacific Lumber* does not prohibit all exculpations under the Bankruptcy Code and the court in such case specifically approved the exculpations of a creditors' committee and its members on the grounds that "11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.... [I]f members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee." *Pacific Lumber*, 253 F.3d at 253 (quoting Lawrence P. King, et al, *Collier on Bankruptcy*, ¶ 1103.05[4][b] (15th Ed. 2008)). *Pacific Lumber's* rationale for permitted exculpation of creditors' committees and their members (which was clearly policy-based and based on a creditors' committee qualified immunity flowing from their duties under section 1103(c) of the Bankruptcy Code and their disinterestedness and importance in chapter 11 cases) does not preclude exculpation to other parties in a particular chapter 11 case that perform similar roles to a creditors' committee and its members. The Independent Directors, and by extension the Chief Executive Officer and Chief Restructuring Officer, were not

part of the Debtor's enterprise prior to their appointment by the Bankruptcy Court under the January 9 Order. The Bankruptcy Court appointed the Independent Directors in lieu of a chapter 11 trustee to address what the Bankruptcy Court perceived as serious conflicts of interest and fiduciary duty concerns with the then-existing management prior to January 9, 2020, as identified by the Committee. In addition, the Bankruptcy Court finds that the Independent Directors expected to be exculpated from claims of negligence, and would likely have been unwilling to serve in contentious cases absent exculpation. The uncontroverted testimony of Mr. Seery and Mr. Dubel demonstrates that the Independent Directors would not have agreed to accept their roles without the exculpation and gatekeeper provision in the January 9 Order. Mr. Dubel also testified as to the increasing important role that independent directors are playing in complex chapter 11 restructurings and that unless independent directors could be assured of exculpation for simple negligence in contentious bankruptcy cases they would be reluctant to accept appointment in chapter 11 cases which would adversely affect the chapter 11 restructuring process. The Bankruptcy Court concludes that the Independent Directors were appointed under the January 9 Order in order to avoid the appointment of a chapter 11 trustee and are analogous to a creditors' committee rather than an incumbent board of directors. The Bankruptcy Court also concludes that if independent directors cannot be assured of exculpation for simple negligence in contentious bankruptcy cases, they may not be willing to serve in that capacity. Based upon the foregoing, the Bankruptcy Court concludes that *Pacific Lumber's* policy of exculpating creditors' committees and their members from "being sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case" is applicable to the Independent Directors in this Chapter 11 Case.⁹

- b. Second, the Bankruptcy Court also concludes that *Pacific Lumber* does not preclude the exculpation of parties if there is a showing that "costs [that] the released parties might incur defending against such suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." *Pacific Lumber*, 584 F.3d at 252. If ever there was a risk of that happening in a chapter 11 reorganization, it is this one. Mr. Seery credibly testified that Mr. Dondero stated outside the courtroom that if Mr. Dondero's pot plan does not get approved, that Mr. Dondero will "burn the place down." The Bankruptcy Court can easily expect that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities that justify their inclusion in the Exculpation Provision.

⁹ The same reasoning applies to the inclusion of Strand in the Exculpation Provision because Strand is the general partner of the Debtor through which each of the Independent Board members act.

75. **Injunction.** Section IX.D of the Plan provides for a Plan injunction to implement and enforce the Plan's release, discharge and release provisions (the "Injunction Provision"). The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor's assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor's assets and those assets could be monetized for less money to the detriment of the Debtor's creditors. The Bankruptcy Court finds and concludes that the Injunction Provision is consistent with and permissible under Bankruptcy Code sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142. The Bankruptcy Court rejects assertions by certain objecting parties that the Injunction Provision constitutes a "third-party release." The Injunction Provision is appropriate under the circumstances of this Chapter 11 Case and complies with applicable bankruptcy law. The Bankruptcy Court also concludes that the terms "implementation" and "consummation" are neither vague nor ambiguous

76. **Gatekeeper Provision.** Section IX.F of the Plan contains a provision contained in paragraph AA of this Confirmation Order and which the Debtor has referred to as a gatekeeper provision (the "Gatekeeper Provision"). The Gatekeeper Provision requires that Enjoined Parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is

colorable, the Bankruptcy Court may, if it has jurisdiction, adjudicate the action. The Bankruptcy Court finds that the inclusion of the Gatekeeper Provision is critical to the effective and efficient administration, implementation, and consummation of the Plan. The Bankruptcy Court also concludes that the Bankruptcy Court has the statutory authority as set forth below to approve the Gatekeeper Provision.

77. **Factual Support for Gatekeeper Provision.** The facts supporting the need for the Gatekeeper Provision are as follows. As discussed earlier in this Confirmation Order, prior to the commencement of the Debtor's bankruptcy case, and while under the direction of Mr. Dondero, the Debtor had been involved in a myriad of litigation, some of which had gone on for years and, in some cases, over a decade. Substantially all of the creditors in this case are either parties who were engaged in litigation with the Debtor, parties who represented the Debtor in connection with such litigation and had not been paid, or trade creditors who provided litigation-related services to the Debtor. During the last several months, Mr. Dondero and the Dondero Related Entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor. Such litigation includes: (i) entry of a temporary restraining order and preliminary injunction against Mr. Dondero [Adv. Proc. No. 20-03190 Docket No. 10 and 59] because of, among other things, his harassment of Mr. Seery and employees and interference with the Debtor's business operations; (ii) a contempt motion against Mr. Dondero for violation of the temporary restraining order, which motion is still pending before the Bankruptcy Court [Adv. Proc. No. 20-03190 Docket No. 48]; (iii) a motion by Mr. Dondero's controlled investors in certain CLOs managed by the Debtor that the Bankruptcy Court referred to

as frivolous and a waste of the Bankruptcy Court's time [Docket No. 1528] which was denied by the Court [Docket No. 1605]; (iv) multiple plan confirmation objections focused on ensuring the Dondero Related Entities be able to continue their litigation against the Debtor and its successors post-confirmation [Docket Nos. 1661, 1667, 1670, 1673, 1676, 1677 and 1868]; (v) objections to the approval of the Debtor's settlements with Acis and HarbourVest and subsequent appeals of the Bankruptcy Court's order approving each of those settlements [Docket Nos. 1347 and 1870]; and (vi) a complaint and injunction sought against Mr. Dondero's affiliated entities to prevent them from violating the January 9 Order and entry of a restraining order against those entities [Adv Proc. No. 21-03000 Docket No 1] (collectively, the "Dondero Post-Petition Litigation").

78. **Findings Regarding Dondero Post-Petition Litigation.** The Bankruptcy Court finds that the Dondero Post-Petition Litigation was a result of Mr. Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Mr. Seery's credible testimony, that if Mr. Dondero's plan proposal was not accepted, he would "burn down the place." The Bankruptcy Court concludes that without appropriate protections in place, in the form of the Gatekeeper Provision, Mr. Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims. The Bankruptcy Court also finds, based upon Mr. Seery's testimony, that the threat of continued litigation by Mr. Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result

in lower distributions to creditors because of costs and distraction such litigation or the threats of such litigation would cause.

79. **Necessity of Gatekeeper Provision.** The Bankruptcy Court further finds that unless the Bankruptcy Court approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance, the absence of which will present unacceptable risks to parties currently willing to serve in such roles. The Bankruptcy Court heard testimony from Mark Tauber, a Vice President with AON Financial Services, the Debtor's insurance broker ("AON"), regarding his efforts to obtain D&O insurance. Mr. Tauber credibly testified that of all the insurance carriers that AON approached to provide D&O insurance coverage after the Effective Date, the only one willing to do so without an exclusion for claims asserted by Mr. Dondero and his affiliates otherwise requires that this Order approve the Gatekeeper Provision. Based on the foregoing, the Bankruptcy Court finds that the Gatekeeper Provision is necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities in this Chapter 11 Case and necessary to the effective and efficient administration, implementation and consummation of the Plan and is appropriate pursuant to *Carroll v. Abide (In re Carroll)* 850 F.3d 811 (5th Cir. 2017). Approval of the Gatekeeper Provision will prevent baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents, will avoid abuse of the court system and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. Any suit against a Protected Party would effectively be a suit against the Debtor, and the Debtor may be required to indemnify the Protected

Parties under the Limited Partnership Agreement, which will remain in effect through the Effective Date, or those certain *Indemnification and Guaranty Agreements*, dated January 9, 2020, between Strand, the Debtor, and each Independent Director, following the Confirmation Date as each such agreement will be assumed pursuant to 11 U.S.C. § 365 pursuant to the Plan.

80. **Statutory Authority to Approve Gatekeeper Provision.** The Bankruptcy Court finds it has the statutory authority to approve the Gatekeeper Provision under sections 1123(a)(5), 1123(b)(6), 1141, 1142(b), and 105(a). The Gatekeeper Provision is also within the spirit of the Supreme Court’s “Barton Doctrine.” *Barton v. Barbour*, 104 U.S. 126 (1881). The Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants, that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008), and *In re Carroll*, 850 F.3d 811 (5th Cir. 2017).

81. **Jurisdiction to Implement Gatekeeper Provision.** The Bankruptcy Court finds that it will have jurisdiction after the Effective Date to implement the Gatekeeper Provision as post-confirmation bankruptcy court jurisdiction has been interpreted by the Fifth Circuit under *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002) and *EOP-Colonnade of Dallas Ltd. P’Ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260 (5th Cir. 2005). Based upon the rationale of the Fifth Circuit in *Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015), the Bankruptcy Court’s jurisdiction to act as a gatekeeper does not violate *Stern v. Marshall*. The Bankruptcy Court’s determination of whether

a claim is colorable, which the Bankruptcy Court has jurisdiction to determine, is distinct from whether the Bankruptcy Court would have jurisdiction to adjudicate any claim it finds colorable.

82. **Resolution of Objections of Scott Ellington and Isaac Leventon.** Each of Scott Ellington (“Mr. Ellington”) and Isaac Leventon (“Mr. Leventon”) (each, a “Senior Employee Claimant”) has asserted certain claims for liquidated but unpaid bonus amounts for the following periods: 2016, 2017, and 2018, as set forth in Exhibit A to that certain *Senior Employees’ Limited Objection to Debtor’s Fifth Amended Plan of Reorganization* [Docket No. 1669] (the “Senior Employees’ Objection”) (for each of Mr. Ellington and Mr. Leventon, the “Liquidated Bonus Claims”).

- a. Mr. Ellington has asserted Liquidated Bonus Claims in the aggregate amount of \$1,367,197.00, and Mr. Leventon has asserted Liquidated Bonus Claims in the aggregate amount of \$598,198.00. Mr. Ellington received two Ballots¹⁰ – a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Ellington completed and timely returned both of such Ballots, voted to reject the Plan, and elected to have his Class 8 Liquidated Bonus Claims treated under Class 7 of the Plan, subject to the objections and reservations of rights set forth in the Senior Employees’ Objection. If Mr. Ellington is permitted to elect Class 7 treatment for his Liquidated Bonus Claims, then the maximum amount of his Liquidated Bonus Claims will be \$1,000,000.
- b. Mr. Leventon received two Ballots—a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Leventon completed and timely returned both of such Ballots and voted each such Ballots to rejected the Plan.
- c. The Senior Employees’ Objection, among other things, objects to the Plan on the grounds that the Debtor improperly disputes the right of Mr. Ellington to elect Class 7 treatment for his Liquidated Bonus Claims and Mr. Leventon’s entitlement to receive Class 7 Convenience Class treatment for his Liquidated Bonus Claims. The Debtor contended that neither Mr. Ellington or Mr. Leventon were entitled to elect to receive Class 7 Convenience Class treatment on account of their Liquidated

¹⁰ As defined in the Plan, “Ballot” means the forms(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

Bonus Claims under the terms of the Plan, the Disclosure Statement Order or applicable law.

- d. The Debtor and Mr. Ellington and Mr. Leventon negotiated at arms' length in an effort to resolve all issues raised in the Senior Employee's Objection, including whether or not Mr. Ellington and Mr. Leventon were entitled to Class 7 Convenience Class treatment of their Liquidated Bonus Claims. As a result of such negotiation, the Debtor, Mr. Ellington, and Mr. Leventon have agreed to the settlement described in paragraphs 82(e) through 82(k) below and approved and effectuated pursuant to decretal paragraphs RR through SS (the "Senior Employees' Settlement").
- e. Under the terms of the Senior Employees' Settlement, the Debtor has the right to elect one of two treatments of the Liquidated Bonus Claims for a Senior Employee Claimant. Under the first treatment option ("Option A"), the Liquidated Bonus Claims will be entitled to be treated in Class 7 of the Plan, and the Liquidated Bonus Claims will be entitled to receive payment in an amount equal to 70.125% of the Class 7 amount of the Liquidated Bonus Claims, subject to the Liquidated Bonus Claims becoming Allowed Claims under the terms of the Plan. Under this calculation, Mr. Ellington would be entitled to receive \$701,250.00 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan, and Mr. Leventon would be entitled to receive \$413,175.10 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan. If, however, any party in interest objects to the allowance of the Senior Employee Claimant's Liquidated Bonus Claims and does not prevail in such objection, then such Senior Employee Claimant will be entitled to a payment in an amount equal to 85% of his Allowed Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed on Class 7 Claims). In addition, under Option A, each of Mr. Ellington and Mr. Leventon would retain their respective rights to assert that the Liquidated Bonus Claims are entitled to be treated as Administrative Expense Claims, as defined in Article I.B.2. of the Plan, in which case the holder of such Liquidated Bonus Claims would be entitled to payment in full of the Allowed Liquidated Bonus Claims. Under Option A, parties in interest would retain the right to object to any motion seeking payment of the Liquidated Bonus Amounts as Administrative Expenses.
- f. Under the second treatment option ("Option B"), the Debtor would agree that the Senior Employee Claimant has Allowed Liquidated Bonus Claims, no longer subject to objection by any party in interest, in the amounts of the Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed by Class 7). If the Debtor elects Option B as to a Senior Employee Claimant, then such Senior Employee Claimant would be entitled to a payment on account of his Allowed Liquidated Bonus Claims in an amount equal to 60% of the amount of the

Liquidated Bonus Claims (which, in Mr. Ellington's case, would be \$600,000 and in Mr. Leventon's case, would be \$358,918.80), and such payment would be the sole recovery on account of such Allowed Liquidated Bonus Claims.

- g. The Debtor may, with the consent of the Committee, elect Option B with respect to a Senior Employee Claimant at any time prior to the occurrence of the Effective Date. If the Debtor does not make an election, then Option A will apply.
- h. Under either Option A or Option B, Mr. Ellington and Mr. Leventon will retain all their rights with respect to all Claims other than the Liquidated Bonus Amounts, including, but not limited to, their Class 6 PTO Claims, other claims asserted as Class 8 General Unsecured Claims, the Senior Employees' claims for indemnification against the Debtor, and any other claims that they may assert constitute Administrative Expense Claims, and any other such Claims are subject to the rights of any party in interest to object to such Claims, and the Debtor reserves any all of its rights and defenses in connection therewith.
- i. Subject to entry of this Confirmation Order and as set forth and announced on the record at the hearing on confirmation of the Plan and no party objecting thereto, Mr. Ellington and Mr. Leventon agreed to change the votes in their respective Ballots from rejection to acceptance of the Plan and to withdraw the Senior Employees' Objection.
- j. The Senior Employees' Settlement represents a valid exercise of the Debtor's business judgment and satisfies the requirements for a compromise under Bankruptcy Rule 9019(a).
- k. For the avoidance of doubt, neither Mr. Leventon nor Mr. Ellington shall be a Released Party under the Plan regardless of how the Senior Employee Claimants' Claims are to be treated hereunder.

Based upon the foregoing findings, and upon the record made before the Bankruptcy Court at the Confirmation Hearing, and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

A. Confirmation of the Plan. The Plan is approved in its entirety and **CONFIRMED** under section 1129 of the Bankruptcy Code. The terms of the Plan, including the

Plan Supplements and Plan Modifications, are incorporated by reference into and are an integral part of this Confirmation Order.¹¹

B. Findings of Fact and Conclusions of Law. The findings of fact and the conclusions of law set forth in this Confirmation Order and on the record of the Confirmation Hearing constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusion of law announced by the Bankruptcy Court at the Confirmation Hearing in relation to confirmation of the Plan are hereby incorporated into this Confirmation Order. To the extent that any of the following constitutes findings of fact or conclusions of law, they are adopted as such. To the extent any findings of fact or conclusions of law set forth in this Confirmation Order (including any findings of fact or conclusions of law announced by the Bankruptcy Court at the Confirmation Hearing and incorporated herein) constitutes an order of the Bankruptcy Court, and is adopted as such.

C. Objections. Any resolution or disposition of objections to confirmation of the Plan or otherwise ruled upon by the Bankruptcy Court on the record of the Confirmation Hearing is hereby incorporated by reference. All objections and all reservations of rights pertaining to confirmation of the Plan that have not been withdrawn, waived or settled are overruled on the merits, except as otherwise specifically provided in this Confirmation Order.

D. Plan Supplements and Plan Modifications. The filing with the Bankruptcy Court of the Plan Supplements and the Plan Modifications constitutes due and

¹¹ The Plan is attached hereto as **Exhibit A**.

sufficient notice thereof. Accordingly, pursuant to section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019, the Plan Modifications and the Plan Supplements do not require additional disclosure under section 1125 of the Bankruptcy Code or resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan. The Plan Modifications and the Plan Supplements constitute the Plan pursuant to section 1127(a) of the Bankruptcy Code. Accordingly, the Plan, as modified, is properly before the Bankruptcy Court and all votes cast with respect to the Plan prior to such modification shall be binding and shall apply with respect to the Plan.

E. Deemed Acceptance of Plan. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims and Equity Interests who voted to accept the Plan (or whom are conclusively presumed to accept the Plan) are deemed to have accepted the Plan as modified by the Plan Modifications. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan Modifications.

F. Vesting of Assets in the Reorganized Debtor. Except as otherwise provided in the Plan or this Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code, except with respect to such Liens, Claims, charges, and other encumbrances that are specifically preserved under the Plan upon the Effective Date. The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the

representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

G. Effectiveness of All Actions. All actions contemplated by the Plan, including all actions in connection with the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, are authorized to be taken on, prior to, or after the Effective Date, as applicable, under this Confirmation Order, without further application to or order of the Bankruptcy Court, or further action by the directors, managers, officers or partners of the Debtor or the Reorganized Debtor and with the effect that such actions had been taken by unanimous action of such parties.

H. Restructuring Transactions. The Debtor or Reorganized Debtor, as applicable, are authorized to enter into and effectuate the Restructuring provided under the Plan, including, without limitation, the entry into and consummation of the transactions contemplated by the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, and may take any actions as may be necessary or appropriate to effect a corporate restructuring of its business or a corporate restructuring of the overall corporate structure of the Reorganized Debtor, as and to the extent provided in the Plan. Any transfers of assets or equity interests effected or any obligations incurred through the Restructuring pursuant to the Plan are hereby approved and shall not constitute fraudulent conveyances or fraudulent transfers or otherwise be subject to avoidance.

I. Preservation of Causes of Action. Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in the Plan or any Final Order (including, without limitation, this Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor, the Litigation Sub-Trust, or the Claimant Trust, as applicable (including, without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of *res judicata*, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of the Plan based on the Disclosure Statement, the Plan, or this Confirmation Order, except where such Causes of Action have been expressly released in the Plan or any other Final Order (including, without limitation, this Confirmation Order). In addition, the right of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

J. Independent Board of Directors of Strand. The terms of the current Independent Directors shall expire on the Effective Date without the need for any further or other action by any of the Independent Directors. For avoidance of doubt, the Assumed Contracts

include the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and James Seery*; the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and John Dubel* and *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and Russell Nelms* and shall each remain in full force and effect notwithstanding the expiration of the terms of any Independent Directors.

K. Cancellation of Equity Interests and Issuance of New Partnership

Interests. On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement. As of the Effective Date and pursuant to the Plan, new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited

Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

L. Transfer of Assets to Claimant Trust. On or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax. Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to the Plan and the Claimant Trust Agreement.

M. Transfer of Estate Claims to Litigation Sub-Trust. On or prior to the Effective Date, the Claimant Trust shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims as successor in interest to the Debtor, and in accordance with section 1141 of the Bankruptcy Code, the Estate Claims shall automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and Litigation Sub-Trust Expenses. The Litigation Trustee will

be authorized to investigate, pursue, and otherwise resolve the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, including as successor in interest to the Debtor or Committee, as applicable, in any litigation commenced prior to the Effective Date in which Estate Claims are asserted.

N. Compromise of Controversies. In consideration for the distributions and other benefits, including releases, provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims, Equity Interests, and controversies resolved under the Plan and the entry of this Confirmation Order constitutes approval of such compromise and settlement under Bankruptcy Rule 9019.

O. Objections to Claims. The Claims Objection Deadline shall be the date that is 180 days after the Effective Date, *provided, however*, that the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee and as otherwise provided under the Plan.

P. Assumption of Contracts and Leases. Effective as of the date of this Confirmation Order, each of the Assumed Contracts shall be assumed by the Debtor without the need for any further notice to or action, order, or approval of the Bankruptcy Court, under section 365 of the Bankruptcy Code and the payment of Cures, if any, shall be paid in accordance with the Plan. Each Assumed Contract shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal, and any other interests. Modifications, amendments, supplements, and restatements to any of the

Assumed Contracts that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of such Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of the Assumed Contracts pursuant to Article V.A of the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, 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 Contracts.

Q. Rejection of Contracts and Leases. Unless previously assumed during the pendency of the Chapter 11 Case or pursuant to the Plan, all other Executory Contracts and Unexpired Leases are rejected as of the date of the entry of this Confirmation Order and pursuant to the terms of the Plan. To the extent that any party asserts any damages resulting from the rejection of any Executory Contract or Unexpired Lease, such claim must be filed within **thirty (30) days** following entry of this Confirmation Order, or such claim will be forever barred and disallowed against the Reorganized Debtor.

R. Assumption of Issuer Executory Contracts. On the Confirmation Date, the Debtor will assume the agreements set forth on **Exhibit B** hereto (collectively, the “Issuer Executory Contracts”) pursuant to section 365 of the Bankruptcy Code and Article V of the Plan. In full and complete satisfaction of its obligation to cure outstanding defaults under section 365(b)(1) of the Bankruptcy Code, the Debtor or, as applicable, any successor manager under the

Issuer Executory Contracts (collectively, the “Portfolio Manager”) will pay to the Issuers¹² a cumulative amount of \$525,000 (the “Cure Amount”) as follows:

- a. \$200,000 in cash on the date that is five business days from the Effective Date, with such payment paid directly to Schulte Roth & Zabel LLP (“SRZ”) in the amount of \$85,714.29, Jones Walker LLP (“JW”) in the amount of \$72,380.95, and Maples Group (“Maples”) and collectively with SRZ and JW, the “Issuers’ Counsel”) in the amount of \$41,904.76 as reimbursement for the attorney’s fees and other legal expenses incurred by the Issuers in connection with the Debtor’s bankruptcy case; and
- b. \$325,000 in four equal quarterly payments of \$81,250.00 (each, a “Payment”), which amounts shall be paid to SRZ in the amount of \$34,821.43, JW in the amount of \$29,404.76, and Maples in the amount of \$17,023.81 as additional reimbursement for the attorney’s fees and other legal expenses incurred by the Issuers in connection with the Debtor’s bankruptcy case (i) from any management fees actually paid to the Portfolio Manager under the Issuer Executory Contracts (the “Management Fees”), and (ii) on the date(s) Management Fees are required to be paid under the Issuer Executory Contracts (the “Payment Dates”), and such obligation shall be considered an irrevocable direction from the Debtor and the Bankruptcy Court to the relevant CLO Trustee to pay, on each Payment Date, the Payment to Issuers’ Counsel, allocated in the proportion set forth in such agreement; *provided, however*, that (x) if the Management Fees are insufficient to make any Payment in full on a Payment Date, such shortfall, in addition to any other amounts due hereunder, shall be paid out of the Management Fees owed on the following Payment Date, and (y) nothing herein shall limit either Debtor’s liability to pay the amounts set forth herein, nor the recourse of the Issuers or Issuers’ Counsel to the Debtor, in the event of any failure to make any Payment.

S. Release of Issuer Claims. Effective as of the Confirmation Date, and to the maximum extent permitted by law, each Issuer on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, successors, designees, and

¹² The “Issuers” are: Brentwood CLO, Ltd., Gleneagles CLO, Ltd., Greenbriar CLO, Ltd., Highland CLO 2018-1, Ltd., Highland Legacy Limited, Highland Loan Funding V Ltd., Highland Park CDO I, Ltd., Pam Capital Funding LP, Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester CLO, Ltd., Aberdeen Loan Funding, Ltd., Eastland CLO, Ltd., Grayson CLO, Ltd., Highland Credit Opportunities CDO Ltd., Jasper CLO, Ltd., Liberty Cayman Holdings, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Valhalla CLO, Ltd.

assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, (i) the Debtor and (ii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, the Independent Directors, the CEO/CRO, and with respect to the Persons listed in this subsection (ii), such Person's Related Persons (collectively, the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Issuer Released Claims").

T. Release of Debtor Claims against Issuer Released Parties. Upon entry of this Order, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue [(i) each Issuer and (ii) Wendy Ebanks, (iii) Yun Zheng, (iv) Laura Chisholm, (v) Mora Goddard, (vi) Stacy Bodden, (vii) Suzan Merren (viii) Scott Dakers, (ix) Samit Ghosh, (x) Inderjit Singh, (xi) Ellen Christian, (xii) Andrew Dean, (xiii) Betsy Mortel, (xiv) David Hogan, (xv) Cleveland Stewart, (xvi) Rachael Rankin, (xvii) Otelia Scott, (xviii) Martin Couch, (xx) Ferona Bartley-Davis, (xxi) Charlotte Cloete, (xxii) Christina McLean, (xxiii) Karen Ellerbe,

(xxiv) Gennie Kay Bigord, (xxv) Evert Brunekreef, (xxvii) Evan Charles Burtton (collectively, the “Issuer Released Parties”),] for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney’s fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the “Debtor Released Claims”); *provided, however*, that notwithstanding anything herein to the contrary, the release contained herein will apply to the Issuer Released Parties set forth in subsection (ii) above only with respect to Debtor Released Claims arising from or relating to the Issuer Executory Contracts. Notwithstanding anything in this Order to the contrary, the releases set forth in paragraphs S and T hereof will not apply with respect to the duties, rights, or obligations of the Debtor or any Issuer hereunder.

U. Authorization to Consummate. The Debtor is authorized to consummate the Plan after the entry of this Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date of the Plan set forth in Article VIII.A of the Plan. The Plan shall not become effective unless and until the conditions set forth in Article VIII.A of the Plan have been satisfied, or otherwise waived pursuant to Article VIII.B of the Plan.

V. Professional Compensation. All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date

must be filed no **later than sixty (60) days after the Effective Date**. The Bankruptcy Court shall determine the Allowed amounts of such Professional Fee Claims after notice and an opportunity for hearing in accordance with the procedures established by the Bankruptcy Code and the Bankruptcy Court. The Debtor shall fund the Professional Fee Reserve as provided under the Plan. The Reorganized Debtor shall pay Professional Fee Claims in Cash in the amounts the Bankruptcy Court allows. The Debtor is authorized to pay the pre-Effective Date fees and expenses of all ordinary course professionals in the ordinary course of business without the need for further Bankruptcy Court order or approval. From and after the Effective Date, any requirement that Professionals comply with sections 327 through 331 and 1103 (if applicable) of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtor or Claimant Trustee, as applicable, may employ and pay any Professional or Entity employed in the ordinary course of the Debtor's business without any further notice to or action, order, or approval of the Bankruptcy Court.

W. Release, Exculpation, Discharge, and Injunction Provisions. The following release, exculpation, discharge, and injunction provisions set forth in the Plan are approved and authorized in their entirety, and such provisions are effective and binding on all parties and Entities to the extent provided therein.

X. Discharge of Claims and Termination of Interests. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete satisfaction, settlement,

discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by the Plan or this Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

Y. Exculpation. Subject in all respects to Article XII.D of the Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(v);

provided, however, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. The Plan's exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of the Plan, including Article IV.C.2 of the Plan, protecting such Exculpated Parties from liability.

Z. Releases by the Debtor. On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person. Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under

any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

AA. Injunction. Upon entry of this Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, this Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner,

in any place whatsoever, that does not conform to or comply with the provisions of the Plan. The injunctions set forth in the Plan and this Confirmation Order shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property. Subject in all respects to Article XII.D of the Plan, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in

Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

BB. Duration of Injunction and Stays. Unless otherwise provided in the Plan, in this Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date, shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Bankruptcy Court will enter an equivalent order under Section 105.

CC. Continuance of January 9 Order and July 16 Order. Unless otherwise provided in the Plan, in this Confirmation Order, or in a Final Order of the Bankruptcy Court, each of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] and *Order Approving the Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 shall remain in full force and effect from the Confirmation Date and following the Effective Date.

DD. No Governmental Releases. Nothing in this Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or

any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in this Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit, or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in this Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws, or any criminal laws of the United States or any state and local authority against any party or person.

EE. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers (whether from the Debtor to the Reorganized Debtor or to any other Person) of property under the Plan or pursuant to: (a) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtor or the Reorganized Debtor; (b) the Restructuring transactions pursuant to the Plan; (c) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (d) the making, assignment, or recording of any lease or sublease; or (e) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan,

including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment to the fullest extent contemplated by section 1146(a) of the Bankruptcy Code, and upon entry of this Confirmation Order, the appropriate state or local governmental officials or agents shall forego the collection of any such tax or governmental assessment and accept for filing and recordation of any of the foregoing instruments or other documents without the payment of any such tax, recordation fee, or governmental assessment.

FF. Cancellation of Notes, Certificates and Instruments. Except for the purpose of evidencing a right to a distribution under the Plan and except as otherwise set forth in the Plan or as otherwise provided in this Confirmation Order, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to the Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the

Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person.

GG. Documents, Mortgages, and Instruments. Each federal, state, commonwealth, local, foreign, or other governmental agency is authorized to accept any and all documents, mortgages, and instruments necessary or appropriate to effectuate, implement, or consummate the Plan, including the Restructuring transactions contemplated under the Plan, and this Confirmation Order.

HH. Post-Confirmation Modifications. Subject section 1127(b) of the Bankruptcy Code and the Plan, the Debtor and the Reorganized Debtor expressly reserve their rights to revoke or withdraw, or to alter, amend, or modify materially the Plan, one or more times after Confirmation and, to the extent necessary, may initiate proceedings in the Bankruptcy Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan or this Confirmation Order, in such manner as may be necessary to carry out the purposes and intent of the Plan. Any such modification or supplement shall be considered a modification of the Plan and shall be made in accordance with Article XII.B of the Plan.

II. Applicable Nonbankruptcy Law. The provisions of this Confirmation Order, the Plan and related documents, or any amendments or modifications thereto, shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

JJ. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state,

federal, or other governmental authority with respect to the dissemination, implementation, or consummation of the Plan and the Disclosure Statement, any certifications, documents, instruments or agreements, and any amendments or modifications thereto, and any other acts referred to in, or contemplated by, the Plan and the Disclosure Statement.

KK. Notice of Effective Date. As soon as reasonably practicable after the Effective Date, the Reorganized Debtor shall file notice of the Effective Date and shall serve a copy of the same on all Holders of Claims and Equity Interests, and all parties who have filed with the Bankruptcy Court requests to receive notices in accordance with Bankruptcy Rules 2002 and 3020(c). Notwithstanding the above, no notice of Confirmation or Consummation or service of any kind shall be required to be mailed or made upon any Entity to whom the Debtor mailed notice of the Confirmation Hearing, but received such notice returned marked “undeliverable as addressed,” “moved, left no forwarding address” or “forwarding order expired,” or similar reason, unless the Debtor has been informed in writing by such Entity, or is otherwise aware, of that Entity’s new address. The above-referenced notices are adequate under the particular circumstances of this Chapter 11 Case and no other or further notice is necessary.

LL. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

MM. Waiver of Stay. For good cause shown, the stay of this Confirmation Order provided by any Bankruptcy Rule is waived, and this Confirmation Order shall be effective and enforceable immediately upon its entry by the Bankruptcy Court.

NN. References to and Omissions of Plan Provisions. References to articles, sections, and provisions of the Plan are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan. The failure to specifically include or to refer to any particular article, section, or provision of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such article, section, or provision, it being the intent of the Bankruptcy Court that the Plan be confirmed in its entirety, except as expressly modified herein, and incorporated herein by this reference.

OO. Headings. Headings utilized herein are for convenience and reference only, and do not constitute a part of the Plan or this Confirmation Order for any other purpose.

PP. Effect of Conflict. This Confirmation Order supersedes any Bankruptcy Court order issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order. If there is any inconsistency between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order govern and control. If there is any inconsistency between the terms of this Confirmation Order and the terms of a final, executed Plan Supplement Document, the terms of the final, executed Plan Supplement Document will govern and control.

QQ. Resolution of Objection of Texas Taxing Authorities. Dallas County, Kaufman County, City of Allen, Allen ISD and City of Richardson (collectively, the “Tax Authorities”) assert that they are the holders of prepetition and administrative expense claims for 2019, 2020 and 2021 ad valorem real and business personal property taxes. The ad valorem property taxes for tax year 2020 shall be paid in accordance with and to the extent required under

applicable nonbankruptcy law. In the event the 2020 taxes are paid after February 1, 2021, the Tax Authorities may assert any rights and amounts they claim are owed with respect to penalties and interest that have accrued through the date of payment and the Debtor and Reorganized Debtor reserve any all rights and defenses in connection therewith.

- a. The Debtor/Reorganized Debtor shall pay all amounts owed to the Tax Authorities for tax year 2021 in accordance with and to the extent required under applicable nonbankruptcy law. The Tax Authorities shall not be required to file and serve an administrative expense claim and request for payment as a condition of allowance of their administrative expense claims pursuant to 11 U.S.C. Section 503(b)(1)(D). With regard to year 2019 ad valorem property taxes, the Tax Authorities will receive payment of their prepetition claims within 30 days of the Effective Date of the Plan. The payment will include interest from the Petition Date through the Effective Date and from the Effective Date through payment in full at the state statutory rate pursuant to 11 U.S.C. Sections 506(b), 511, and 1129, if applicable, subject to all of the Debtor's and Reorganized Debtor's rights and defenses in connection therewith. Notwithstanding any other provision in the Plan, the Tax Authorities shall (i) retain the liens that secure all prepetition and postpetition amounts ultimately owed to them, if any, as well as (ii) the state law priority of those liens until the claims are paid in full.
- b. The Tax Authorities' prepetition claims and their administrative expense claims shall not be discharged until such time as the amounts owed are paid in full. In the event of a default asserted by the Taxing Authorities, the Tax Authorities shall provide notice Debtor or Reorganized Debtor, as applicable, and may demand cure of any such asserted default. Subject to all of its rights and defenses, the Debtor or Reorganized Debtor shall have fifteen (15) days from the date of the notice to cure the default. If the alleged default is not cured, the Tax Authorities may exercise any of their respective rights under applicable law and pursue collection of all amounts owed pursuant to state law outside of the Bankruptcy Court, subject in all respects to the Debtor's and Reorganized Debtor's applicable rights and defenses. The Debtor/Reorganized Debtor shall be entitled to any notices of default required under applicable nonbankruptcy law and each of the Taxing Authorities, the Debtor and the Reorganized Debtor reserve any and all of their respective rights and defenses in connection therewith. The Debtor's and Reorganized Debtor's rights and defenses under Texas Law and the Bankruptcy Code with respect to this provision of the Confirmation Order, including their right to dispute or object to the Tax Authorities' Claims and liens, are fully preserved.

RR. Resolution of Objections of Scott Ellington and Isaac Leventon.

Pursuant to Bankruptcy Rule 9019(a), the Senior Employees' Settlement is approved in all respects. The Debtor may, only with the consent of the Committee, elect Option B for a Senior Employee Claimant by written notice to such Senior Employee Claimant on or before the occurrence of the Effective Date. If the Debtor does not elect Option B, then Option A will govern the treatment of the Liquidated Bonus Claims.

- a. Notwithstanding any language in the Plan, the Disclosure Statement, or this Confirmation Order to the contrary, if Option A applies to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee Claimant will receive the treatment described in paragraph 82(e) hereof, and if the Debtor timely elects Option B with respect to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee will receive the treatment described in paragraph 82(f) hereof.
- b. The Senior Employees' Settlement is hereby approved, without prejudice to the respective rights of Mr. Ellington and Mr. Leventon to assert all their remaining Claims against the Debtor's estate, including, but not limited to, their Class 6 PTO Claims, their remaining Class 8 General Unsecured Claims, any indemnification claims, and any Administrative Expense Claims that they may assert and is without prejudice to the rights of any party in interest to object to any such Claims.
- c. Pursuant to Bankruptcy Rule 3018(a), Mr. Ellington and Mr. Leventon were permitted to change their votes on the Plan. Accordingly, Mr. Ellington's votes on his Ballots in Class 7 and Class 8 of the Plan were changed from a rejection of the Plan to acceptance of the Plan, and Mr. Leventon's votes on his Ballots in Class 7 and Class 8 of the Plan were, changed from rejections of the Plan to acceptances of the Plan.
- d. The Senior Employees' Objection is deemed withdrawn.

SS. No Release of Claims Against Senior Employee Claimants. For the avoidance of doubt, the Senior Employees' Settlement, as approved herein, shall not, and shall not be deemed to, release any Claims or Causes of Action held by the Debtor against either Senior

Employee Claimant nor shall either Senior Employee Claimant be, or be deemed to be, a “Released Party” under the Plan.

TT. Resolution of Objection of Internal Revenue Service. Notwithstanding any other provision or term of the Plan or Confirmation Order, the following Default Provision shall control as to the United States of America, Internal Revenue Service (“IRS”) and all of its claims, including any administrative claim (the “IRS Claim”):

(a) Notwithstanding any other provision in the Plan, if the Debtor, the Reorganized Debtor, or any successor in interest fails to pay when due any payment required to be made on federal taxes, the IRS Claim, or other payment required to be made to the IRS under the terms and provisions of this Plan, the Confirmation Order, or the Internal Revenue Code (26 U.S.C.), or fails to timely file any required federal tax return, or if any other event of default as set forth in the Plan occurs, the IRS shall be entitled to give the Debtor, the Reorganized Debtor and/or any successor in interest and their counsel of record, by United States Certified Mail, written notice of the failure and/or default with demand that it be cured, and if the failure and/or default is not cured within 14 days of the date of said notice and demand, then the following shall apply to the IRS:

(1) The administrative collection powers and the rights of the IRS shall be reinstated as they existed prior to the filing of the bankruptcy petition, including, but not limited to, the assessment of taxes, the filing of a notice of Federal tax lien and the powers of levy, seizure, and collection as provided under the Internal Revenue Code;

(2) The automatic stay of 11 U.S.C. § 362 and any injunction of the Plan or in the Confirmation Order shall, with regard to the IRS only, lift or terminate without further notice or hearing by the Bankruptcy Court, and the entire prepetition liability owed to the IRS, together with any unpaid postpetition tax liabilities, may become due and payable immediately; and

(3) The IRS shall have the right to proceed to collect from the Debtor, the Reorganized Debtor or any successor in interest any of the prepetition tax liabilities and related penalties and interest through administrative or judicial collection procedures available under the United States Code as if no bankruptcy petition had been filed and as if no plan had been confirmed.

(b) If the IRS declares the Debtor, the Reorganized Debtor, or any successor-in-interest to be in default of the Debtor’s, the Reorganized Debtor’s and/ or any successor- in-interest’s obligations under the Plan, then entire prepetition liability of an IRS’ Allowed Claim, together with any unpaid postpetition tax liabilities shall become due and payable

immediately upon written demand to the Debtor, Reorganized Debtor and/or any successor-in-interest. Failure of the IRS to declare a failure and/or default does not constitute a waiver by the United States or its agency the IRS of the right to declare that the Debtor, Reorganized Debtor, and/or any successor in interest is in default.

(c) The IRS shall only be required to send two notices of failure and/or default, and upon the third event of a failure and/or default, the IRS shall be entitled to proceed as set out in paragraphs (1), (2), and/or (3) herein above without further notice to the Debtor, the Reorganized Debtor, or any successor in interest, or its counsel. The collection statute expiration date for all unpaid federal tax liabilities shall be extended pursuant to non-bankruptcy law.

(d) The Internal Revenue Service shall not be bound by any release provisions in the Plan that would release any liability of the responsible persons of the Debtor, the Reorganized Debtor, and/or any successor in interest to the IRS. The Internal Revenue Service may take such actions as it deems necessary to assess any liability that may be due and owing by the responsible persons of the Debtor, the Reorganized Debtor and/or any successor in interest to the Internal Revenue Service.

(e) Nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, claims, causes of action, rights of setoff or recoupment, rights to appeal tax assessments, or other legal or equitable defenses that the Debtor or Reorganized Debtor have under non-bankruptcy law in connection with any claim, liability or cause of action of the United States and its agency the Internal Revenue Service.

(f) The term “any payment required to be made on federal taxes,” as used herein above, is defined as: any payment or deposit required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full. The term “any required tax return,” as used herein above, is defined as: any tax return or report required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full.

UU. IRS Proof of Claim. Notwithstanding anything in the Plan or in this Confirmation Order, until all required tax returns are filed with and processed by the IRS, the IRS’s proof of claim will not be deemed fixed for purposes of Section 502 of the Bankruptcy Code and may be amended in order to reflect the IRS’ assessment of the Debtor’s unpaid priority and general unsecured taxes, penalties and interest.

VV. CLO Holdco, Ltd. Settlement Notwithstanding anything contained herein to the contrary, nothing in this Order is or is intended to supersede the rights and obligations of either the Debtor or CLO Holdco contained in that certain *Settlement Agreement between CLO Holdco, Ltd., and Highland Capital Management, L.P., dated January 25, 2021* [Docket No. 1838-1] (the “CLOH Settlement Agreement”). In the event of any conflict between the terms of this Order and the terms of the CLOH Settlement Agreement, the terms of the CLOH Settlement Agreement will govern.

WW. Retention of Jurisdiction. The Bankruptcy Court may properly, and upon the Effective Date shall, to the maximum extent permitted under applicable law, retain jurisdiction over all matters arising out of, and related to, this Chapter 11 Case, including the matters set forth in Article XI of the Plan and section 1142 of the Bankruptcy Code.

XX. Payment of Statutory Fees; Filing of Quarterly Reports. All fees payable pursuant to 28 U.S.C. § 1930 shall be paid on or before the Effective Date. The Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case. Notwithstanding anything to the contrary in the Plan, the U.S. Trustee shall not be required to file any proofs of claim with respect to quarterly fees payable pursuant to 28 U.S.C. § 1930.

YY. Dissolution of the Committee. On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee’s Professionals will cease to have

any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). Notwithstanding the foregoing, any Committee member or Professional may serve following the Effective Date with respect to the Claimant Trust Oversight Board or Litigation Sub-Trust. The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan, the Claimant Trust Agreement, and/or Litigation Sub-Trust in connection with such representation.

ZZ. Miscellaneous. After the Effective Date, the Debtor or Reorganized Debtor, as applicable, shall have no obligation to file with the Bankruptcy Court or serve on any parties reports that the Debtor or Reorganized Debtor, as applicable, were obligated to file under the Bankruptcy Code or a court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed before the Effective Date), ordinary course professional reports, reports to any parties otherwise required under the "first" and "second" day orders entered in this Chapter 11 Case (including any cash collateral financing orders entered in this Chapter 11 Case) and monthly or quarterly reports for Professionals; *provided, however*, that

the Debtor or Reorganized Debtor, as applicable, will comply with the U.S. Trustee's post confirmation reporting requirements.

###END OF ORDER###

Exhibit A

Fifth Amended Plan (as Modified)

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Debtor.)	

**FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND
CAPITAL MANAGEMENT, L.P. (AS MODIFIED)**

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

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DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION

HIGHLAND CAPITAL MANAGEMENT, L.P., as debtor and debtor-in-possession in the above-captioned case (the “Debtor”), proposes the following chapter 11 plan of reorganization (the “Plan”) for, among other things, the resolution of the outstanding Claims against, and Equity Interests in, the Debtor. Unless otherwise noted, capitalized terms used in this Plan have the meanings set forth in Article I of this Plan. The Debtor is the proponent of this Plan within the meaning of section 1129 of the Bankruptcy Code.

Reference is made to the Disclosure Statement (as such term is defined herein and distributed contemporaneously herewith) for a discussion of the Debtor’s history, business, results of operations, historical financial information, projections and assets, and for a summary and analysis of this Plan and the treatment provided for herein. There also are other agreements and documents that may be Filed with the Bankruptcy Court that are referenced in this Plan or the Disclosure Statement as Exhibits and Plan Documents. All such Exhibits and Plan Documents are incorporated into and are a part of this Plan as if set forth in full herein. Subject to the other provisions of this Plan, and in accordance with the requirements set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Debtor reserves the right to alter, amend, modify, revoke, or withdraw this Plan prior to the Effective Date.

If this Plan cannot be confirmed, for any reason, then subject to the terms set forth herein, this Plan may be revoked.

ARTICLE I.
RULES OF INTERPRETATION, COMPUTATION OF TIME,
GOVERNING LAW AND DEFINED TERMS

A. Rules of Interpretation, Computation of Time and Governing Law

For purposes hereof: (a) in the appropriate context, each term, whether stated in the singular or the plural, shall include both the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and the neuter gender; (b) any reference herein to a contract, lease, instrument, release, indenture or other agreement or document being in a particular form or on particular terms and conditions means that the referenced document, as previously amended, modified or supplemented, if applicable, shall be substantially in that form or substantially on those terms and conditions; (c) any reference herein to an existing document or exhibit having been Filed or to be Filed shall mean that document or exhibit, as it may thereafter be amended, modified or supplemented in accordance with its terms; (d) unless otherwise specified, all references herein to “Articles,” “Sections,” “Exhibits” and “Plan Documents” are references to Articles, Sections, Exhibits and Plan Documents hereof or hereto; (e) unless otherwise stated, the words “herein,” “hereof,” “hereunder” and “hereto” refer to this Plan in its entirety rather than to a particular portion of this Plan; (f) captions and headings to Articles and Sections are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation hereof; (g) any reference to an Entity as a Holder of a Claim or Equity Interest includes such Entity’s successors and assigns; (h) the rules of construction set

forth in section 102 of the Bankruptcy Code shall apply; (i) any term used in capitalized form herein that is not otherwise defined but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in the Bankruptcy Code or the Bankruptcy Rules, as the case may be; and (j) “\$” or “dollars” means Dollars in lawful currency of the United States of America. The provisions of Bankruptcy Rule 9006(a) shall apply in computing any period of time prescribed or allowed herein.

B. Defined Terms

Unless the context otherwise requires, the following terms shall have the following meanings when used in capitalized form herein:

1. “*Acis*” means collectively Acis Capital Management, L.P. and Acis Capital Management GP, LLP.

2. “*Administrative Expense Claim*” means any Claim for costs and expenses of administration of the Chapter 11 Case that is Allowed pursuant to sections 503(b), 507(a)(2), 507(b) or 1114(2) of the Bankruptcy Code, including, without limitation, (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor; and (b) all fees and charges assessed against the Estate pursuant to sections 1911 through 1930 of chapter 123 of title 28 of the United States Code, and that have not already been paid by the Debtor during the Chapter 11 Case and a Professional Fee Claim.

3. “*Administrative Expense Claims Bar Date*” means, with respect to any Administrative Expense Claim (other than a Professional Fee Claim) becoming due on or prior to the Effective Date, 5:00 p.m. (prevailing Central Time) on such date that is forty-five days after the Effective Date.

4. “*Administrative Expense Claims Objection Deadline*” means, with respect to any Administrative Expense Claim, the later of (a) ninety (90) days after the Effective Date and (b) sixty (60) days after the timely Filing of the applicable request for payment of such Administrative Expense Claim; *provided, however*, that the Administrative Expense Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee.

5. “*Affiliate*” of any Person means any Entity that, with respect to such Person, either (i) is an “affiliate” as defined in section 101(2) of the Bankruptcy Code, or (ii) is an “affiliate” as defined in Rule 405 of the Securities Act of 1933, or (iii) directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. For the purposes of this definition, the term “control” (including, without limitation, the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction in any respect of the management or policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

6. “*Allowed*” means, with respect to any Claim, except as otherwise provided in the Plan: (a) any Claim that is evidenced by a Proof of Claim that has been timely Filed by the Bar Date, or that is not required to be evidenced by a Filed Proof of Claim under the Bankruptcy

Code or a Final Order; (b) a Claim that is listed in the Schedules as not contingent, not unliquidated, and not disputed and for which no Proof of Claim has been timely filed; (c) a Claim Allowed pursuant to the Plan or an order of the Bankruptcy Court that is not stayed pending appeal; or (d) a Claim that is not Disputed (including for which a Proof of Claim has been timely filed in a liquidated and noncontingent amount that has not been objected to by the Claims Objection Deadline or as to which any such objection has been overruled by Final Order); *provided, however*, that with respect to a Claim described in clauses (a) and (b) above, such Claim shall be considered Allowed only if and to the extent that, with respect to such Claim, no objection to the allowance thereof has been interposed within the applicable period of time fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, or such an objection is so interposed and the Claim shall have been Allowed as set forth above.

7. “*Allowed Claim or Equity Interest*” means a Claim or an Equity Interest of the type that has been Allowed.

8. “*Assets*” means all of the rights, titles, and interest of the Debtor, Reorganized Debtor, or Claimant Trust, in and to property of whatever type or nature, including, without limitation, real, personal, mixed, intellectual, tangible, and intangible property, the Debtor’s books and records, and the Causes of Action.

9. “*Available Cash*” means any Cash in excess of the amount needed for the Claimant Trust and Reorganized Debtor to maintain business operations as determined in the sole discretion of the Claimant Trustee.

10. “*Avoidance Actions*” means any and all avoidance, recovery, subordination or other actions or remedies that may be brought by and on behalf of the Debtor or its Estate under the Bankruptcy Code or applicable nonbankruptcy law, including, without limitation, actions or remedies arising under sections 502, 510, 544, 545, and 547-553 of the Bankruptcy Code or under similar state or federal statutes and common law, including fraudulent transfer laws

11. “*Ballot*” means the form(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

12. “*Bankruptcy Code*” means title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended from time to time and as applicable to the Chapter 11 Case.

13. “*Bankruptcy Court*” means the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, or any other court having jurisdiction over the Chapter 11 Case.

14. “*Bankruptcy Rules*” means the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, in each case as amended from time to time and as applicable to the Chapter 11 Case.

15. “*Bar Date*” means the applicable deadlines set by the Bankruptcy Court for the filing of Proofs of Claim against the Debtor as set forth in the Bar Date Order, which deadlines may be or have been extended for certain Claimants by order of the Bankruptcy Court.

16. “*Bar Date Order*” means the *Order (I) Establishing Bar Dates for Filing Proofs of Claim and (II) Approving the Form and Manner of Notice Thereof* [D.I. 488].

17. “*Business Day*” means any day, other than a Saturday, Sunday or “legal holiday” (as defined in Bankruptcy Rule 9006(a)).

18. “*Cash*” means the legal tender of the United States of America or the equivalent thereof.

19. “*Causes of Action*” means any action, claim, cross-claim, third-party claim, cause of action, controversy, demand, right, Lien, indemnity, contribution, guaranty, suit, obligation, liability, debt, damage, judgment, account, defense, remedy, offset, power, privilege, license and franchise of any kind or character whatsoever, in each case whether known, unknown, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, foreseen or unforeseen, direct or indirect, choate or inchoate, secured or unsecured, assertable directly or derivatively (including, without limitation, under alter ego theories), whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity or pursuant to any other theory of law. For the avoidance of doubt, Cause of Action includes, without limitation,: (a) any right of setoff, counterclaim or recoupment and any claim for breach of contract or for breach of duties imposed by law or in equity; (b) the right to object to Claims or Equity Interests; (c) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (d) any claim or defense including fraud, mistake, duress and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; (e) any claims under any state or foreign law, including, without limitation, any fraudulent transfer or similar claims; (f) the Avoidance Actions, and (g) the Estate Claims. The Causes of Action include, without limitation, the Causes of Action belonging to the Debtor’s Estate listed on the schedule of Causes of Action to be filed with the Plan Supplement.

20. “*CEO/CRO*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer.

21. “*Chapter 11 Case*” means the Debtor’s case under chapter 11 of the Bankruptcy Code commenced on the Petition Date in the Delaware Bankruptcy Court and transferred to the Bankruptcy Court on December 4, 2019, and styled *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj-11.

22. “*Claim*” means any “claim” against the Debtor as defined in section 101(5) of the Bankruptcy Code.

23. “*Claims Objection Deadline*” means the date that is 180 days after the Confirmation Date; *provided, however*, the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee.

24. “*Claimant Trust*” means the trust established for the benefit of the Claimant Trust Beneficiaries on the Effective Date in accordance with the terms of this Plan and the Claimant Trust Agreement.

25. “*Claimant Trust Agreement*” means the agreement Filed in the Plan Supplement establishing and delineating the terms and conditions of the Claimant Trust.

26. “*Claimant Trust Assets*” means (i) other than the Reorganized Debtor Assets (which are expressly excluded from this definition), all other Assets of the Estate, including, but not limited to, all Causes of Action, Available Cash, any proceeds realized or received from such Assets, all rights of setoff, recoupment, and other defenses with respect, relating to, or arising from such Assets, (ii) any Assets transferred by the Reorganized Debtor to the Claimant Trust on or after the Effective Date, (iii) the limited partnership interests in the Reorganized Debtor, and (iv) the ownership interests in New GP LLC. For the avoidance of doubt, any Causes of Action that, for any reason, are not capable of being transferred to the Claimant Trust shall constitute Reorganized Debtor Assets.

27. “*Claimant Trust Beneficiaries*” means the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, including, upon Allowance, Disputed General Unsecured Claims and Disputed Subordinated Claims that become Allowed following the Effective Date, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, post-petition interest from the Petition Date at the Federal Judgment Rate in accordance with the terms and conditions set forth in the Claimant Trust Agreement and all Disputed Claims in Class 8 and Class 9 have been resolved, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests.

28. “*Claimant Trustee*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer, or such other Person identified in the Plan Supplement who will act as the trustee of the Claimant Trust in accordance with the Plan, the Confirmation Order, and Claimant Trust Agreement or any replacement trustee pursuant to (and in accordance with) the Claimant Trust Agreement. The Claimant Trustee shall be responsible for, among other things, monetizing the Estate’s investment assets, resolving Claims (other than those Claims assigned to the Litigation Sub-Trust for resolution), and, as the sole officer of New GP LLC, winding down the Reorganized Debtor’s business operations.

29. “*Claimant Trust Expenses*” means all reasonable legal and other reasonable professional fees, costs, and expenses incurred by the Trustees on account of administration of the Claimant Trust, including any reasonable administrative fees and expenses, reasonable attorneys’ fees and expenses, reasonable insurance costs, taxes, reasonable escrow expenses, and other expenses.

30. “*Claimant Trust Interests*” means the non-transferable interests in the Claimant Trust that are issued to the Claimant Trust Beneficiaries pursuant to this Plan; *provided, however*, Holders of Class A Limited Partnership Interests, Class B Limited Partnership Interests, and Class C Limited Partnership Interests will not be deemed to hold Claimant Trust Interests

unless and until the Contingent Claimant Trust Interests distributed to such Holders vest in accordance with the terms of this Plan and the Claimant Trust Agreement.

31. “*Claimant Trust Oversight Committee*” means the committee of five Persons established pursuant to ARTICLE IV of this Plan to oversee the Claimant Trustee’s performance of its duties and otherwise serve the functions described in this Plan and the Claimant Trust Agreement.

32. “*Class*” means a category of Holders of Claims or Equity Interests as set forth in ARTICLE III hereof pursuant to section 1122(a) of the Bankruptcy Code.

33. “*Class A Limited Partnership Interest*” means the Class A Limited Partnership Interests as defined in the Limited Partnership Agreement held by The Dugaboy Investment Trust, Mark and Pamela Okada Family Trust – Exempt Trust 2, Mark and Pamela Okada – Exempt Descendants’ Trust, and Mark Kiyoshi Okada, and the General Partner Interest.

34. “*Class B Limited Partnership Interest*” means the Class B Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

35. “*Class B/C Limited Partnership Interests*” means, collectively, the Class B Limited Partnership and Class C Limited Partnership Interests.

36. “*Class C Limited Partnership Interest*” means the Class C Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

37. “*Committee*” means the Official Committee of Unsecured Creditors appointed by the U.S. Trustee pursuant to 11 U.S.C. § 1102(a)(1) on October 29, 2019 [D.I. 65], consisting of (i) the Redeemer Committee of Highland Crusader Fund, (ii) Meta-e Discovery, (iii) UBS, and (iv) Acis.

38. “*Confirmation Date*” means the date on which the clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court.

39. “*Confirmation Hearing*” means the hearing held by the Bankruptcy Court pursuant to section 1128 of the Bankruptcy Code to consider confirmation of this Plan, as such hearing may be adjourned or continued from time to time.

40. “*Confirmation Order*” means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

41. “*Convenience Claim*” means any prepetition, liquidated, and unsecured Claim against the Debtor that as of the Confirmation Date is less than or equal to \$1,000,000 or any General Unsecured Claim that makes the Convenience Class Election. For the avoidance of doubt, the Reduced Employee Claims will be Convenience Claims.

42. “*Convenience Claim Pool*” means the \$13,150,000 in Cash that shall be available upon the Effective Date for distribution to Holders of Convenience Claims under the Plan as set forth herein. Any Cash remaining in the Convenience Claim Pool after all distributions on account of Convenience Claims have been made will be transferred to the Claimant Trust and administered as a Claimant Trust Asset.

43. “*Convenience Class Election*” means the option provided to each Holder of a General Unsecured Claim that is a liquidated Claim as of the Confirmation Date on their Ballot to elect to reduce their claim to \$1,000,000 and receive the treatment provided to Convenience Claims.

44. “*Contingent Claimant Trust Interests*” means the contingent Claimant Trust Interests to be distributed to Holders of Class A Limited Partnership Interests, Holders of Class B Limited Partnership Interests, and Holders of Class C Limited Partnership Interests in accordance with this Plan, the rights of which shall not vest, and consequently convert to Claimant Trust Interests, unless and until the Claimant Trustee Files a certification that all holders of Allowed General Unsecured Claims have been paid indefeasibly in full, plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, all accrued and unpaid post-petition interest from the Petition Date at the Federal Judgment Rate and all Disputed Claims in Class 8 and Class 9 have been resolved. As set forth in the Claimant Trust Agreement, the Contingent Claimant Trust Interests distributed to the Holders of Class A Limited Partnership Interests will be subordinated to the Contingent Claimant Trust Interests distributed to the Holders of Class B/C Limited Partnership Interests.

45. “*Debtor*” means Highland Capital Management, L.P. in its capacity as debtor and debtor in possession in the Chapter 11 Case.

46. “*Delaware Bankruptcy Court*” means the United States Bankruptcy Court for the District of Delaware.

47. “*Disclosure Statement*” means that certain *Disclosure Statement for Debtor’s Fifth Amended Chapter 11 Plan of Reorganization*, as amended, supplemented, or modified from time to time, which describes this Plan, including all exhibits and schedules thereto and references therein that relate to this Plan.

48. “*Disputed*” means with respect to any Claim or Equity Interest, any Claim or Equity Interest that is not yet Allowed.

49. “*Disputed Claims Reserve*” means the appropriate reserve(s) or account(s) to be established on the Initial Distribution Date and maintained by the Claimant Trustee for distributions on account of Disputed Claims that may subsequently become an Allowed Claim.

50. “*Disputed Claims Reserve Amount*” means, for purposes of determining the Disputed Claims Reserve, the Cash that would have otherwise been distributed to a Holder of a Disputed Claim at the time any distributions of Cash are made to the Holders of Allowed Claims. The amount of the Disputed Claim upon which the Disputed Claims Reserve is calculated shall be: (a) the amount set forth on either the Schedules or the filed Proof of Claim, as applicable; (b) the amount agreed to by the Holder of the Disputed Claim and the Claimant Trustee or Reorganized

Debtor, as applicable; (c) the amount ordered by the Bankruptcy Court if it enters an order disallowing, in whole or in part, a Disputed Claim; or (d) as otherwise ordered by the Bankruptcy Court, including an order estimating the Disputed Claim.

51. “*Distribution Agent*” means the Claimant Trustee, or any party designated by the Claimant Trustee to serve as distribution agent under this Plan.

52. “*Distribution Date*” means the date or dates determined by the Reorganized Debtor or the Claimant Trustee, as applicable, on or after the Initial Distribution Date upon which the Distribution Agent shall make distributions to holders of Allowed Claims and Interests entitled to receive distributions under the Plan.

53. “*Distribution Record Date*” means the date for determining which Holders of Claims and Equity Interests are eligible to receive distributions hereunder, which date shall be the Effective Date or such later date determined by the Bankruptcy Court.

54. “*Effective Date*” means the Business Day that this Plan becomes effective as provided in ARTICLE VIII hereof.

55. “*Employees*” means the employees of the Debtor set forth in the Plan Supplement.

56. “*Enjoined Parties*” means (i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero (“Dondero”), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing.

57. “*Entity*” means any “entity” as defined in section 101(15) of the Bankruptcy Code and also includes any Person or any other entity.

58. “*Equity Interest*” means any Equity Security in the Debtor, including, without limitation, all issued, unissued, authorized or outstanding partnership interests, shares, of stock or limited company interests, the Class A Limited Partnership Interests, the Class B Limited Partnership Interests, and the Class C Limited Partnership Interests.

59. “*Equity Security*” means an “equity security” as defined in section 101(16) of the Bankruptcy Code.

60. “*Estate*” means the bankruptcy estate of the Debtor created by virtue of section 541 of the Bankruptcy Code upon the commencement of the Chapter 11 Case.

61. “*Estate Claims*” has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [D.I. 354].

62. “*Exculpated Parties*” means, collectively, (i) the Debtor and its successors and assigns, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), NexBank, SSB (and any of its subsidiaries), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Exculpated Party.”

63. “*Executory Contract*” means a contract to which the Debtor is a party that is subject to assumption or rejection under sections 365 or 1123 of the Bankruptcy Code.

64. “*Exhibit*” means an exhibit annexed hereto or to the Disclosure Statement (as such exhibits are amended, modified or otherwise supplemented from time to time), which are incorporated by reference herein.

65. “*Federal Judgment Rate*” means the post-judgment interest rate set forth in 28 U.S.C. § 1961 as of the Effective Date.

66. “*File*” or “*Filed*” or “*Filing*” means file, filed or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Case.

67. “*Final Order*” means an order or judgment of the Bankruptcy Court, which is in full force and effect, and as to which the time to appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing has expired and as to which no appeal, petition for *certiorari*, or other proceedings for a new trial, reargument or rehearing shall then be pending or as to which any right to appeal, petition for *certiorari*, new trial, reargument, or rehearing shall have been waived in writing in form and substance satisfactory to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, or, in the event that an appeal, writ of *certiorari*, new trial, reargument, or rehearing thereof has been sought, such order of the Bankruptcy Court shall have been determined by the highest court to which such order was appealed, or *certiorari*, new trial, reargument or rehearing shall have been denied and the time to take any further appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing shall have expired; *provided, however*, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be Filed with respect to such order shall not preclude such order from being a Final Order.

68. “*Frontier Secured Claim*” means the loan from Frontier State Bank to the Debtor in the principal amount of \$7,879,688.00 made pursuant to that certain First Amended and Restated Loan Agreement, dated March 29, 2018.

69. “*General Partner Interest*” means the Class A Limited Partnership Interest held by Strand, as the Debtor’s general partner.

70. “*General Unsecured Claim*” means any prepetition Claim against the Debtor that is not Secured and is not a/an: (a) Administrative Expense Claim; (b) Professional Fee Claim; (c) Priority Tax Claim; (d) Priority Non-Tax Claim; or (e) Convenience Claim.

71. “*Governmental Unit*” means a “governmental unit” as defined in section 101(27) of the Bankruptcy Code.

72. “*GUC Election*” means the option provided to each Holder of a Convenience Claim on their Ballot to elect to receive the treatment provided to General Unsecured Claims.

73. “*Holder*” means an Entity holding a Claim against, or Equity Interest in, the Debtor.

74. “*Impaired*” means, when used in reference to a Claim or Equity Interest, a Claim or Equity Interest that is impaired within the meaning of section 1124 of the Bankruptcy Code.

75. “*Independent Directors*” means John S. Dubel, James P. Seery, Jr., and Russell Nelms, the independent directors of Strand appointed on January 9, 2020, and any additional or replacement directors of Strand appointed after January 9, 2020, but prior to the Effective Date.

76. “*Initial Distribution Date*” means, subject to the “Treatment” sections in ARTICLE III hereof, the date that is on or as soon as reasonably practicable after the Effective Date, when distributions under this Plan shall commence to Holders of Allowed Claims and Equity Interests.

77. “*Insurance Policies*” means all insurance policies maintained by the Debtor as of the Petition Date.

78. “*Jefferies Secured Claim*” means any Claim in favor of Jefferies, LLC, arising under that certain Prime Brokerage Customer Agreement, dated May 24, 2013, between the Debtor and Jefferies, LLC, that is secured by the assets, if any, maintained in the prime brokerage account created by such Prime Brokerage Customer Agreement.

79. “*Lien*” means a “lien” as defined in section 101(37) of the Bankruptcy Code and, with respect to any asset, includes, without limitation, any mortgage, lien, pledge, charge, security interest or other encumbrance of any kind, or any other type of preferential arrangement that has the practical effect of creating a security interest, in respect of such asset.

80. “*Limited Partnership Agreement*” means that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, as amended.

81. “*Litigation Sub-Trust*” means the sub-trust established within the Claimant Trust or as a wholly –owned subsidiary of the Claimant Trust on the Effective Date in each case in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement and Claimant Trust Agreement. As set forth in the Litigation Sub-Trust Agreement, the Litigation Sub-Trust shall hold the Claimant Trust Assets that are Estate Claims.

82. “*Litigation Sub-Trust Agreement*” means the agreement filed in the Plan Supplement establishing and delineating the terms and conditions of the Litigation Sub-Trust.

83. “*Litigation Trustee*” means the trustee appointed by the Committee and reasonably acceptable to the Debtor who shall be responsible for investigating, litigating, and settling the Estate Claims for the benefit of the Claimant Trust in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement.

84. “*Managed Funds*” means Highland Multi-Strategy Credit Fund, L.P., Highland Restoration Capital Partners, L.P., and any other investment vehicle managed by the Debtor pursuant to an Executory Contract assumed pursuant to this Plan.

85. “*New Frontier Note*” means that promissory note to be provided to the Allowed Holders of Class 2 Claims under this Plan and any other documents or security agreements securing the obligations thereunder.

86. “*New GP LLC*” means a limited liability company incorporated in the State of Delaware pursuant to the New GP LLC Documents to serve as the general partner of the Reorganized Debtor on the Effective Date.

87. “*New GP LLC Documents*” means the charter, operating agreement, and other formational documents of New GP LLC.

88. “*Ordinary Course Professionals Order*” means that certain *Order Pursuant to Sections 105(a), 327, 328, and 330 of the Bankruptcy Code Authorizing the Debtor to Retain, Employ, and Compensate Certain Professionals Utilized by the Debtor in the Ordinary Course* [D.I. 176].

89. “*Other Unsecured Claim*” means any Secured Claim other than the Jefferies Secured Claim and the Frontier Secured Claim.

90. “*Person*” means a “person” as defined in section 101(41) of the Bankruptcy Code and also includes any natural person, individual, corporation, company, general or limited partnership, limited liability company, unincorporated organization firm, trust, estate, business trust, association, joint stock company, joint venture, government, governmental agency, Governmental Unit or any subdivision thereof, the United States Trustee, or any other entity, whether acting in an individual, fiduciary or other capacity.

91. “*Petition Date*” means October 16, 2019.

92. “*Plan*” means this *Debtor’s Fifth Amended Chapter 11 Plan of Reorganization*, including the Exhibits and the Plan Documents and all supplements, appendices,

and schedules thereto, either in its present form or as the same may be altered, amended, modified or otherwise supplemented from time to time.

93. “*Plan Distribution*” means the payment or distribution of consideration to Holders of Allowed Claims and Allowed Equity Interests under this Plan.

94. “*Plan Documents*” means any of the documents, other than this Plan, but including, without limitation, the documents to be filed with the Plan Supplement, to be executed, delivered, assumed, or performed in connection with the occurrence of the Effective Date, and as may be modified consistent with the terms hereof with the consent of the Committee.

95. “*Plan Supplement*” means the ancillary documents necessary for the implementation and effectuation of the Plan, including, without limitation, (i) the form of Claimant Trust Agreement, (ii) the forms of New GP LLC Documents, (iii) the form of Reorganized Limited Partnership Agreement, (iv) the Sub-Servicer Agreement (if applicable), (v) the identity of the initial members of the Claimant Trust Oversight Committee, (vi) the form of Litigation Sub-Trust Agreement; (vii) the schedule of retained Causes of Action; (viii) the New Frontier Note, (ix) the schedule of Employees; (x) the form of Senior Employee Stipulation; and (xi) the schedule of Executory Contracts and Unexpired Leases to be assumed pursuant to this Plan, which, in each case, will be in form and substance reasonably acceptable to the Debtor and the Committee.

96. “*Priority Non-Tax Claim*” means a Claim entitled to priority pursuant to section 507(a) of the Bankruptcy Code, including any Claims for paid time-off entitled to priority under section 507(a)(4) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

97. “*Pro Rata*” means the proportion that (a) the Allowed amount of a Claim or Equity Interest in a particular Class bears to (b) the aggregate Allowed amount of all Claims or Equity Interests in such Class.

98. “*Professional*” means (a) any Entity employed in the Chapter 11 Case pursuant to section 327, 328, 363 or 1103 of the Bankruptcy Code or otherwise and (b) any Entity seeking compensation or reimbursement of expenses in connection with the Chapter 11 Case pursuant to sections 327, 328, 330, 331, 363, 503(b), 503(b)(4) and 1103 of the Bankruptcy Code.

99. “*Professional Fee Claim*” means a Claim under sections 328, 330(a), 331, 363, 503 or 1103 of the Bankruptcy Code, with respect to a particular Professional, for compensation for services rendered or reimbursement of costs, expenses or other charges incurred after the Petition Date and prior to and including the Effective Date.

100. “*Professional Fee Claims Bar Date*” means with respect to Professional Fee Claims, the Business Day which is sixty (60) days after the Effective Date or such other date as approved by order of the Bankruptcy Court.

101. “*Professional Fee Claims Objection Deadline*” means, with respect to any Professional Fee Claim, thirty (30) days after the timely Filing of the applicable request for payment of such Professional Fee Claim.

102. “*Professional Fee Reserve*” means the reserve established and funded by the Claimant Trustee pursuant this Plan to provide sufficient funds to satisfy in full unpaid Allowed Professional Fee Claims.

103. “*Proof of Claim*” means a written proof of Claim or Equity Interest Filed against the Debtor in the Chapter 11 Case.

104. “*Priority Tax Claim*” means any Claim of a Governmental Unit of the kind specified in section 507(a)(8) of the Bankruptcy Code.

105. “*Protected Parties*” means, collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the Claimant Trust Oversight Committee (in their official capacities), (xiii) New GP LLC, (xiv) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), NexBank, SSB (and any of its subsidiaries), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Protected Party.”

106. “*PTO Claims*” means any Claim for paid time off in favor of any Debtor employee in excess of the amount that would qualify as a Priority Non-Tax Claim under section 507(a)(4) of the Bankruptcy Code.

107. “*Reduced Employee Claims*” has the meaning set forth in ARTICLE IX.D.

108. “*Reinstated*” means, with respect to any Claim or Equity Interest, (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim or Equity Interest in accordance with section 1124 of the Bankruptcy Code or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim or Equity Interest to demand or receive accelerated payment of such Claim or Equity Interest after the occurrence of a default: (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code or of a kind that section 365(b)(2) of the Bankruptcy Code expressly does not require to be cured; (ii) reinstating the maturity of such Claim or Equity Interest as such maturity existed before such default; (iii) compensating the Holder of such Claim or Equity Interest for any damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; (iv) if such Claim or Equity Interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to section 365(b)(1)(A) of the Bankruptcy Code, compensating the Holder

of such Claim or Equity Interest (other than any Debtor or an insider of any Debtor) for any actual pecuniary loss incurred by such Holder as a result of such failure; and (v) not otherwise altering the legal, equitable, or contractual rights to which such Claim entitles the Holder of such Claim.

109. “*Rejection Claim*” means any Claim for monetary damages as a result of the rejection of an executory contract or unexpired lease pursuant to the Confirmation Order.

110. “*Related Entity*” means, without duplication, (a) Dondero, (b) Mark Okada (“Okada”), (c) Grant Scott (“Scott”), (d) Hunter Covitz (“Covitz”), (e) any entity or person that was an insider of the Debtor on or before the Petition Date under Section 101(31) of the Bankruptcy Code, including, without limitation, any entity or person that was a non-statutory insider, (f) any entity that, after the Effective Date, is an insider or Affiliate of one or more of Dondero, Okada, Scott, Covitz, or any of their respective insiders or Affiliates, including, without limitation, The Dugaboy Investment Trust, (g) the Hunter Mountain Investment Trust and any of its direct or indirect parents, (h) the Charitable Donor Advised Fund, L.P., and any of its direct or indirect subsidiaries, and (i) Affiliates of the Debtor and any other Entities listed on the Related Entity List.

111. “*Related Entity List*” means that list of Entities filed with the Plan Supplement.

112. “*Related Persons*” means, with respect to any Person, such Person’s predecessors, successors, assigns (whether by operation of law or otherwise), and each of their respective present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives, in each case solely in their capacity as such.

113. “*Released Parties*” means, collectively, (i) the Independent Directors; (ii) Strand (solely from the date of the appointment of the Independent Directors through the Effective Date); (iii) the CEO/CRO; (iv) the Committee; (v) the members of the Committee (in their official capacities), (vi) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case; and (vii) the Employees.

114. “*Reorganized Debtor*” means the Debtor, as reorganized pursuant to this Plan on and after the Effective Date.

115. “*Reorganized Debtor Assets*” means any limited and general partnership interests held by the Debtor, the management of the Managed Funds and those Causes of Action (including, without limitation, claims for breach of fiduciary duty), that, for any reason, are not capable of being transferred to the Claimant Trust. For the avoidance of doubt, “*Reorganized Debtor Assets*” includes any partnership interests or shares of Managed Funds held by the Debtor but does not include the underlying portfolio assets held by the Managed Funds.

116. “*Reorganized Limited Partnership Agreement*” means that certain Fifth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., by and among the Claimant Trust, as limited partner, and New GP LLC, as general partner, Filed with the Plan Supplement.

117. “*Restructuring*” means the restructuring of the Debtor, the principal terms of which are set forth in this Plan and the Disclosure Statement.

118. “*Retained Employee Claim*” means any Claim filed by a current employee of the Debtor who will be employed by the Reorganized Debtor upon the Effective Date.

119. “*Schedules*” means the schedules of Assets and liabilities, statements of financial affairs, lists of Holders of Claims and Equity Interests and all amendments or supplements thereto Filed by the Debtor with the Bankruptcy Court [D.I. 247].

120. “*Secured*” means, when referring to a Claim: (a) secured by a Lien on property in which the Debtor’s Estate has an interest, which Lien is valid, perfected, and enforceable pursuant to applicable law or by reason of a Bankruptcy Court order, or that is subject to setoff pursuant to section 553 of the Bankruptcy Code, to the extent of the value of the creditor’s interest in the interest of the Debtor’s Estate in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code or (b) Allowed pursuant to the Plan as a Secured Claim.

121. “*Security*” or “*security*” means any security as such term is defined in section 101(49) of the Bankruptcy Code.

122. “*Senior Employees*” means the senior employees of the Debtor Filed in the Plan Supplement.

123. “*Senior Employee Stipulation*” means the agreements filed in the Plan Supplement between each Senior Employee and the Debtor.

124. “*Stamp or Similar Tax*” means any stamp tax, recording tax, personal property tax, conveyance fee, intangibles or similar tax, real estate transfer tax, sales tax, use tax, transaction privilege tax (including, without limitation, such taxes on prime contracting and owner-builder sales), privilege taxes (including, without limitation, privilege taxes on construction contracting with regard to speculative builders and owner builders), and other similar taxes imposed or assessed by any Governmental Unit.

125. “*Statutory Fees*” means fees payable pursuant to 28 U.S.C. § 1930.

126. “*Strand*” means Strand Advisors, Inc., the Debtor’s general partner.

127. “*Sub-Servicer*” means a third-party selected by the Claimant Trustee to service or sub-service the Reorganized Debtor Assets.

128. “*Sub-Servicer Agreement*” means the agreement that may be entered into providing for the servicing of the Reorganized Debtor Assets by the Sub-Servicer.

129. “*Subordinated Claim*” means any Claim that is subordinated to the Convenience Claims and General Unsecured Claims pursuant to an order entered by the Bankruptcy Court (including any other court having jurisdiction over the Chapter 11 Case) after notice and a hearing.

130. “*Subordinated Claimant Trust Interests*” means the Claimant Trust Interests to be distributed to Holders of Allowed Subordinated Claims under the Plan, which such interests shall be subordinated in right and priority to the Claimant Trust Interests distributed to Holders of Allowed General Unsecured Claims as provided in the Claimant Trust Agreement.

131. “*Trust Distribution*” means the transfer of Cash or other property by the Claimant Trustee to the Claimant Trust Beneficiaries.

132. “*Trustees*” means, collectively, the Claimant Trustee and Litigation Trustee.

133. “*UBS*” means, collectively, UBS Securities LLC and UBS AG London Branch.

134. “*Unexpired Lease*” means a lease to which the Debtor is a party that is subject to assumption or rejection under section 365 of the Bankruptcy Code.

135. “*Unimpaired*” means, with respect to a Class of Claims or Equity Interests that is not impaired within the meaning of section 1124 of the Bankruptcy Code.

136. “*Voting Deadline*” means the date and time by which all Ballots to accept or reject the Plan must be received in order to be counted under the Order of the Bankruptcy Court approving the Disclosure Statement as containing adequate information pursuant to section 1125(a) of the Bankruptcy Code and authorizing the Debtor to solicit acceptances of the Plan.

137. “*Voting Record Date*” means November 23, 2020.

ARTICLE II.

ADMINISTRATIVE EXPENSES AND PRIORITY TAX CLAIMS

A. Administrative Expense Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder; *provided, however*, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

If an Administrative Expense Claim (other than a Professional Fee Claim) is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must File, on

or before the applicable Administrative Expense Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for allowance and payment of such Administrative Expense Claim.

Objections to any Administrative Expense Claim (other than a Professional Fee Claim) must be Filed and served on the Debtor or the Reorganized Debtor, as applicable, and the party asserting such Administrative Expense Claim by the Administrative Expense Claims Objection Deadline.

B. Professional Fee Claims

Professionals or other Entities asserting a Professional Fee Claim for services rendered through the Effective Date must submit fee applications under sections 327, 328, 329, 330, 331, 503(b) or 1103 of the Bankruptcy Code and, upon entry of an order of the Bankruptcy Court granting such fee applications, such Professional Fee Claim shall promptly be paid in Cash in full to the extent provided in such order.

Professionals or other Entities asserting a Professional Fee Claim for services rendered on or prior to the Effective Date must File, on or before the Professional Fee Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated as requiring such notice by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for final allowance of such Professional Fee Claim.

Objections to any Professional Fee Claim must be Filed and served on the Debtor or Reorganized Debtor, as applicable, and the party asserting the Professional Fee Claim by the Professional Fee Claim Objection Deadline. Each Holder of an Allowed Professional Fee Claim will be paid by the Debtor or the Claimant Trust, as applicable, in Cash within ten (10) Business Days of entry of the order approving such Allowed Professional Fee Claim.

On the Effective Date, the Claimant Trustee shall establish the Professional Fee Reserve. The Professional Fee Reserve shall vest in the Claimant Trust and shall be maintained by the Claimant Trustee in accordance with the Plan and Claimant Trust Agreement. The Claimant Trust shall fund the Professional Fee Reserve on the Effective Date in an estimated amount determined by the Debtor in good faith prior to the Confirmation Date and that approximates the total projected amount of unpaid Professional Fee Claims on the Effective Date. Following the payment of all Allowed Professional Fee Claims, any excess funds in the Professional Fee Reserve shall be released to the Claimant Trust to be used for other purposes consistent with the Plan and the Claimant Trust Agreement.

C. Priority Tax Claims

On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Priority Tax Claim is an Allowed Priority Tax Claim as of the Effective Date or (ii) the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, each Holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Priority Tax Claim, at the election of the Debtor: (a) Cash in an amount of a total value as of the Effective Date of the Plan equal to the amount of such Allowed

Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, or (b) if paid over time, payment of such Allowed Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code; or (c) such other less favorable treatment as agreed to in writing by the Debtor and such Holder. Payment of statutory fees due pursuant to 28 U.S.C. § 1930(a)(6) will be made at all appropriate times until the entry of a final decree; *provided, however*, that the Debtor may prepay any or all such Claims at any time, without premium or penalty.

ARTICLE III.
CLASSIFICATION AND TREATMENT OF
CLASSIFIED CLAIMS AND EQUITY INTERESTS

A. Summary

All Claims and Equity Interests, except Administrative Expense Claims and Priority Tax Claims, are classified in the Classes set forth below. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims, and Priority Tax Claims have not been classified.

The categories of Claims and Equity Interests listed below classify Claims and Equity Interests for all purposes including, without limitation, confirmation and distribution pursuant to the Plan and pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan deems a Claim or Equity Interest to be classified in a particular Class only to the extent that the Claim or Equity Interest qualifies within the description of that Class and will be deemed classified in a different Class to the extent that any remainder of such Claim or Equity Interest qualifies within the description of such different Class. A Claim or Equity Interest is in a particular Class only to the extent that any such Claim or Equity Interest is Allowed in that Class and has not been paid, released or otherwise settled (in each case, by the Debtor or any other Entity) prior to the Effective Date.

B. Summary of Classification and Treatment of Classified Claims and Equity Interests

Class	Claim	Status	Voting Rights
1	Jefferies Secured Claim	Unimpaired	Deemed to Accept
2	Frontier Secured Claim	Impaired	Entitled to Vote
3	Other Secured Claims	Unimpaired	Deemed to Accept
4	Priority Non-Tax Claim	Unimpaired	Deemed to Accept
5	Retained Employee Claim	Unimpaired	Deemed to Accept
6	PTO Claims	Unimpaired	Deemed to Accept
7	Convenience Claims	Impaired	Entitled to Vote
8	General Unsecured Claims	Impaired	Entitled to Vote
9	Subordinated Claims	Impaired	Entitled to Vote
10	Class B/C Limited Partnership Interests	Impaired	Entitled to Vote
11	Class A Limited Partnership Interests	Impaired	Entitled to Vote

C. Elimination of Vacant Classes

Any Class that, as of the commencement of the Confirmation Hearing, does not have at least one Holder of a Claim or Equity Interest that is Allowed in an amount greater than zero for voting purposes shall be considered vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class.

D. Impaired/Voting Classes

Claims and Equity Interests in Class 2 and Class 7 through Class 11 are Impaired by the Plan, and only the Holders of Claims or Equity Interests in those Classes are entitled to vote to accept or reject the Plan.

E. Unimpaired/Non-Voting Classes

Claims in Class 1 and Class 3 through Class 6 are Unimpaired by the Plan, and such Holders are deemed to have accepted the Plan and are therefore not entitled to vote on the Plan.

F. Impaired/Non-Voting Classes

There are no Classes under the Plan that will not receive or retain any property and no Classes are deemed to reject the Plan.

G. Cramdown

If any Class of Claims or Equity Interests is deemed to reject this Plan or does not vote to accept this Plan, the Debtor may (i) seek confirmation of this Plan under section 1129(b) of the Bankruptcy Code or (ii) amend or modify this Plan in accordance with the terms hereof and the Bankruptcy Code. If a controversy arises as to whether any Claims or Equity Interests, or any class of Claims or Equity Interests, are Impaired, the Bankruptcy Court shall, after notice and a hearing, determine such controversy on or before the Confirmation Date.

H. Classification and Treatment of Claims and Equity Interests

1. Class 1 – Jefferies Secured Claim

- *Classification:* Class 1 consists of the Jefferies Secured Claim.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 1 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 1 Claim, at the election of the Debtor: (A) Cash equal to the amount of such Allowed Class 1 Claim; (B) such other less favorable treatment as to which the Debtor and the Holder of such Allowed Class 1 Claim will have agreed upon in writing; or (C) such other treatment rendering such Claim Unimpaired. Each Holder of an Allowed Class 1 Claim will retain the Liens securing its Allowed Class 1 Claim as of the Effective Date until

full and final payment of such Allowed Class 1 Claim is made as provided herein.

- *Impairment and Voting:* Class 1 is Unimpaired, and the Holders of Class 1 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 1 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

2. Class 2 – Frontier Secured Claim

- *Classification:* Class 2 consists of the Frontier Secured Claim.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 2 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 2 Claim: (A) Cash in an amount equal to all accrued but unpaid interest on the Frontier Claim through and including the Effective Date and (B) the New Frontier Note. The Holder of an Allowed Class 2 Claim will retain the Liens securing its Allowed Class 2 Claim as of the Effective Date until full and final payment of such Allowed Class 2 Claim is made as provided herein.
- *Impairment and Voting:* Class 2 is Impaired, and the Holders of Class 2 Claims are entitled to vote to accept or reject this Plan.

3. Class 3 – Other Secured Claims

- *Classification:* Class 3 consists of the Other Secured Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 3 Claim is Allowed on the Effective Date or (ii) the date on which such Class 3 Claim becomes an Allowed Class 3 Claim, each Holder of an Allowed Class 3 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 3 Claim, at the option of the Debtor, or following the Effective Date, the Reorganized Debtor or Claimant Trustee, as applicable, (i) Cash equal to such Allowed Other Secured Claim, (ii) the collateral securing its Allowed Other Secured Claim, plus postpetition interest to the extent required under Bankruptcy Code Section 506(b), or (iii) such other treatment rendering such Claim Unimpaired.
- *Impairment and Voting:* Class 3 is Unimpaired, and the Holders of Class 3 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 3 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

4. Class 4 – Priority Non-Tax Claims

- *Classification:* Class 4 consists of the Priority Non-Tax Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 4 Claim is Allowed on the Effective Date or (ii) the date on which such Class 4 Claim becomes an Allowed Class 4 Claim, each Holder of an Allowed Class 4 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Class 4 Claim Cash equal to the amount of such Allowed Class 4 Claim.
- *Impairment and Voting:* Class 4 is Unimpaired, and the Holders of Class 4 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 4 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

5. Class 5 – Retained Employee Claims

- *Classification:* Class 5 consists of the Retained Employee Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the Effective Date, each Allowed Class 5 Claim will be Reinstated.
- *Impairment and Voting:* Class 5 is Unimpaired, and the Holders of Class 5 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 5 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

6. Class 6 – PTO Claims

- *Classification:* Class 6 consists of the PTO Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 6 Claim is Allowed on the Effective Date or (ii) the date on which such Class 6 Claim becomes an Allowed Class 6 Claim, each Holder of an Allowed Class 6 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Class 6 Claim Cash equal to the amount of such Allowed Class 6 Claim.
- *Impairment and Voting:* Class 6 is Unimpaired, and the Holders of Class 6 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 6

Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

7. Class 7 – Convenience Claims

- *Classification:* Class 7 consists of the Convenience Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 7 Claim is Allowed on the Effective Date or (ii) the date on which such Class 7 Claim becomes an Allowed Class 7 Claim, each Holder of an Allowed Class 7 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Class 7 Claim (1) the treatment provided to Allowed Holders of Class 8 General Unsecured Claims if the Holder of such Class 7 Claim makes the GUC Election or (2) an amount in Cash equal to the lesser of (a) 85% of the Allowed amount of such Holder's Class 7 Claim or (b) such Holder's Pro Rata share of the Convenience Claims Cash Pool.
- *Impairment and Voting:* Class 7 is Impaired, and the Holders of Class 7 Claims are entitled to vote to accept or reject this Plan.

8. Class 8 – General Unsecured Claims

- *Classification:* Class 8 consists of the General Unsecured Claims.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 8 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Claimant Trust Interests, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing, or (iii) the treatment provided to Allowed Holders of Class 7 Convenience Claims if the Holder of such Class 8 General Unsecured Claim is eligible and makes a valid Convenience Class Election.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any General Unsecured Claim, except with respect to any General Unsecured Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 8 is Impaired, and the Holders of Class 8 Claims are entitled to vote to accept or reject this Plan.

9. Class 9 – Subordinated Claims

- *Classification:* Class 9 consists of the Subordinated Claims.

Treatment: On the Effective Date, Holders of Subordinated Claims shall receive either (i) their Pro Rata share of the Subordinated Claimant Trust Interests or, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee may agree upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Subordinated Claim, except with respect to any Subordinated Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 9 is Impaired, and the Holders of Class 9 Claims are entitled to vote to accept or reject this Plan.

10. Class 10 – Class B/C Limited Partnership Interests

- *Classification:* Class 10 consists of the Class B/C Limited Partnership Interests.

- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 10 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Class B/C Limited Partnership Interest Claim, except with respect to any Class B/C Limited Partnership Interest Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 10 is Impaired, and the Holders of Class 10 Claims are entitled to vote to accept or reject this Plan.

11. Class 11 – Class A Limited Partnership Interests

- *Classification:* Class 11 consists of the Class A Limited Partnership Interests.

- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 11 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Class A Limited Partnership Interest, except with respect to any Class A Limited Partnership Interest Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 11 is Impaired, and the Holders of Class 11 Claims are entitled to vote to accept or reject this Plan.

I. Special Provision Governing Unimpaired Claims

Except as otherwise provided in the Plan, nothing under the Plan will affect the Debtor's rights in respect of any Unimpaired Claims, including, without limitation, all rights in respect of legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claims.

J. Subordinated Claims

The allowance, classification, and treatment of all Claims under the Plan shall take into account and conform to the contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. Upon written notice and hearing, the Debtor the Reorganized Debtor, and the Claimant Trustee reserve the right to seek entry of an order by the Bankruptcy Court to re-classify or to subordinate any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan that becomes a subordinated Claim at any time shall be modified to reflect such subordination.

ARTICLE IV.
MEANS FOR IMPLEMENTATION OF THIS PLAN

A. Summary

As discussed in the Disclosure Statement, the Plan will be implemented through (i) the Claimant Trust, (ii) the Litigation Sub-Trust, and (iii) the Reorganized Debtor.

On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust. The Claimant Trust, as limited

partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to this Plan and the Claimant Trust Agreement, and the Litigation Trustee will pursue, if applicable, the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan. The Reorganized Debtor will administer the Reorganized Debtor Assets and, if needed, with the utilization of a Sub-Servicer, which administration will include, among other things, managing the wind down of the Managed Funds.

Although the Reorganized Debtor will manage the wind down of the Managed Funds, it is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be cost effective.

The Reorganized Debtor will distribute all proceeds from the wind down to the Claimant Trust, as its limited partner, and New GP LLC, as its general partner, in each case in accordance with the Reorganized Limited Partnership Agreement. Such proceeds, along with the proceeds of the Claimant Trust Assets, will ultimately be distributed to the Claimant Trust Beneficiaries as set forth in this Plan and the Claimant Trust Agreement.

B. The Claimant Trust²

1. Creation and Governance of the Claimant Trust and Litigation Sub-Trust.

On or prior to the Effective Date, the Debtor and the Claimant Trustee shall execute the Claimant Trust Agreement and shall take all steps necessary to establish the Claimant Trust and the Litigation Sub-Trust in accordance with the Plan in each case for the benefit of the Claimant Trust Beneficiaries. Additionally, on or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and

² In the event of a conflict between the terms of this summary and the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, the terms of the Claimant Trust Agreement or the Litigation Sub-Trust Agreement, as applicable, shall control.

such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax.

The Claimant Trustee shall be the exclusive trustee of the Claimant Trust Assets, excluding the Estate Claims and the Litigation Trustee shall be the exclusive trustee with respect to the Estate Claims in each case for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Claimant Trust Assets. The Claimant Trustee shall also be responsible for resolving all Claims and Equity Interests in Class 8 through Class 11, under the supervision of the Claimant Trust Oversight Committee.

On the Effective Date, the Claimant Trustee and Litigation Trustee shall execute the Litigation Sub-Trust Agreement and shall take all steps necessary to establish the Litigation Sub-Trust. Upon the creation of the Litigation Sub-Trust, the Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate Claims. The Claimant Trust shall be governed by the Claimant Trust Agreement and administered by the Claimant Trustee. The powers, rights, and responsibilities of the Claimant Trustee shall be specified in the Claimant Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting to the Claimant Trust Oversight Committee as may be set forth in the Claimant Trust Agreement. The Claimant Trust shall hold and distribute the Claimant Trust Assets (including the proceeds from the Estate Claims, if any) in accordance with the provisions of the Plan and the Claimant Trust Agreement; *provided* that the Claimant Trust Oversight Committee may direct the Claimant Trust to reserve Cash from distributions as necessary to fund the Claimant Trust and Litigation Sub-Trust. Other rights and duties of the Claimant Trustee and the Claimant Trust Beneficiaries shall be as set forth in the Claimant Trust Agreement. After the Effective Date, neither the Debtor nor the Reorganized Debtor shall have any interest in the Claimant Trust Assets.

The Litigation Sub-Trust shall be governed by the Litigation Sub-Trust Agreement and administered by the Litigation Trustee. The powers, rights, and responsibilities of the Litigation Trustee shall be specified in the Litigation Sub-Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting as may be set forth in the Litigation Sub-Trust Agreement. The Litigation Sub-Trust shall investigate, prosecute, settle, or otherwise resolve the Estate Claims in accordance with the provisions of the Plan and the Litigation Sub-Trust Agreement and shall distribute the proceeds therefrom to the Claimant Trust for distribution. Other rights and duties of the Litigation Trustee shall be as set forth in the Litigation Sub-Trust Agreement.

2. *Claimant Trust Oversight Committee*

The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will be overseen by the Claimant Trust Oversight Committee, subject to the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as applicable.

The Claimant Trust Oversight Committee will initially consist of five members. Four of the five members will be representatives of the members of the Committee: (i) the Redeemer Committee of Highland Crusader Fund, (ii) UBS, (iii) Acis, and (iv) Meta-e Discovery. The fifth member will be an independent, natural Person chosen by the Committee and reasonably acceptable to the Debtor. The members of the Claimant Trust Oversight Committee may be replaced as set forth in the Claimant Trust Agreement. The identity of the members of the Claimant Trust Oversight Committee will be disclosed in the Plan Supplement.

As set forth in the Claimant Trust Agreement, in no event will any member of the Claimant Trust Oversight Committee with a Claim against the Estate be entitled to vote, opine, or otherwise be involved in any matters related to such member's Claim.

The independent member(s) of the Claimant Trust Oversight Committee may be entitled to compensation for their services as set forth in the Claimant Trust Agreement. Any member of the Claimant Trust Oversight Committee may be removed, and successor chosen, in the manner set forth in the Claimant Trust Agreement.

3. Purpose of the Claimant Trust.

The Claimant Trust shall be established for the purpose of (i) managing and monetizing the Claimant Trust Assets, subject to the terms of the Claimant Trust Agreement and the oversight of the Claimant Trust Oversight Committee, (ii) serving as the limited partner of, and holding the limited partnership interests in, the Reorganized Debtor, (iii) serving as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner, (iv) in its capacity as the sole member and manager of New GP LLC, overseeing the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement; and (v) administering the Disputed Claims Reserve and serving as Distribution Agent with respect to Disputed Claims in Class 7 or Class 8.

In its management of the Claimant Trust Assets, the Claimant Trust will also reconcile and object to the General Unsecured Claims, Subordinated Claims, Class B/C Limited Partnership Interests, and Class A Limited Partnership Interests, as provided for in this Plan and the Claimant Trust Agreement, and make Trust Distributions to the Claimant Trust Beneficiaries in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business.

The purpose of the Reorganized Debtor is discussed at greater length in ARTICLE IV.C.

4. Purpose of the Litigation Sub-Trust.

The Litigation Sub-Trust shall be established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims. Any proceeds therefrom shall be distributed by the Litigation Sub-Trust to the Claimant Trust for distribution to the Claimant Trust Beneficiaries pursuant to the terms of the Claimant Trust Agreement.

5. Claimant Trust Agreement and Litigation Sub-Trust Agreement.

The Claimant Trust Agreement generally will provide for, among other things:

- (i) the payment of the Claimant Trust Expenses;
- (ii) the payment of other reasonable expenses of the Claimant Trust;
- (iii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation;
- (iv) the investment of Cash by the Claimant Trustee within certain limitations, including those specified in the Plan;
- (v) the orderly monetization of the Claimant Trust Assets;
- (vi) litigation of any Causes of Action, which may include the prosecution, settlement, abandonment, or dismissal of any such Causes of Action, subject to reporting and oversight by the Claimant Trust Oversight Committee;
- (vii) the resolution of Claims and Equity Interests in Class 8 through Class 11, subject to reporting and oversight by the Claimant Trust Oversight Committee;
- (viii) the administration of the Disputed Claims Reserve and distributions to be made therefrom; and
- (ix) the management of the Reorganized Debtor, including the utilization of a Sub-Servicer, with the Claimant Trust serving as the managing member of New GP LLC.

Except as otherwise ordered by the Bankruptcy Court, the Claimant Trust Expenses shall be paid from the Claimant Trust Assets in accordance with the Plan and Claimant Trust Agreement. The Claimant Trustee may establish a reserve for the payment of Claimant Trust Expense (including, without limitation, any reserve for potential indemnification claims as authorized and provided under the Claimant Trust Agreement), and shall periodically replenish such reserve, as necessary.

In furtherance of, and consistent with the purpose of, the Claimant Trust and the Plan, the Trustees, for the benefit of the Claimant Trust, shall, subject to reporting and oversight by the Claimant Trust Oversight Committee as set forth in the Claimant Trust Agreement: (i) hold the Claimant Trust Assets for the benefit of the Claimant Trust Beneficiaries, (ii) make Distributions to the Claimant Trust Beneficiaries as provided herein and in the Claimant Trust Agreement, and (iii) have the sole power and authority to prosecute and resolve any Causes of Action and objections to Claims and Equity Interests (other than those assigned to the Litigation Sub-Trust), without approval of the Bankruptcy Court. Except as otherwise provided in the Claimant Trust Agreement, the Claimant Trustee shall be responsible for all decisions and duties with respect to the Claimant Trust and the Claimant Trust Assets; *provided, however*, that the prosecution and resolution of any Estate Claims included in the Claimant Trust Assets shall be the responsibility of the Litigation Trustee. The Litigation Sub-Trust Agreement generally will provide for, among other things:

- (i) the payment of other reasonable expenses of the Litigation Sub-Trust;

(ii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and

(iii) the investigation and prosecution of Estate Claims, which may include the prosecution, settlement, abandonment, or dismissal of any such Estate Claims, subject to reporting and oversight as set forth in the Litigation Sub-Trust Agreement.

The Trustees, on behalf of the Claimant Trust and Litigation Sub-Trust, as applicable, may each employ, without further order of the Bankruptcy Court, employees and other professionals (including those previously retained by the Debtor and the Committee) to assist in carrying out the Trustees' duties hereunder and may compensate and reimburse the reasonable expenses of these professionals without further Order of the Bankruptcy Court from the Claimant Trust Assets in accordance with the Plan and the Claimant Trust Agreement.

The Claimant Trust Agreement and Litigation Sub-Trust Agreement may include reasonable and customary provisions that allow for indemnification by the Claimant Trust in favor of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee. Any such indemnification shall be the sole responsibility of the Claimant Trust and payable solely from the Claimant Trust Assets.

6. Compensation and Duties of Trustees.

The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as appropriate. The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

7. Cooperation of Debtor and Reorganized Debtor.

To effectively investigate, prosecute, compromise and/or settle the Claims and/or Causes of Action that constitute Claimant Trust Assets (including Estate Claims), the Claimant Trustee, Litigation Trustee, and each of their professionals may require reasonable access to the Debtor's and Reorganized Debtor's documents, information, and work product relating to the Claimant Trust Assets. Accordingly, the Debtor and the Reorganized Debtor, as applicable, shall reasonably cooperate with the Claimant Trustee and Litigation Trustee, as applicable, in their prosecution of Causes of Action and in providing the Claimant Trustee and Litigation Trustee with copies of documents and information in the Debtor's possession, custody, or control on the Effective Date that either Trustee indicates relates to the Estate Claims or other Causes of Action.

The Debtor and Reorganized Debtor shall preserve all records, documents or work product (including all electronic records, documents, or work product) related to the Claims and Causes of Action, including Estate Claims, until the earlier of (a) the dissolution of the Reorganized Debtor or (b) termination of the Claimant Trust and Litigation Sub-Trust.

8. United States Federal Income Tax Treatment of the Claimant Trust.

Unless the IRS requires otherwise, for all United States federal income tax purposes, the parties shall treat the transfer of the Claimant Trust Assets to the Claimant Trust as: (a) a transfer

of the Claimant Trust Assets (other than the amounts set aside in the Disputed Claims Reserve, if the Claimant Trustee makes the election described in Section 7 below) directly to the applicable Claimant Trust Beneficiaries followed by (b) the transfer by the such Claimant Trust Beneficiaries to the Claimant Trust of such Claimant Trust Assets in exchange for the Claimant Trust Interests. Accordingly, the applicable Claimant Trust Beneficiaries shall be treated for United States federal income tax purposes as the grantors and owners of their respective share of the Claimant Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes.

9. Tax Reporting.

(a) The Claimant Trustee shall file tax returns for the Claimant Trust treating the Claimant Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claims Reserve as a separate taxable entity.

(b) The Claimant Trustee shall be responsible for payment, out of the Claimant Trust Assets, of any taxes imposed on the Claimant Trust or its assets.

(c) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Claimant Trust Beneficiaries of such valuation, and such valuation shall be used consistently for all federal income tax purposes.

(d) The Claimant Trustee shall distribute such tax information to the applicable Claimant Trust Beneficiaries as the Claimant Trustee determines is required by applicable law.

10. Claimant Trust Assets.

The Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Causes of Action included in the Claimant Trust Assets (except for the Estate Claims) without any further order of the Bankruptcy Court, and the Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to sell, liquidate, or otherwise monetize all Claimant Trust Assets, except as otherwise provided in this Plan or in the Claimant Trust Agreement, without any further order of the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Litigation Trustee shall have the exclusive right to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Estate Claims included in the Claimant Trust Assets without any further order of the Bankruptcy Court.

From and after the Effective Date, the Trustees, in accordance with section 1123(b)(3) and (4) of the Bankruptcy Code, and on behalf of the Claimant Trust, shall each serve as a representative of the Estate with respect to any and all Claimant Trust Assets, including the Causes of Action and Estate Claims, as appropriate, and shall retain and possess the right to (a) commence, pursue, settle, compromise, or abandon, as appropriate, any and all Causes of Action in any court or other tribunal and (b) sell, liquidate, or otherwise monetize all Claimant Trust Assets.

11. Claimant Trust Expenses.

From and after the Effective Date, the Claimant Trust shall, in the ordinary course of business and without the necessity of any approval by the Bankruptcy Court, pay the reasonable professional fees and expenses incurred by the Claimant Trust, the Litigation Sub-Trust, and any professionals retained by such parties and entities from the Claimant Trust Assets, except as otherwise provided in the Claimant Trust Agreement.

12. Trust Distributions to Claimant Trust Beneficiaries.

The Claimant Trustee, in its discretion, may make Trust Distributions to the Claimant Trust Beneficiaries at any time and/or use the Claimant Trust Assets or proceeds thereof, *provided* that such Trust Distributions or use is otherwise permitted under the terms of the Plan, the Claimant Trust Agreement, and applicable law.

13. Cash Investments.

With the consent of the Claimant Trust Oversight Committee, the Claimant Trustee may invest Cash (including any earnings thereon or proceeds therefrom) in a manner consistent with the terms of the Claimant Trust Agreement; *provided, however*, that such investments are investments permitted to be made by a “liquidating trust” within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings or other controlling authorities.

14. Dissolution of the Claimant Trust and Litigation Sub-Trust.

The Trustees and the Claimant Trust and Litigation Sub-Trust shall be discharged or dissolved, as the case may be, at such time as: (a) the Litigation Trustee determines that the pursuit of Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate Claims, (b) the Claimant Trustee determines that the pursuit of Causes of Action (other than Estate Claims) is not likely to yield sufficient additional proceeds to justify further pursuit of such Causes of Action, (c) the Claimant Trustee determines that the pursuit of sales of other Claimant Trust Assets is not likely to yield sufficient additional proceeds to justify further pursuit of such sales of Claimant Trust Assets, (d) all objections to Disputed Claims and Equity Interests are fully resolved, (e) the Reorganized Debtor is dissolved, and (f) all Distributions required to be made by the Claimant Trustee to the Claimant Trust Beneficiaries under the Plan have been made, but in no event shall the Claimant Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions, without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes) is necessary to facilitate or complete the recovery on, and liquidation of, the Claimant Trust Assets; *provided, however*, that each extension must be approved, upon a finding that the extension is necessary to facilitate or complete the recovery on, and liquidation of the Claimant Trust Assets, by the Bankruptcy Court within 6 months of the beginning of the extended term and

no extension, together with any prior extensions, shall exceed three years without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes.

Upon dissolution of the Claimant Trust, and pursuant to the Claimant Trust Agreement, any remaining Claimant Trust Assets that exceed the amounts required to be paid under the Plan will be transferred (in the sole discretion of the Claimant Trustee) in Cash or in-kind to the Holders of the Claimant Trust Interests as provided in the Claimant Trust Agreement.

C. The Reorganized Debtor

1. Corporate Existence

The Debtor will continue to exist after the Effective Date, with all of the powers of partnerships pursuant to the law of the State of Delaware and as set forth in the Reorganized Limited Partnership Agreement.

2. Cancellation of Equity Interests and Release

On the Effective Date, (i) all prepetition Equity Interests, including the Class A Limited Partnership Interests and the Class B/C Limited Partnership Interests, in the Debtor shall be canceled, and (ii) all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, the Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement.

3. Issuance of New Partnership Interests

On the Effective Date, the Debtor or the Reorganized Debtor, as applicable, will issue new Class A Limited Partnership Interests to (i) the Claimant Trust, as limited partner, and (ii) New GP LLC, as general partner, and will admit (a) the Claimant Trust as the limited partner of the Reorganized Debtor, and (b) New GP LLC as the general partner of the Reorganized Debtor. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor. Also, on the Effective Date, the Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement and receive partnership interests in the Reorganized Debtor consistent with the terms of the Reorganized Limited Partnership Agreement.

The Reorganized Limited Partnership Agreement does not provide for, and specifically disclaims, the indemnification obligations under the Limited Partnership Agreement, including any such indemnification obligations that accrued or arose or could have been brought prior to the Effective Date. Any indemnification Claims under the Limited Partnership Agreement that accrued, arose, or could have been filed prior to the Effective Date will be resolved through the Claims resolution process provided that a Claim is properly filed in accordance with the Bankruptcy Code, the Plan, or the Bar Date Order. Each of the Debtor, the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust reserve all rights with respect to any such indemnification Claims.

4. Management of the Reorganized Debtor

Subject to and consistent with the terms of the Reorganized Limited Partnership Agreement, the Reorganized Debtor shall be managed by its general partner, New GP LLC. The initial officers and employees of the Reorganized Debtor shall be selected by the Claimant Trustee. The Reorganized Debtor may, in its discretion, also utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees.

As set forth in the Reorganized Limited Partnership Agreement, New GP LLC will receive a fee for managing the Reorganized Debtor. Although New GP LLC will be a limited liability company, it will elect to be treated as a C-Corporation for tax purposes. Therefore, New GP LLC (and any taxable income attributable to it) will be subject to corporate income taxation on a standalone basis, which may reduce the return to Claimants.

5. Vesting of Assets in the Reorganized Debtor

Except as otherwise provided in this Plan or the Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.

The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

6. Purpose of the Reorganized Debtor

Except as may be otherwise provided in this Plan or the Confirmation Order, the Reorganized Debtor will continue to manage the Reorganized Debtor Assets (which shall include, for the avoidance of doubt, serving as the investment manager of the Managed Funds) and may use, acquire or dispose of the Reorganized Debtor Assets and compromise or settle any Claims with respect to the Reorganized Debtor Assets without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules. The Reorganized Debtor shall oversee the resolution of Claims in Class 1 through Class 7.

Without limiting the foregoing, the Reorganized Debtor will pay the charges that it incurs after the Effective Date for Professionals' fees, disbursements, expenses or related support services (including reasonable fees relating to the preparation of Professional fee applications) in the ordinary course of business and without application or notice to, or order of, the Bankruptcy Court.

7. Distribution of Proceeds from the Reorganized Debtor Assets; Transfer of Reorganized Debtor Assets

Any proceeds received by the Reorganized Debtor will be distributed to the Claimant Trust, as limited partner, and New GP LLC, as general partner, in the manner set forth in the Reorganized Limited Partnership Agreement. As set forth in the Reorganized Limited Partnership Agreement,

the Reorganized Debtor may, from time to time distribute Reorganized Debtor Assets to the Claimant Trust either in Cash or in-kind, including to institute the wind-down and dissolution of the Reorganized Debtor. Any assets distributed to the Claimant Trust will be (i) deemed transferred in all respects as forth in ARTICLE IV.B.1, (ii) deemed Claimant Trust Assets, and (iii) administered as Claimant Trust Assets.

D. Company Action

Each of the Debtor, the Reorganized Debtor, and the Trustees, as applicable, may take any and all actions to execute, deliver, File or record such contracts, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and implement the provisions of this Plan, the Claimant Trust Agreement, the Reorganized Limited Partnership Agreement, or the New GP LLC Documents, as applicable, in the name of and on behalf of the Debtor, the Reorganized Debtor, or the Trustees, as applicable, and in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, officers, or directors of the Debtor or the Reorganized Debtor, as applicable, or by any other Person.

Prior to, on or after the Effective Date (as appropriate), all matters provided for pursuant to this Plan that would otherwise require approval of the stockholders, partners, directors, managers, or members of the Debtor, any Related Entity, or any Affiliate thereof (as of prior to the Effective Date) will be deemed to have been so approved and will be in effect prior to, on or after the Effective Date (as appropriate) pursuant to applicable law and without any requirement of further action by the stockholders, partners, directors, managers or members of such Persons, or the need for any approvals, authorizations, actions or consents of any Person.

All matters provided for in this Plan involving the legal or corporate structure of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, and any legal or corporate action required by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, in connection with this Plan, will be deemed to have occurred and will be in full force and effect in all respects, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, partners, directors, managers, or members of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, or by any other Person. On the Effective Date, the appropriate officers of the Debtor and the Reorganized Debtor, as applicable, as well as the Trustees, are authorized to issue, execute, deliver, and consummate the transactions contemplated by, the contracts, agreements, documents, guarantees, pledges, consents, securities, certificates, resolutions and instruments contemplated by or described in this Plan in the name of and on behalf of the Debtor and the Reorganized Debtor, as well as the Trustees, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. The appropriate officer of the Debtor, the Reorganized Debtor, as well as the Trustees, will be authorized to certify or attest to any of the foregoing actions.

E. Release of Liens, Claims and Equity Interests

Except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, from and after the Effective Date and concurrently with the applicable distributions made pursuant to the Plan, all Liens, Claims, Equity Interests, mortgages, deeds of trust, or other security interests against the property of the Estate will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity. Any Entity holding such Liens or Equity Interests extinguished pursuant to the prior sentence will, pursuant to section 1142 of the Bankruptcy Code, promptly execute and deliver to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, such instruments of termination, release, satisfaction and/or assignment (in recordable form) as may be reasonably requested by the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable. For the avoidance of doubt, this section is in addition to, and shall not be read to limit in any respects, ARTICLE IV.C.2.

F. Cancellation of Notes, Certificates and Instruments

Except for the purpose of evidencing a right to a distribution under this Plan and except as otherwise set forth in this Plan, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to this Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. For the avoidance of doubt, this section is in addition to, and shall not be read to limit in any respects, ARTICLE IV.C.2.

G. Cancellation of Existing Instruments Governing Security Interests

Upon payment or other satisfaction of an Allowed Class 1 or Allowed Class 2 Claim, or promptly thereafter, the Holder of such Allowed Class 1 or Allowed Class 2 Claim shall deliver to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, any collateral or other property of the Debtor held by such Holder, together with any termination statements, instruments of satisfaction, or releases of all security interests with respect to its Allowed Class 1 or Allowed Class 2 Claim that may be reasonably required to terminate any related financing statements, mortgages, mechanics' or other statutory Liens, or *lis pendens*, or similar interests or documents.

H. Control Provisions

To the extent that there is any inconsistency between this Plan as it relates to the Claimant Trust, the Claimant Trust Agreement, the Reorganized Debtor, or the Reorganized Limited Partnership Agreement, this Plan shall control.

I. Treatment of Vacant Classes

Any Claim or Equity Interest in a Class considered vacant under ARTICLE III.C of this Plan shall receive no Plan Distributions.

J. Plan Documents

The documents, if any, to be Filed as part of the Plan Documents, including any documents filed with the Plan Supplement, and any amendments, restatements, supplements, or other modifications to such documents, and any consents, waivers, or other deviations under or from any such documents, shall be incorporated herein by this reference (including to the applicable definitions in ARTICLE I hereof) and fully enforceable as if stated in full herein.

The Debtor and the Committee are currently working to finalize the forms of certain of the Plan Documents to be filed with the Plan Supplement. To the extent that the Debtor and the Committee cannot agree as to the form and content of such Plan Documents, they intend to submit the issue to non-binding mediation pursuant to the *Order Directing Mediation* entered on August 3, 2020 [D.I. 912].

K. Highland Capital Management, L.P. Retirement Plan and Trust

The Highland Capital Management, L.P. Retirement Plan And Trust (“Pension Plan”) is a single-employer defined benefit pension plan covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). 29 U.S.C. §§ 1301-1461. The Debtor is the contributing sponsor and, as such, the PBGC asserts that the Debtor is liable along with any members of the contributing sponsor’s controlled-group within the meaning of 29 U.S.C. §§ 1301(a)(13), (14) with respect to the Pension Plan.

Upon the Effective Date, the Reorganized Debtor shall be deemed to have assumed the Pension Plan and shall comply with all applicable statutory provisions of ERISA and the Internal Revenue Code (the “IRC”), including, but not limited to, satisfying the minimum funding standards pursuant to 26 U.S.C. §§ 412, 430, and 29 U.S.C. §§ 1082, 1083; paying the PBGC premiums in accordance with 29 U.S.C. §§ 1306 and 1307; and administering the Pension Plan in accordance with its terms and the provisions of ERISA and the IRC. In the event that the Pension Plan terminates after the Plan of Reorganization Effective Date, the PBGC asserts that the Reorganized Debtor and each of its controlled group members will be responsible for the liabilities imposed by Title IV of ERISA.

Notwithstanding any provision of the Plan, the Confirmation Order, or the Bankruptcy Code (including section 1141 thereof) to the contrary, neither the Plan, the Confirmation Order, or the Bankruptcy Code shall be construed as discharging, releasing, exculpating or relieving the Debtor, the Reorganized Debtor, or any person or entity in any capacity, from any liability or responsibility, if any, with respect to the Pension Plan under any law, governmental policy, or regulatory provision. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility against any person or entity as a result of any of the provisions of the Plan, the Confirmation Order, or the Bankruptcy Code. The Debtor reserves the right to contest any such liability or responsibility.

ARTICLE V.

TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

A. Assumption, Assignment, or Rejection of Executory Contracts and Unexpired Leases

Unless an Executory Contract or Unexpired Lease: (i) was previously assumed or rejected by the Debtor pursuant to this Plan on or prior to the Confirmation Date; (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) is the subject of a motion to assume filed by the Debtor on or before the Confirmation Date; (iv) contains a change of control or similar provision that would be triggered by the Chapter 11 Case (unless such provision has been irrevocably waived); or (v) is specifically designated as a contract or lease to be assumed in the Plan or the Plan Supplement, on the Confirmation Date, each Executory Contract and Unexpired Lease shall be deemed rejected pursuant to section 365 of the Bankruptcy Code, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, unless such Executory Contract or Unexpired Lease is listed in the Plan Supplement.

At any time on or prior to the Confirmation Date, the Debtor may (i) amend the Plan Supplement in order to add or remove a contract or lease from the list of contracts to be assumed or (ii) assign (subject to applicable law) any Executory Contract or Unexpired Lease, as determined by the Debtor in consultation with the Committee, or the Reorganized Debtor, as applicable.

The Confirmation Order will constitute an order of the Bankruptcy Court approving the above-described assumptions, rejections, and assumptions and assignments. Except as otherwise provided herein or agreed to by the Debtor and the applicable counterparty, each assumed Executory Contract or Unexpired Lease shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto. Modifications, amendments, supplements, and restatements to prepetition Executory Contracts and Unexpired Leases that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Executory Contract or Unexpired Lease or the validity, priority, or amount of any Claims that may arise in connection therewith. To the extent applicable, no change of control (or similar provision) will be deemed to occur under any such Executory Contract or Unexpired Lease.

If certain, but not all, of a contract counterparty's Executory Contracts and/or Unexpired Leases are rejected pursuant to the Plan, the Confirmation Order shall be a determination that such counterparty's Executory Contracts and/or Unexpired Leases that are being assumed pursuant to the Plan are severable agreements that are not integrated with those Executory Contracts and/or Unexpired Leases that are being rejected pursuant to the Plan. Parties seeking to contest this finding with respect to their Executory Contracts and/or Unexpired Leases must file a timely objection to the Plan on the grounds that their agreements are integrated and not severable, and any such dispute shall be resolved by the Bankruptcy Court at the Confirmation Hearing (to the extent not resolved by the parties prior to the Confirmation Hearing).

Notwithstanding anything herein to the contrary, the Debtor shall assume or reject that certain real property lease with Crescent TC Investors L.P. ("Landlord") for the Debtor's headquarters located at 200/300 Crescent Ct., Suite #700, Dallas, Texas 75201 (the "Lease") in accordance with the notice to Landlord, procedures and timing required by 11 U.S.C. §365(d)(4),

as modified by that certain *Agreed Order Granting Motion to Extend Time to Assume or Reject Unexpired Nonresidential Real Property Lease* [Docket No. 1122].

B. Claims Based on Rejection of Executory Contracts or Unexpired Leases

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Confirmation Date shall be deemed rejected, pursuant to the Confirmation Order. Any Person asserting a Rejection Claim shall File a proof of claim within thirty days of the Confirmation Date. Any Rejection Claims that are not timely Filed pursuant to this Plan shall be forever disallowed and barred. If one or more Rejection Claims are timely Filed, the Claimant Trustee may File an objection to any Rejection Claim.

Rejection Claims shall be classified as General Unsecured Claims and shall be treated in accordance with ARTICLE III of this Plan.

C. Cure of Defaults for Assumed or Assigned Executory Contracts and Unexpired Leases

Any monetary amounts by which any Executory Contract or Unexpired Lease to be assumed or assigned hereunder is in default shall be satisfied, under section 365(b)(1) of the Bankruptcy Code, by the Debtor upon assumption or assignment thereof, by payment of the default amount in Cash as and when due in the ordinary course or on such other terms as the parties to such Executory Contracts may otherwise agree. The Debtor may serve a notice on the Committee and parties to Executory Contracts or Unexpired Leases to be assumed or assigned reflecting the Debtor's or Reorganized Debtor's intention to assume or assign the Executory Contract or Unexpired Lease in connection with this Plan and setting forth the proposed cure amount (if any).

If a dispute regarding (1) the amount of any payments to cure a default, (2) the ability of the Debtor, the Reorganized Debtor, or any assignee to provide "adequate assurance of future performance" (within the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed or assigned or (3) any other matter pertaining to assumption or assignment, the cure payments required by section 365(b)(1) of the Bankruptcy Code will be made following the entry of a Final Order or orders resolving the dispute and approving the assumption or assignment.

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 Confirmation Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

ARTICLE VI.
PROVISIONS GOVERNING DISTRIBUTIONS

A. Dates of Distributions

Except as otherwise provided in this Plan, on the Effective Date or as soon as reasonably practicable thereafter (or if a Claim is not an Allowed Claim or Equity Interest on the Effective Date, on the date that such Claim or Equity Interest becomes an Allowed Claim or Equity Interest, or as soon as reasonably practicable thereafter), each Holder of an Allowed Claim or Equity Interest against the Debtor shall receive the full amount of the distributions that this Plan provides for Allowed Claims or Allowed Equity Interests in the applicable Class and in the manner provided herein. If any payment or act under this Plan is required to be made or performed on a date that is not on a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date. If and to the extent there are Disputed Claims or Equity Interests, distributions on account of any such Disputed Claims or Equity Interests shall be made pursuant to the provisions provided in this Plan. Except as otherwise provided in this Plan, Holders of Claims and Equity Interests shall not be entitled to interest, dividends or accruals on the distributions provided for therein, regardless of whether distributions are delivered on or at any time after the Effective Date.

Upon the Effective Date, all Claims and Equity Interests against the Debtor shall be deemed fixed and adjusted pursuant to this Plan and none of the Debtor, the Reorganized Debtor, or the Claimant Trust will have liability on account of any Claims or Equity Interests except as set forth in this Plan and in the Confirmation Order. All payments and all distributions made by the Distribution Agent under this Plan shall be in full and final satisfaction, settlement and release of all Claims and Equity Interests against the Debtor and the Reorganized Debtor.

At the close of business on the Distribution Record Date, the transfer ledgers for the Claims against the Debtor and the Equity Interests in the Debtor shall be closed, and there shall be no further changes in the record holders of such Claims and Equity Interests. The Debtor, the Reorganized Debtor, the Trustees, and the Distribution Agent, and each of their respective agents, successors, and assigns shall have no obligation to recognize the transfer of any Claims against the Debtor or Equity Interests in the Debtor occurring after the Distribution Record Date and shall be entitled instead to recognize and deal for all purposes hereunder with only those record holders stated on the transfer ledgers as of the close of business on the Distribution Record Date irrespective of the number of distributions to be made under this Plan to such Persons or the date of such distributions.

B. Distribution Agent

Except as provided herein, all distributions under this Plan shall be made by the Claimant Trustee, as Distribution Agent, or by such other Entity designated by the Claimant Trustee, as a Distribution Agent on the Effective Date or thereafter. The Reorganized Debtor will be the Distribution Agent with respect to Claims in Class 1 through Class 7.

The Claimant Trustee, or such other Entity designated by the Claimant Trustee to be the Distribution Agent, shall not be required to give any bond or surety or other security for the performance of such Distribution Agent's duties unless otherwise ordered by the Bankruptcy Court.

The Distribution Agent shall be empowered to (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties under this Plan; (b) make all distributions contemplated hereby; (c) employ professionals to represent it with respect to its responsibilities; and (d) exercise such other powers as may be vested in the Distribution Agent by order of the Bankruptcy Court, pursuant to this Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions hereof.

The Distribution Agent shall not have any obligation to make a particular distribution to a specific Holder of an Allowed Claim if such Holder is also the Holder of a Disputed Claim.

C. Cash Distributions

Distributions of Cash may be made by wire transfer from a domestic bank, except that Cash payments made to foreign creditors may be made in such funds and by such means as the Distribution Agent determines are necessary or customary in a particular foreign jurisdiction.

D. Disputed Claims Reserve

On or prior to the Initial Distribution Date, the Claimant Trustee shall establish, fund and maintain the Disputed Claims Reserve(s) in the appropriate Disputed Claims Reserve Amounts on account of any Disputed Claims.

E. Distributions from the Disputed Claims Reserve

The Disputed Claims Reserve shall at all times hold Cash in an amount no less than the Disputed Claims Reserve Amount. To the extent a Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, within 30 days of the date on which such Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, the Claimant Trustee shall distribute from the Disputed Claims Reserve to the Holder thereof any prior distributions, in Cash, that would have been made to such Allowed Claim if it had been Allowed as of the Effective Date. For the avoidance of doubt, each Holder of a Disputed Claim that subsequently becomes an Allowed Claim will also receive its Pro Rata share of the Claimant Trust Interests. If, upon the resolution of all Disputed Claims any Cash remains in the Disputed Claims Reserve, such Cash shall be transferred to the Claimant Trust and be deemed a Claimant Trust Asset.

F. Rounding of Payments

Whenever this Plan would otherwise call for, with respect to a particular Person, payment of a fraction of a dollar, the actual payment or distribution shall reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down. To the extent that Cash to be distributed under this Plan remains undistributed as a result of the aforementioned rounding, such Cash or stock shall be treated as "Unclaimed Property" under this Plan.

G. De Minimis Distribution

Except as to any Allowed Claim that is Unimpaired under this Plan, none of the Debtor, the Reorganized Debtor, or the Distribution Agent shall have any obligation to make any Plan Distributions with a value of less than \$100, unless a written request therefor is received by the Distribution Agent from the relevant recipient at the addresses set forth in ARTICLE VI.J hereof within 120 days after the later of the (i) Effective Date and (ii) the date such Claim becomes an Allowed Claim. *De minimis* distributions for which no such request is timely received shall revert to the Claimant Trust. Upon such reversion, the relevant Allowed Claim (and any Claim on account of missed distributions) shall be automatically deemed satisfied, discharged and forever barred, notwithstanding any federal or state escheat laws to the contrary.

H. Distributions on Account of Allowed Claims

Except as otherwise agreed by the Holder of a particular Claim or as provided in this Plan, all distributions shall be made pursuant to the terms of this Plan and the Confirmation Order. Except as otherwise provided in this Plan, distributions to any Holder of an Allowed Claim shall, to the extent applicable, be allocated first to the principal amount of any such Allowed Claim, as determined for U.S. federal income tax purposes and then, to the extent the consideration exceeds such amount, to the remainder of such Claim comprising accrued but unpaid interest, if any (but solely to the extent that interest is an allowable portion of such Allowed Claim).

I. General Distribution Procedures

The Distribution Agent shall make all distributions of Cash or other property required under this Plan, unless this Plan specifically provides otherwise. All Cash and other property held by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, for ultimate distribution under this Plan shall not be subject to any claim by any Person.

J. Address for Delivery of Distributions

Distributions to Holders of Allowed Claims, to the extent provided for under this Plan, shall be made (1) at the addresses set forth in any written notices of address change delivered to the Debtor and the Distribution Agent; (2) at the address set forth on any Proofs of Claim Filed by such Holders (to the extent such Proofs of Claim are Filed in the Chapter 11 Case), (2), or (3) at the addresses in the Debtor's books and records.

If there is any conflict or discrepancy between the addresses set forth in (1) through (3) in the foregoing sentence, then (i) the address in Section (2) shall control; (ii) if (2) does not apply, the address in (1) shall control, and (iii) if (1) does not apply, the address in (3) shall control.

K. Undeliverable Distributions and Unclaimed Property

If the distribution to the Holder of any Allowed Claim is returned to the Reorganized Debtor or the Claimant Trust as undeliverable, no further distribution shall be made to such Holder, and Distribution Agent shall not have any obligation to make any further distribution to the Holder, unless and until the Distribution Agent is notified in writing of such Holder's then current address.

Any Entity that fails to claim any Cash within six months from the date upon which a distribution is first made to such Entity shall forfeit all rights to any distribution under this Plan and such Cash shall thereafter be deemed an Claimant Trust Asset in all respects and for all purposes. Entities that fail to claim Cash shall forfeit their rights thereto and shall have no claim whatsoever against the Debtor's Estate, the Reorganized Debtor, the Claimant Trust, or against any Holder of an Allowed Claim to whom distributions are made by the Distribution Agent.

L. Withholding Taxes

In connection with this Plan, to the extent applicable, the Distribution Agent shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions made pursuant to this Plan shall be subject to such withholding and reporting requirements. The Distribution Agent shall be entitled to deduct any U.S. federal, state or local withholding taxes from any Cash payments made with respect to Allowed Claims, as appropriate. As a condition to receiving any distribution under this Plan, the Distribution Agent may require that the Holder of an Allowed Claim entitled to receive a distribution pursuant to this Plan provide such Holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Distribution Agent to comply with applicable tax reporting and withholding laws. If a Holder fails to comply with such a request within one year, such distribution shall be deemed an unclaimed distribution. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the applicable recipient for all purposes of this Plan.

M. Setoffs

The Distribution Agent may, to the extent permitted under applicable law, set off against any Allowed Claim and any distributions to be made pursuant to this Plan on account of such Allowed Claim, the claims, rights and causes of action of any nature that the Debtor, the Reorganized Debtor, or the Distribution Agent may hold against the Holder of such Allowed Claim that are not otherwise waived, released or compromised in accordance with this Plan; *provided, however*, that neither such a setoff nor the allowance of any Claim hereunder shall constitute a waiver or release by the Debtor, the Reorganized Debtor, or the Claimant Trustee of any such claims, rights and causes of action that the Debtor, the Reorganized Debtor, or Claimant Trustee possesses against such Holder. Any Holder of an Allowed Claim subject to such setoff reserves the right to challenge any such setoff in the Bankruptcy Court or any other court with jurisdiction with respect to such challenge.

N. Surrender of Cancelled Instruments or Securities

As a condition precedent to receiving any distribution pursuant to this Plan on account of an Allowed Claim evidenced by negotiable instruments, securities, or notes canceled pursuant to ARTICLE IV of this Plan, the Holder of such Claim will tender the applicable negotiable instruments, securities, or notes evidencing such Claim (or a sworn affidavit identifying the negotiable instruments, securities, or notes formerly held by such Holder and certifying that they have been lost), to the Distribution Agent unless waived in writing by the Distribution Agent.

O. Lost, Stolen, Mutilated or Destroyed Securities

In addition to any requirements under any applicable agreement and applicable law, any Holder of a Claim or Equity Interest evidenced by a security or note that has been lost, stolen, mutilated, or destroyed will, in lieu of surrendering such security or note to the extent required by this Plan, deliver to the Distribution Agent: (i) evidence reasonably satisfactory to the Distribution Agent of such loss, theft, mutilation, or destruction; and (ii) such security or indemnity as may be required by the Distribution Agent to hold such party harmless from any damages, liabilities, or costs incurred in treating such individual as a Holder of an Allowed Claim or Equity Interest. Upon compliance with ARTICLE VI.O of this Plan as determined by the Distribution Agent, by a Holder of a Claim evidenced by a security or note, such Holder will, for all purposes under this Plan, be deemed to have surrendered such security or note to the Distribution Agent.

**ARTICLE VII.
PROCEDURES FOR RESOLVING CONTINGENT,
UNLIQUIDATED AND DISPUTED CLAIMS**

A. Filing of Proofs of Claim

Unless such Claim appeared in the Schedules and is not listed as disputed, contingent, or unliquidated, or such Claim has otherwise been Allowed or paid, each Holder of a Claim was required to file a Proof of Claim on or prior to the Bar Date.

B. Disputed Claims

Following the Effective Date, each of the Reorganized Debtor or the Claimant Trustee, as applicable, may File with the Bankruptcy Court an objection to the allowance of any Disputed Claim or Disputed Equity Interest, request the Bankruptcy Court subordinate any Claims to Subordinated Claims, or any other appropriate motion or adversary proceeding with respect to the foregoing by the Claims Objection Deadline or, at the discretion of the Reorganized Debtor or Claimant Trustee, as applicable, compromised, settled, withdrew or resolved without further order of the Bankruptcy Court, and (ii) unless otherwise provided in the Confirmation Order, the Reorganized Debtor or the Claimant Trust, as applicable, are authorized to settle, or withdraw any objections to, any Disputed Claim or Disputed Equity Interests following the Effective Date without further notice to creditors (other than the Entity holding such Disputed Claim or Disputed Equity Interest) or authorization of the Bankruptcy Court, in which event such Claim or Equity Interest shall be deemed to be an Allowed Claim or Equity Interest in the amount compromised for purposes of this Plan.

C. Procedures Regarding Disputed Claims or Disputed Equity Interests

No payment or other distribution or treatment shall be made on account of a Disputed Claim or Disputed Equity Interest unless and until such Disputed Claim or Disputed Equity Interest becomes an Allowed Claim or Equity Interests and the amount of such Allowed Claim or Equity Interest, as applicable, is determined by order of the Bankruptcy Court or by stipulation between the Reorganized Debtor or Claimant Trust, as applicable, and the Holder of the Claim or Equity Interest.

D. Allowance of Claims and Equity Interests

Following the date on which a Disputed Claim or Disputed Equity Interest becomes an Allowed Claim or Equity Interest after the Distribution Date, the Distribution Agent shall make a distribution to the Holder of such Allowed Claim or Equity Interest in accordance with the Plan.

1. Allowance of Claims

After the Effective Date and subject to the other provisions of this Plan, the Reorganized Debtor or the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Claim. Except as expressly provided in this Plan or in any order entered in the Chapter 11 Case prior to the Effective Date (including, without limitation, the Confirmation Order), no Claim or Equity Interest will become an Allowed Claim or Equity Interest unless and until such Claim or Equity Interest is deemed Allowed under this Plan or the Bankruptcy Code or the Bankruptcy Court has entered an order, including, without limitation, the Confirmation Order, in the Chapter 11 Case allowing such Claim or Equity Interest.

2. Estimation

Subject to the other provisions of this Plan, the Debtor, prior to the Effective Date, and the Reorganized Debtor or the Claimant Trustee, as applicable, after the Effective Date, may, at any time, request that the Bankruptcy Court estimate (a) any Disputed Claim or Disputed Equity Interest pursuant to applicable law and in accordance with this Plan and (b) any contingent or unliquidated Claim pursuant to applicable law, including, without limitation, section 502(c) of the Bankruptcy Code, and the Bankruptcy Court will retain jurisdiction under 28 U.S.C. §§ 157 and 1334 to estimate any Disputed Claim or Disputed Equity Interest, contingent Claim or unliquidated Claim, including during the litigation concerning any objection to any Claim or Equity Interest or during the pendency of any appeal relating to any such objection. All of the aforementioned objection, estimation and resolution procedures are cumulative and not exclusive of one another. Claims or Equity Interests may be estimated and subsequently compromised, settled, withdrawn or resolved by any mechanism approved by the Bankruptcy Court. The rights and objections of all parties are reserved in connection with any such estimation proceeding.

3. Disallowance of Claims

Any Claims or Equity Interests held by Entities from which property is recoverable under sections 542, 543, 550, or 553 of the Bankruptcy Code, or that are a transferee of a transfer avoidable under sections 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code, shall be deemed disallowed pursuant to section 502(d) of the Bankruptcy Code, and holders of such Claims or Interests may not receive any distributions on account of such Claims or Interests until such time as such Causes of Action against that Entity have been settled or a Bankruptcy Court Order with respect thereto has been entered and all sums due, if any, to the Reorganized Debtor or the Claimant Trust, as applicable, by that Entity have been turned over or paid to the Reorganized Debtor or the Claimant Trust, as applicable.

EXCEPT AS OTHERWISE PROVIDED HEREIN OR AS AGREED TO BY THE DEBTOR, REORGANIZED DEBTOR, OR CLAIMANT TRUSTEE, AS APPLICABLE,

ANY AND ALL PROOFS OF CLAIM FILED AFTER THE BAR DATE SHALL BE DEEMED DISALLOWED AND EXPUNGED AS OF THE EFFECTIVE DATE WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTCY COURT, AND HOLDERS OF SUCH CLAIMS MAY NOT RECEIVE ANY DISTRIBUTIONS ON ACCOUNT OF SUCH CLAIMS, UNLESS SUCH LATE PROOF OF CLAIM HAS BEEN DEEMED TIMELY FILED BY A FINAL ORDER.

ARTICLE VIII.
EFFECTIVENESS OF THIS PLAN

A. Conditions Precedent to the Effective Date

The Effective Date of this Plan will be conditioned upon the satisfaction or waiver by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee with such consent not to be unreasonably withheld), pursuant to the provisions of ARTICLE VIII.B of this Plan of the following:

- This Plan and the Plan Documents, including the Claimant Trust Agreement and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to this Plan shall have been Filed in form and substance reasonably acceptable to the Debtor and the Committee.
- The Confirmation Order shall have become a Final Order and shall be in form and substance reasonably acceptable to the Debtor and the Committee. The Confirmation Order shall provide that, among other things, (i) the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee are authorized to take all actions necessary or appropriate to effectuate and consummate this Plan, including, without limitation, (a) entering into, implementing, effectuating, and consummating the contracts, instruments, releases, and other agreements or documents created in connection with or described in this Plan, (b) assuming the Executory Contracts and Unexpired Leases set forth in the Plan Supplement, (c) making all distributions and issuances as required under this Plan; and (d) entering into any transactions as set forth in the Plan Documents; (ii) the provisions of the Confirmation Order and this Plan are nonseverable and mutually dependent; (iii) the implementation of this Plan in accordance with its terms is authorized; (iv) pursuant to section 1146 of the Bankruptcy Code, the delivery of any deed or other instrument or transfer order, in furtherance of, or in connection with this Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under this Plan, shall not be subject to any Stamp or Similar Tax; and (v) the vesting of the Claimant Trust Assets in the Claimant Trust and the Reorganized Debtor Assets in the Reorganized Debtor, in each case as of the Effective Date free and clear of liens and claims to the fullest extent permissible under applicable law pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.
- All documents and agreements necessary to implement this Plan, including without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust

Agreement, and the New GP LLC Documents, in each case in form and substance reasonably acceptable to the Debtor and the Committee, shall have (a) been tendered for delivery, and (b) been effected by, executed by, or otherwise deemed binding upon, all Entities party thereto and shall be in full force and effect. All conditions precedent to such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements.

- All authorizations, consents, actions, documents, approvals (including any governmental approvals), certificates and agreements necessary to implement this Plan, including, without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, shall have been obtained, effected or executed and delivered to the required parties and, to the extent required, filed with the applicable governmental units in accordance with applicable laws and any applicable waiting periods shall have expired without any action being taken or threatened by any competent authority that would restrain or prevent effectiveness or consummation of the Restructuring.
- The Debtor shall have obtained applicable directors' and officers' insurance coverage that is acceptable to each of the Debtor, the Committee, the Claimant Trust Oversight Committee, the Claimant Trustee and the Litigation Trustee.
- The Professional Fee Reserve shall be funded pursuant to this Plan in an amount determined by the Debtor in good faith.

B. Waiver of Conditions

The conditions to effectiveness of this Plan set forth in this ARTICLE VIII (other than that the Confirmation Order shall have been entered) may be waived in whole or in part by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee), without notice, leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or effectuate this Plan. The failure to satisfy or waive a condition to the Effective Date may be asserted by the Debtor regardless of the circumstances giving rise to the failure of such condition to be satisfied. The failure of the Debtor to exercise any of the foregoing rights will not be deemed a waiver of any other rights, and each right will be deemed an ongoing right that may be asserted at any time by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable.

C. Dissolution of the Committee

On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee's Professionals will cease to have any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on

the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan and the Claimant Trust Agreement in connection with such representation.

ARTICLE IX.
EXCULPATION, INJUNCTION AND RELATED PROVISIONS

A. General

Notwithstanding anything contained in the Plan to the contrary, the allowance, classification and treatment of all Allowed Claims and Equity Interests and their respective distributions and treatments under the Plan shall take into account the relative priority and rights of the Claims and the Equity Interests in each Class in connection with any contractual, legal and equitable subordination rights relating thereto whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code, or otherwise.

B. Discharge of Claims

To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by this Plan or the Confirmation Order, all consideration distributed under this Plan will be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to this Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

C. Exculpation

Subject in all respects to ARTICLE XII.D of this Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); *provided, however*, the foregoing

will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.

D. Releases by the Debtor

On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person.

Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

Notwithstanding anything herein to the contrary, any release provided pursuant to this ARTICLE IX.D (i) with respect to a Senior Employee, is conditioned in all respects on (a) such Senior Employee executing a Senior Employee Stipulation on or prior to the Effective Date and (b) the reduction of such Senior Employee's Allowed Claim as set forth in the Senior Employee Stipulation (such amount, the "Reduced Employee Claim"), and (ii) with respect to any Employee, including a Senior Employee, shall be deemed null and void and of no force and effect (1) if there is more than one member of the Claimant Trust Oversight Committee who does not represent entities holding a Disputed or Allowed Claim (the "Independent Members"), the Claimant Trustee and the Independent Members by majority vote determine or (2) if there is only one Independent Member, the Independent Member after discussion with the Claimant Trustee, determines (in each case after discussing with the full Claimant Trust Oversight Committee) that such Employee (regardless of whether the Employee is then currently employed by the Debtor, the Reorganized Debtor, or the Claimant Trustee):

- sues, attempts to sue, or threatens or works with or assists any entity or person to sue, attempt to sue, or threaten the Reorganized Debtor, the Claimant Trust, the Litigation

Sub-Trust, or any of their respective employees or agents, or any Released Party on or in connection with any claim or cause of action arising prior to the Effective Date,

- has taken any action that, impairs or harms the value of the Claimant Trust Assets or the Reorganized Debtor Assets, or
- (x) upon the request of the Claimant Trustee, has failed to provide reasonable assistance in good faith to the Claimant Trustee or the Reorganized Debtor with respect to (1) the monetization of the Claimant Trust Assets or Reorganized Debtor Assets, as applicable, or (2) the resolution of Claims, or (y) has taken any action that impedes or frustrates the Claimant Trustee or the Reorganized Debtor with respect to any of the foregoing.

Provided, however, that the release provided pursuant to this ARTICLE IX.D will vest and the Employee will be indefeasibly released pursuant to this ARTICLE IX.D if such Employee's release has not been deemed null and void and of no force and effect on or prior to the date that is the date of dissolution of the Claimant Trust pursuant to the Claimant Trust Agreement.

By executing the Senior Employee Stipulation embodying this release, each Senior Employee acknowledges and agrees, without limitation, to the terms of this release and the tolling agreement contained in the Senior Employee Stipulation.

The provisions of this release and the execution of a Senior Employee Stipulation will not in any way prevent or limit any Employee from (i) prosecuting its Claims, if any, against the Debtor's Estate, (ii) defending him or herself against any claims or causes of action brought against the Employee by a third party, or (iii) assisting other persons in defending themselves from any Estate Claims brought by the Litigation Trustee (but only with respect to Estate Claims brought by the Litigation Trustee and not collection or other actions brought by the Claimant Trustee).

E. Preservation of Rights of Action

1. Maintenance of Causes of Action

Except as otherwise provided in this Plan, after the Effective Date, the Reorganized Debtor or the Claimant Trust will retain all rights to commence, pursue, litigate or settle, as appropriate, any and all Causes of Action included in the Reorganized Debtor Assets or Claimant Trust Assets, as applicable, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including, without limitation, in an adversary proceeding Filed in the Chapter 11 Case and, as the successors in interest to the Debtor and the Estate, may, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any or all of the Causes of Action without notice to or approval from the Bankruptcy Court.

2. Preservation of All Causes of Action Not Expressly Settled or Released

Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in this Plan or any Final Order (including, without limitation, the Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor or Claimant Trust, as applicable (including,

without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of this Plan based on the Disclosure Statement, this Plan or the Confirmation Order, except where such Causes of Action have been expressly released in this Plan or any other Final Order (including, without limitation, the Confirmation Order). In addition, the right of the Reorganized Debtor or the Claimant Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

F. Injunction

Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court

(i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

G. Duration of Injunctions and Stays

ARTICLE II. Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Court will enter an equivalent order under Section 105.

H. Continuance of January 9 Order

Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, the restrictions set forth in paragraphs 9 and 10 of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [D.I. 339] shall remain in full force and effect following the Effective Date.

**ARTICLE X.
BINDING NATURE OF PLAN**

On the Effective Date, and effective as of the Effective Date, the Plan, including, without limitation, the provisions in ARTICLE IX, will bind, and will be deemed binding upon, all Holders of Claims against and Equity Interests in the Debtor and such Holder's respective successors and assigns, to the maximum extent permitted by applicable law, notwithstanding whether or not such Holder will receive or retain any property or interest in property under the Plan. All Claims and Debts shall be fixed and adjusted pursuant to this Plan. The Plan shall also bind any taxing authority, recorder of deeds, or similar official for any county, state, Governmental Unit or parish in which any instrument related to the Plan or related to any transaction contemplated thereby is to be recorded with respect to any taxes of the kind specified in Bankruptcy Code section 1146(a).

ARTICLE XI.
RETENTION OF JURISDICTION

Pursuant to sections 105 and 1142 of the Bankruptcy Code and notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall, after the Effective Date, retain such jurisdiction over the Chapter 11 Case and all Entities with respect to all matters related to the Chapter 11 Case, the Reorganized Debtor, the Claimant Trust, and this Plan to the maximum extent legally permissible, including, without limitation, jurisdiction to:

- allow, disallow, determine, liquidate, classify, estimate or establish the priority, secured, unsecured, or subordinated status of any Claim or Equity Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of any Claim or Equity Interest;
- grant or deny any applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or this Plan, for periods ending on or before the Effective Date; *provided, however*, that, from and after the Effective Date, the Reorganized Debtor shall pay Professionals in the ordinary course of business for any work performed after the Effective Date subject to the terms of this Plan and the Confirmation Order, and such payment shall not be subject to the approval of the Bankruptcy Court;
- resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which the Debtor is party or with respect to which the Debtor, Reorganized Debtor, or Claimant Trust may be liable and to adjudicate and, if necessary, liquidate, any Claims arising therefrom, including, without limitation, any dispute regarding whether a contract or lease is or was executory or expired;
- make any determination with respect to a claim or cause of action against a Protected Party as set forth in ARTICLE IX;
- resolve any claim or cause of action against an Exculpated Party or Protected Party arising from or related to the Chapter 11 Case, the negotiation of this Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, or the transactions in furtherance of the foregoing;
- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any sale, disposition, assignment or other transfer of the Reorganized Debtor Assets or Claimant Trust Assets, including any break-up compensation or expense reimbursement that may be requested by a purchaser thereof; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;

- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any borrowing or the incurrence of indebtedness, whether secured or unsecured by the Reorganized Debtor or Claimant Trust; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;
- resolve any issues related to any matters adjudicated in the Chapter 11 Case;
- ensure that distributions to Holders of Allowed Claims and Allowed Equity Interests are accomplished pursuant to the provisions of this Plan;
- decide or resolve any motions, adversary proceedings, contested or litigated matters and any other Causes of Action (including Estate Claims) that are pending as of the Effective Date or that may be commenced in the future, including approval of any settlements, compromises, or other resolutions as may be requested by the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee whether under Bankruptcy Rule 9019 or otherwise, and grant or deny any applications involving the Debtor that may be pending on the Effective Date or instituted by the Reorganized Debtor, the Claimant Trustee, or Litigation Trustee after the Effective Date, provided that the Reorganized Debtor, the Claimant Trustee, and the Litigation Trustee shall reserve the right to commence actions in all appropriate forums and jurisdictions;
- enter such orders as may be necessary or appropriate to implement, effectuate, or consummate the provisions of this Plan, the Plan Documents, and all other contracts, instruments, releases, and other agreements or documents adopted in connection with this Plan, the Plan Documents, or the Disclosure Statement;
- resolve any cases, controversies, suits or disputes that may arise in connection with the implementation, effectiveness, consummation, interpretation, or enforcement of this Plan or any Entity's obligations incurred in connection with this Plan;
- issue injunctions and enforce them, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with implementation, effectiveness, consummation, or enforcement of this Plan, except as otherwise provided in this Plan;
- enforce the terms and conditions of this Plan and the Confirmation Order;
- resolve any cases, controversies, suits or disputes with respect to the release, exculpation, indemnification, and other provisions contained herein and enter such orders or take such others actions as may be necessary or appropriate to implement or enforce all such releases, injunctions and other provisions;
- enter and implement such orders or take such others actions as may be necessary or appropriate if the Confirmation Order is modified, stayed, reversed, revoked or vacated;

- resolve any other matters that may arise in connection with or relate to this Plan, the Disclosure Statement, the Confirmation Order, the Plan Documents, or any contract, instrument, release, indenture or other agreement or document adopted in connection with this Plan or the Disclosure Statement; and
- enter an order concluding or closing the Chapter 11 Case after the Effective Date.

ARTICLE XII.
MISCELLANEOUS PROVISIONS

A. Payment of Statutory Fees and Filing of Reports

All outstanding Statutory Fees shall be paid on the Effective Date. All such fees payable, and all such fees that become due and payable, after the Effective Date shall be paid by the Reorganized Debtor when due or as soon thereafter as practicable until the Chapter 11 Case is closed, converted, or dismissed. The Claimant Trustee shall File all quarterly reports due prior to the Effective Date when they become due, in a form reasonably acceptable to the U.S. Trustee. After the Effective Date, the Claimant Trustee shall File with the Bankruptcy Court quarterly reports when they become due, in a form reasonably acceptable to the U.S. Trustee. The Reorganized Debtor shall remain obligated to pay Statutory Fees to the Office of the U.S. Trustee until the earliest of the Debtor's case being closed, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code.

B. Modification of Plan

Effective as of the date hereof and subject to the limitations and rights contained in this Plan: (a) the Debtor reserves the right, in accordance with the Bankruptcy Code and the Bankruptcy Rules, to amend or modify this Plan prior to the entry of the Confirmation Order with the consent of the Committee, such consent not to be unreasonably withheld; and (b) after the entry of the Confirmation Order, the Debtor may, after notice and hearing and entry of an order of the Bankruptcy Court, amend or modify this Plan, in accordance with section 1127(b) of the Bankruptcy Code or remedy any defect or omission or reconcile any inconsistency in this Plan in such manner as may be necessary to carry out the purpose and intent of this Plan.

C. Revocation of Plan

The Debtor reserves the right to revoke or withdraw this Plan prior to the Confirmation Date and to File a subsequent chapter 11 plan with the consent of the Committee. If the Debtor revokes or withdraws this Plan prior to the Confirmation Date, then: (i) this Plan shall be null and void in all respects; (ii) any settlement or compromise embodied in this Plan, assumption of Executory Contracts or Unexpired Leases effected by this Plan and any document or agreement executed pursuant hereto shall be deemed null and void except as may be set forth in a separate order entered by the Bankruptcy Court; and (iii) nothing contained in this Plan shall: (a) constitute a waiver or release of any Claims by or against, or any Equity Interests in, the Debtor or any other Entity; (b) prejudice in any manner the rights of the Debtor or any other Entity; or (c) constitute an admission, acknowledgement, offer or undertaking of any sort by the Debtor or any other Entity.

D. Obligations Not Changed

Notwithstanding anything in this Plan to the contrary, nothing herein will affect or otherwise limit or release any non-Debtor Entity's (including any Exculpated Party's) duties or obligations, including any contractual and indemnification obligations, to the Debtor, the Reorganized Debtor, or any other Entity whether arising under contract, statute, or otherwise.

E. Entire Agreement

Except as otherwise described herein, this Plan supersedes all previous and contemporaneous negotiations, promises, covenants, agreements, understandings, and representations on such subjects, all of which have become merged and integrated into this Plan.

F. Closing of Chapter 11 Case

The Claimant Trustee shall, after the Effective Date and promptly after the full administration of the Chapter 11 Case, File with the Bankruptcy Court all documents required by Bankruptcy Rule 3022 and any applicable order of the Bankruptcy Court to close the Chapter 11 Case.

G. Successors and Assigns

This Plan shall be binding upon and inure to the benefit of the Debtor and its successors and assigns, including, without limitation, the Reorganized Debtor and the Claimant Trustee. The rights, benefits, and obligations of any Person or Entity named or referred to in this Plan shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor, or assign of such Person or Entity.

H. Reservation of Rights

Except as expressly set forth herein, this Plan shall have no force or effect unless and until the Bankruptcy Court enters the Confirmation Order and the Effective Date occurs. Neither the filing of this Plan, any statement or provision contained herein, nor the taking of any action by the Debtor, the Reorganized Debtor, the Claimant Trustee, or any other Entity with respect to this Plan shall be or shall be deemed to be an admission or waiver of any rights of: (1) the Debtor, the Reorganized Debtor, or the Claimant Trustee with respect to the Holders of Claims or Equity Interests or other Entity; or (2) any Holder of a Claim or an Equity Interest or other Entity prior to the Effective Date.

Neither the exclusion or inclusion by the Debtor of any contract or lease on any exhibit, schedule, or other annex to this Plan or in the Plan Documents, nor anything contained in this Plan, will constitute an admission by the Debtor that any such contract or lease is or is not an executory contract or lease or that the Debtor, the Reorganized Debtor, the Claimant Trustee, or their respective Affiliates has any liability thereunder.

Except as explicitly provided in this Plan, nothing herein shall waive, excuse, limit, diminish, or otherwise alter any of the defenses, claims, Causes of Action, or other rights of the

Debtor, the Reorganized Debtor, or the Claimant Trustee under any executory or non-executory contract.

Nothing in this Plan will increase, augment, or add to any of the duties, obligations, responsibilities, or liabilities of the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, under any executory or non-executory contract or lease.

If there is a dispute regarding whether a contract or lease is or was executory at the time of its assumption under this Plan, the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, shall have thirty (30) days following entry of a Final Order resolving such dispute to alter their treatment of such contract.

I. Further Assurances

The Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, all Holders of Claims and Equity Interests receiving distributions hereunder, and all other Entities shall, from time to time, prepare, execute and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of this Plan or the Confirmation Order. On or before the Effective Date, the Debtor shall File with the Bankruptcy Court all agreements and other documents that may be necessary or appropriate to effectuate and further evidence the terms and conditions hereof.

J. Severability

If, prior to the Confirmation Date, any term or provision of this Plan is determined by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court will have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision will then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order will constitute a judicial determination and will provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

K. Service of Documents

All notices, requests, and demands to or upon the Debtor, the Reorganized Debtor, or the Claimant Trustee to be effective shall be in writing and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when actually delivered addressed as follows:

If to the Claimant Trust:

Highland Claimant Trust
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700

Dallas, Texas 75201
Attention: James P. Seery, Jr.

If to the Debtor:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.

with copies to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Attn: Jeffrey N. Pomerantz, Esq.
Ira D. Kharasch, Esq.
Gregory V. Demo, Esq.

If to the Reorganized Debtor:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.

with copies to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Attn: Jeffrey N. Pomerantz, Esq.
Ira D. Kharasch, Esq.
Gregory V. Demo, Esq.

L. Exemption from Certain Transfer Taxes Pursuant to Section 1146(a) of the Bankruptcy Code

To the extent permitted by applicable law, pursuant to section 1146(a) of the Bankruptcy Code, any transfers of property pursuant hereto shall not be subject to any Stamp or Similar Tax or governmental assessment in the United States, and the Confirmation Order shall direct the appropriate federal, state or local governmental officials or agents or taxing authority to forego the collection of any such Stamp or Similar Tax or governmental assessment and to accept for filing and recordation instruments or other documents pursuant to such transfers of property without the payment of any such Stamp or Similar Tax or governmental assessment. Such exemption specifically applies, without limitation, to (i) all actions, agreements and documents necessary to

evidence and implement the provisions of and the distributions to be made under this Plan; (ii) the maintenance or creation of security or any Lien as contemplated by this Plan; and (iii) assignments, sales, or transfers executed in connection with any transaction occurring under this Plan.

M. Governing Law

Except to the extent that the Bankruptcy Code, the Bankruptcy Rules or other federal law is applicable, or to the extent that an exhibit or schedule to this Plan provides otherwise, the rights and obligations arising under this Plan shall be governed by, and construed and enforced in accordance with, the laws of Texas, without giving effect to the principles of conflicts of law of such jurisdiction; *provided, however*, that corporate governance matters relating to the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trust, as applicable, shall be governed by the laws of the state of organization of the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trustee, as applicable.

N. Tax Reporting and Compliance

The Debtor is hereby authorized to request an expedited determination under section 505(b) of the Bankruptcy Code of the tax liability of the Debtor is for all taxable periods ending after the Petition Date through, and including, the Effective Date.

O. Exhibits and Schedules

All exhibits and schedules to this Plan, if any, including the Exhibits and the Plan Documents, are incorporated and are a part of this Plan as if set forth in full herein.

P. Controlling Document

In the event of an inconsistency between this Plan and any other instrument or document created or executed pursuant to this Plan, or between this Plan and the Disclosure Statement, this Plan shall control. The provisions of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and of the Confirmation Order, on the other hand, shall be construed in a manner consistent with each other so as to effectuate the purposes of each; *provided, however*, that if there is determined to be any inconsistency between any provision of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and any provision of the Confirmation Order, on the other hand, that cannot be so reconciled, then, solely to the extent of such inconsistency, the provisions of the Confirmation Order shall govern, and any such provisions of the Confirmation Order shall be deemed a modification of this Plan, the Disclosure Statement, and the Plan Documents, as applicable.

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Dated: January 22, 2021

Respectfully submitted,

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: 

James P. Seery, Jr.
Chief Executive Officer and Chief Restructuring
Officer

Prepared by:

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for the Debtor and Debtor-in-Possession

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Exhibit B

Schedule of CLO Management Agreements and Related Contracts to Be Assumed

Schedule of CLO Management Agreements and Related Contracts to Be Assumed

1. Servicing Agreement, dated December 20, 2007, by and among Greenbriar CLO, Ltd., and Highland Capital Management, L.P.
2. Investment Management Agreement, dated November 1, 2007, by and between Longhorn Credit Funding, LLC, and Highland Capital Management, L.P. (as amended)
3. Reference Portfolio Management Agreement, dated August 1, 2016, by and between Highland Capital Management, L.P., and Valhalla CLO, Ltd.
4. Collateral Servicing Agreement, dated December 20, 2006, by and among Highland Park CDO I, Ltd., and Highland Capital Management, L.P.
5. Portfolio Management Agreement, dated March 15, 2005, by and among Southfork CLO Ltd., and Highland Capital Management, L.P.
6. Amended and Restated Portfolio Management Agreement, dated November 30, 2005, by and among Jaspar CLO Ltd., and Highland Capital Management, L.P.
7. Servicing Agreement, dated May 31, 2007, by and among Westchester CLO, Ltd., and Highland Capital Management, L.P.
8. Servicing Agreement, dated May 10, 2006, by and among Rockwall CDO Ltd. and Highland Capital Management, L.P. (as amended)
9. Portfolio Management Agreement, dated December 8, 2005, by and between Liberty CLO, Ltd., and Highland Capital Management, L.P.
10. Servicing Agreement, dated March 27, 2008, by and among Aberdeen Loan Funding, Ltd., and Highland Capital Management, L.P.
11. Servicing Agreement, dated May 9, 2007, by and among Rockwall CDO II Ltd. and Highland Capital Management, L.P.
12. Collateral Management Agreement, by and between, Highland Loan Funding V Ltd. and Highland Capital Management, L.P., dated August 1, 2001.
13. Collateral Management Agreement, dated August 18, 1999, by and between Highland Legacy Limited and Highland Capital Management, L.P.
14. Servicing Agreement, dated November 30, 2006, by and among Grayson CLO Ltd., and Highland Capital Management, L.P. (as amended)
15. Servicing Agreement, dated October 25, 2007, by and among Stratford CLO Ltd., and Highland Capital Management, L.P.
16. Servicing Agreement, dated August 3, 2006, by and among Red River CLO Ltd., and Highland Capital Management, L.P. (as amended)
17. Servicing Agreement, dated December 21, 2006, by and among Brentwood CLO, Ltd., and Highland Capital Management, L.P.
18. Servicing Agreement, dated March 13, 2007, by and among Eastland CLO Ltd., and Highland Capital Management, L.P.

19. Portfolio Management, Agreement, dated October 13, 2005, by and among Gleneagles CLO, Ltd., and Highland Capital Management, L.P.
20. Members' Agreement and Amendment, dated November 15, 2017, by and between Highland CLO Funding, Ltd. and Highland Capital Management, L.P.
21. Collateral Management Agreement, dated May 19, 1998, by and between Pam Capital Funding LP, Ranger Asset Mgt LP and Highland Capital Management, L.P.
22. Collateral Management Agreement, dated August 6, 1997, by and between Pamco Cayman Ltd., Ranger Asset Mgt LP and Highland Capital Management, L.P.
23. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Red River CLO Ltd. et al
24. Interim Collateral Management Agreement, June 15, 2005, between Highland Capital Management, L.P. and Rockwall CDO Ltd
25. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Rockwall CDO Ltd
26. Collateral Servicing Agreement dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.; The Bank of New York Trust Company, National Association
27. Representations and Warranties Agreement, dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.
28. Collateral Administration Agreement, dated March 27, 2008, between Highland Capital Management, L.P. and Aberdeen Loan Funding, Ltd.; State Street Bank and Trust Company
29. Collateral Administration Agreement, dated December 20, 2007, between Highland Capital Management, L.P. and Greenbriar CLO, Ltd.; State Street Bank and Trust Company
30. Collateral Acquisition Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd
31. Collateral Administration Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd. and Investors Bank and Trust Company
32. Collateral Administration Agreement, dated October 13, 2005, between Highland Capital Management, L.P. and Gleneagles CLO, Ltd.; JPMorgan Chase Bank, National Association
33. Collateral Acquisition Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.
34. Collateral Administration Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.; Investors Bank & Trust Company
35. Collateral Acquisition Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.

36. Collateral Administration Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.; U.S. Bank National Association
37. Master Warehousing and Participation Agreement, dated April 19, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company
38. Master Warehousing and Participation Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
39. Master Warehousing and Participation Agreement (Amendment No. 2), dated May 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
40. Master Warehousing and Participation Agreement (Amendment No. 1), dated April 12, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
41. Master Warehousing and Participation Agreement (Amendment No. 3), dated June 22, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
42. Master Warehousing and Participation Agreement (Amendment No. 4), dated July 17, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
43. Collateral Administration Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; U.S. Bank National Association; IXIS Financial Products Inc.
44. Collateral Administration Agreement, dated April 18, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company; U.S. Bank National Association
45. Master Participation Agreement, dated June 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Grand Central Asset Trust
46. A&R Asset Acquisition Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Smith Barney Inc.; Highland Loan Funding V Ltd.
47. A&R Master Participation Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Brothers Holding Company; Highland Loan Funding V Ltd.
48. Collateral Acquisition Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.
49. Collateral Administration Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.; JPMorgan Chase Bank, National Association
50. Master Warehousing and Participation Agreement, dated March 24, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.

51. Master Warehousing and Participation Agreement (Amendment No. 1), dated May 16, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.
52. Collateral Administration Agreement, dated December 8, 2005, between Highland Capital Management, L.P. and Liberty CLO Ltd.
53. Collateral Administration Agreement, dated May 10, 2006, between Highland Capital Management, L.P. and Rockwall CDO Ltd; JPMorgan Chase Bank, National Association
54. Collateral Administration Agreement, dated May 9, 2007, between Highland Capital Management, L.P. and Rockwall CDO II, Ltd.; Investors Bank & Trust Company
55. Collateral Administration Agreement, dated March 15, 2005, between Highland Capital Management, L.P. and Southfork CLO Ltd.; JPMorgan Chase Bank, National Association
56. Collateral Administration Agreement, dated October 25, 2007, between Highland Capital Management, L.P. and Stratford CLO Ltd.; State Street
57. Collateral Administration Agreement, dated August 18, 2004, between Highland Capital Management, L.P. and Valhalla CLO, Ltd.; JPMorgan Chase Bank
58. Collateral Acquisition Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.
59. Collateral Administration Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.; Investors Bank & Trust Company
60. Collateral Administration Agreement, dated December 21, 2006, between Highland Capital Management, L.P. and Brentwood CLO, Ltd.; Investors Bank & Trust Company

EXHIBIT 10

(as subsequently amended and/or modified, the “Plan”).²

PLEASE TAKE FURTHER NOTICE that Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”), filed the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* on November 24, 2020 [Docket No. 1473] (the “Disclosure Statement”).

PLEASE TAKE FURTHER NOTICE that attached as Exhibit C to the Disclosure Statement was the Debtor’s Liquidation Analysis/Financial Projections.

PLEASE TAKE FURTHER NOTICE that attached hereto as **Exhibit A** are the Debtor’s amended Liquidation Analysis/Financial Projections (the “Amended Liquidation Analysis/Financial Projections”), which supersede the Liquidation Analysis/Financial Projections filed on November 24, 2020, with the Disclosure Statement.

PLEASE TAKE FURTHER NOTICE that a prior version of the Amended Liquidation Analysis/Financial Projections was provided to parties in interests on January 28, 2021, in advance of the deposition of James P. Seery, Jr., the Debtor’s Chief Executive Officer and Chief Restructuring Officer, and that the Amended Liquidation Analysis/Financial Projections differ from such version in two respects:

- The Amended Liquidation Analysis/Financial Projections include the settlement in principle between UBS and the Debtor, which provides for UBS receiving a Class 8 (General Unsecured Claim) of \$50,000,000 and a Class 9 (Subordinated Claim) of \$25,000,000. The prior Liquidation Analysis/Financial Projections included a Class 8 (General Unsecured Claim) in the amount of \$94,761,076 pursuant to the Court’s order temporarily allowing the UBS claim in that amount for voting purposes; and
- The Debtor inadvertently understated the aggregate amount of Class 8 (General Unsecured Claims) by \$4,392,937, which error is corrected in the Amended Liquidation Analysis/Financial Projections.

PLEASE TAKE NOTICE that the Debtor hereby files the documents included herewith

² All capitalized terms used but not defined herein have the meanings given to them in the Plan.

as **Exhibits DD-FF** (collectively, the “Fifth Plan Supplement”) as Exhibits DD-FF to the Plan:

Exhibit DD: Schedule of Retained Causes of Action (supersedes Exhibits E, L, and Q);

Exhibit EE: Revisions to Form of Claimant Trust Agreement (amends Exhibit R); and

Exhibit FF: Schedule of Contracts and Leases to Be Assumed (supersedes Exhibit H, I, and X).³

PLEASE TAKE NOTICE that the Debtor hereby gives notice of supplemental amendments (the “Plan Amendments”) to the Plan, which are set forth in the redlined excerpts of the Plan attached hereto as **Exhibit B**.

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³ The Schedule of Contracts and Leases includes an agreement with Bloomberg Finance, L.P. (“Bloomberg”). The Debtor is currently in discussions with Bloomberg regarding the assumption of such agreement.

Dated: February 1, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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EXHIBIT A

Highland Capital Management, L.P.
Disclaimer For Financial Projections

This document includes financial projections for July 2020 through December 2022 (the “Projections”) for Highland Capital Management, L.P. (“Company”). These Projections have been prepared by DSI with input from management at the Company. The historical information utilized in these Projections has not been audited or reviewed for accuracy by DSI.

This document includes certain statements, estimates and forecasts provided by the Company with respect to the Company’s anticipated future performance. These estimates and forecasts contain significant elements of subjective judgment and analysis that may or may not prove to be accurate or correct. There can be no assurance that these statements, estimates and forecasts will be attained and actual outcomes and results may differ materially from what is estimated or forecast herein.

These Projections should not be regarded as a representation of DSI that the projected results will be achieved.

Management may update or supplement these Projections in the future, however, DSI expressly disclaims any obligation to update its report.

These Projections were not prepared with a view toward compliance with published guidelines of the Securities and Exchange Commission or the American Institute of Certified Public Accountants regarding historical financial statements, projections or forecasts.

Highland Capital Management, L.P.
Statement of Assumptions

- A. Plan effective date is March 1, 2021
- B. All investment assets are sold by December 31, 2022.
- C. All demand notes are collected in the year 2021; 3 term notes defaulted and have been demanded based on default provisions; payment estimated in 2021
- D. Dugaboy term note with maturity date beyond 12/31/2022 are sold in Q1 2022; in the interim interest income and principal payments are not collected due to prepayment on note
- E. Fixed assets currently used in daily operations are sold in June 2021 for \$0
- F. Highland bonus plan has been terminated in accordance with its terms. Accrual for employee bonuses as of January 2021 are reversed and not paid.
- G. All Management advisory or shared service contracts are terminated on their terms by the effective date or shortly thereafter
- H. Post-effective date, the reorganized Debtor would retain up to ten HCMLP employees (or hire similar employees) to help monetize the remaining assets.
- I. Litigation Trustee budget is \$6,500,000.
- J. Unrealized gains or losses are not recorded on a monthly basis; all gains or losses are recorded as realized gains or losses upon sale of asset.
- K. Plan does not provide for payment of interest to Class 8 holders of general unsecured claims, as set forth in the Plan. If holders of general unsecured claims receive 100% of their allowed claims, they would then be entitled to receive interest at the federal judgement rate, prior to any funds being available for claims or interest of junior priority.
- L. Plan assumes zero allowed claims for IFA and Hunter Mountain Investment Trust ("HM").
- M. Claim amounts listed in Plan vs. Liquidation schedule are subject to change; claim amounts in Class 8 assume \$0 for IFA and HM, \$50.0 million for UBS and \$45 million HV. Assumes RCP claims will offset against HCMLP's interest in fund and will not be paid from Debtor assets
- N. With the exception of Class 2 - Frontier, Classes 1-7 will be paid in full within 30 days of effective date.
- O. Class 7 payout limited to 85% of each individual creditor claim or in the aggregate \$13.15 million. Plan currently projects Class 7 payout of \$10.3 million.
- P. See below for Class 8 estimated payout schedule; payout is subject to certain assets being monetized by payout date (no Plan requirement to do so):
 - o By September 30, 2021 - \$50,000,000
 - o By March 31, 2022 – additional \$50,000,000
 - o By June 30, 2022 – additional \$25,000,000
 - o All remaining proceeds are assumed to be paid out on or soon after all remaining assets are monetized.
- Q. Assumptions subject to revision based on business decision and performance of the business

Highland Capital Management, L.P.
Plan Analysis Vs. Liquidation Analysis
(US \$000's)

	<u>Plan Analysis</u>	<u>Liquidation Analysis</u>
Estimated cash on hand at 1/31/2020	\$ 24,290	\$ 24,290
Estimated proceeds from monetization of assets [1][2]	257,941	191,946
Estimated expenses through final distribution[1][3]	(59,573)	(41,488)
Total estimated \$ available for distribution	<u>222,658</u>	<u>174,748</u>
Less: Claims paid in full		
Unclassified [4]	(1,080)	(1,080)
Administrative claims [5]	(10,574)	(10,574)
Class 1 - Jefferies Secured Claim	-	-
Class 2 - Frontier Secured Claim [6]	(5,781)	(5,781)
Class 3 - Other Secured Claims	(62)	(62)
Class 4 – Priority Non-Tax Claims	(16)	(16)
Class 5 - Retained Employee Claims	-	-
Class 6 - PTO Claims [5]	-	-
Class 7 – Convenience Claims [7][8]	(10,280)	-
Subtotal	<u>(27,793)</u>	<u>(17,514)</u>
Estimated amount remaining for distribution to general unsecured claims	<u>194,865</u>	<u>157,235</u>
% Distribution to Class 7 (Class 7 claims included in Class 8 in Liquidation scenario)	85.00%	0.00%
Class 8 – General Unsecured Claims [8][10]	<u>273,219</u>	<u>286,100</u>
Subtotal	<u>273,219</u>	<u>286,100</u>
% Distribution to general unsecured claims	71.32%	54.96%
Estimated amount remaining for distribution	-	-
Class 9 – Subordinated Claims	<i>no distribution</i>	<i>no distribution</i>
Class 10 – Class B/C Limited Partnership Interests	<i>no distribution</i>	<i>no distribution</i>
Class 11 – Class A Limited Partnership Interest	<i>no distribution</i>	<i>no distribution</i>

Footnotes:

[1] Assumes chapter 7 Trustee will not be able to achieve same sales proceeds as Claimant Trustee

Assumes Chapter 7 Trustee engages new professionals to help liquidate assets and terminates any management agreements with funds or CLOS

[2] Sale of investment assets, sale of fixed assets, collection of accounts receivable and interest receivable; Plan includes revenue from managing CLOs

[3] Estimated expenses through final distribution exclude non-cash expenses:

Depreciation of \$462 thousand in 2021; Bad debt of \$124K in 2021

[4] Unclassified claims include payments for priority tax claims and settlements with previously approved by the Bankruptcy Court

[5] Represents \$4.7 million in unpaid professional fees, \$4.5 million in timing of payments to vendors and \$1.2 million to pay PTO

[6] Debtor will pay all unpaid interest estimated at \$253 thousand of Frontier on effective date and continue to pay interest quarterly at 5.25% until Frontier's collateral is sold

[7] Claims payout limited to 85% of each individual creditor claim or limited to a total class payout of \$13.15 million

[8] Plan: Class 7 includes \$1.2 million estimate for aggregate contract rejections damage; Liquidation Class 8 includes \$2.0 million for estimated rejection damages

[10] Class estimates \$0 allowed claim for the following creditors: IFA and HM; assumes RCP claims offset against HCMLP interest in RCP fund

UBS claim included at \$50.0 million.

Notes:

All claim amounts are estimated as of February 1, 2020 and subject to change

Highland Capital Management, L.P.
Balance Sheet
(US \$000's)

	Actual Jun-20	Actual Sep-20	Forecast ---> Dec-20	Mar-21	Jun-21	Sep-21	Dec-21	Mar-22	Jun-22	Sep-22	Dec-22
Assets											
Cash and Cash Equivalents	\$ 14,994	\$ 5,888	\$ 31,047	\$ 10,328	\$ 40,063	\$ 42,833	\$ 135,137	\$ 80,733	\$ 72,238	\$ 69,368	\$ -
Other Current Assets	13,182	13,651	13,784	15,172	14,671	14,220	9,943	8,268	8,417	8,567	-
Investment Assets	320,912	305,961	283,812	280,946	233,234	171,174	47,503	47,503	25,888	25,888	-
Net Fixed Assets	3,055	2,823	2,592	1,348	-	-	-	-	-	-	-
TOTAL ASSETS	\$ 352,142	\$ 328,323	\$ 331,235	\$ 307,793	\$ 287,968	\$ 228,227	\$ 192,583	\$ 136,504	\$ 106,542	\$ 103,823	\$ -
Liabilities											
Post-petition Liabilities	\$ 142,730	\$ 135,597	\$ 131,230	\$ 12,891	\$ 10,249	\$ 10,503	\$ -	\$ -	\$ -	\$ -	\$ -
Pre-petition Liabilities	9,861	9,884	10,000	-	-	-	-	-	-	-	-
Claims											
Unclassified	-	-	-	-	-	-	-	-	-	-	-
Class 1 – Jefferies Secured Claim	-	-	-	-	-	-	-	-	-	-	-
Class 2 - Frontier Secured Claim	-	-	-	5,528	-	-	-	-	-	-	-
Class 3 - Other Secured Claims	-	-	-	-	-	-	-	-	-	-	-
Class 4 – Priority Non-Tax Claims	-	-	-	-	-	-	-	-	-	-	-
Class 5 – Retained Employee Claims	-	-	-	-	-	-	-	-	-	-	-
Class 6 - PTO Claims	-	-	-	-	-	-	-	-	-	-	-
Class 7 – Convenience Claims	-	-	-	-	-	-	-	-	-	-	-
Class 8 – General Unsecured Claims	-	-	-	273,219	273,219	223,219	223,219	173,219	148,219	148,219	78,354
Class 9 – Subordinated Claims [1]	-	-	-	-	-	-	-	-	-	-	-
Class 10 – Class B/C Limited Partnership Interests	-	-	-	-	-	-	-	-	-	-	-
Class 11 – Class A Limited Partnership Interests	-	-	-	-	-	-	-	-	-	-	-
Claim Payable	9,861	9,884	10,000	278,747	273,219	223,219	223,219	173,219	148,219	148,219	78,354
TOTAL LIABILITIES	\$ 152,591	\$ 145,481	\$ 141,230	\$ 291,639	\$ 283,468	\$ 233,723	\$ 223,219	\$ 173,219	\$ 148,219	\$ 148,219	\$ 78,354
Partners' Capital	199,551	182,842	190,005	16,154	4,500	(5,495)	(30,636)	(36,715)	(41,677)	(44,396)	(78,354)
TOTAL LIABILITIES AND PARTNERS' CAPITAL	\$ 352,142	\$ 328,323	\$ 331,235	\$ 307,793	\$ 287,968	\$ 228,227	\$ 192,583	\$ 136,504	\$ 106,543	\$ 103,823	\$ -

[1] Class 9 has \$60 million of subordinated claims; Debtor anticipates no distributions to Class 9

Highland Capital Management, L.P.
Profit/Loss
(US \$000's)

	Actual Jan 2020 to June 2020 Total	Actual 3 month ended Sept 2020	Forecast ---> 3 month ended Dec 2020	Total 2020	3 month ended Mar 2021	3 month ended Jun 2021	3 month ended Sept 2021	3 month ended Dec 2021	Total 2021
Revenue									
Management Fees	\$ 6,572	\$ 1,949	\$ 2,804	\$ 11,325	\$ 1,329	\$ 856	\$ 856	\$ 856	\$ 3,897
Shared Service Fees	7,672	3,765	3,788	15,225	1,373	45	45	-	1,463
Other Income	3,126	538	340	4,004	316	274	-	-	591
Total revenue	\$ 17,370	\$ 6,252	\$ 6,931	\$ 30,554	\$ 3,018	\$ 1,176	\$ 901	\$ 856	\$ 5,951
Operating Expenses [1]	13,328	9,171	9,399	31,899	12,168	4,897	3,973	3,333	24,371
Income/(loss) From Operations	\$ 4,042	\$ (2,918)	\$ (2,468)	\$ (1,345)	\$ (9,149)	\$ (3,722)	\$ (3,072)	\$ (2,477)	\$ (18,420)
Professional Fees	17,522	7,707	8,351	33,581	7,478	6,583	2,268	1,810	18,138
Other Income/(Expenses) [2]	2,302	1,518	1,059	4,879	(156,042)	326	(93)	29	(155,781)
Operating Gain/(Loss)	\$ (11,178)	\$ (9,107)	\$ (9,761)	\$ (30,046)	\$ (172,669)	\$ (9,978)	\$ (5,433)	\$ (4,259)	\$ (192,339)
Realized and Unrealized Gain/(Loss)									
Other Realized Gains/(Loss)	-	-	-	-	(1,013)	522	-	-	(491)
Net Realized Gain/(Loss) on Sale of Investment	(28,418)	1,549	(8,850)	(35,719)	(168)	(2,198)	(4,563)	(7,581)	(14,510)
Net Change in Unrealized Gain/(Loss) of Investments	(29,929)	(7,450)	4,523	(32,857)	-	-	-	-	-
Net Realized Gain /(Loss) from Equity Method Investees	-	-	(364)	(364)	-	-	-	(13,301)	(13,301)
Net Change in Unrealized Gain /(Loss) from Equity Method Investees	(80,782)	(1,700)	-	(82,482)	-	-	-	-	-
Total Realized and Unrealized Gain/(Loss)	\$ (139,129)	\$ (7,601)	\$ (4,692)	\$ (151,422)	\$ (1,182)	\$ (1,675)	\$ (4,563)	\$ (20,882)	\$ (28,302)
Net Income	\$ (150,307)	\$ (16,708)	\$ (14,453)	\$ (181,468)	\$ (173,851)	\$ (11,654)	\$ (9,996)	\$ (25,141)	\$ (220,641)

Footnotes:

[1] Operating expenses include an adjustment in January 2021 to account for expenses that have not been accrued or paid prior to effective date.

[2] Other income and expenses of \$197.3 million in Q1 2021 includes:

[a] \$209.7 million was expensed to record for the increase of allowed claims.

[b] Income of \$11.7 million for the accrued, but unpaid payroll liability related to the Debtor's deferred bonus programs amount written-off.

Highland Capital Management, L.P.
Profit/Loss
(US \$000's)

	Forecast --->					
	3 month ended Mar 2022	3 month ended Jun 2022	3 month ended Sept 2022	3 month ended Dec 2022	Total 2022	Plan
Revenue						
Management Fees	\$ 580	\$ 580	\$ 580	\$ 580	\$ 2,318	\$ 6,215
Shared Service Fees	-	-	-	-	-	1,463
Other Income	-	-	-	-	-	591
Total revenue	\$ 580	\$ 580	\$ 580	\$ 580	\$ 2,318	\$ 8,269
Operating Expenses	3,635	2,679	1,739	6,425	14,478	38,849
Income/(loss) From Operations	\$ (3,056)	\$ (2,099)	\$ (1,159)	\$ (5,846)	\$ (12,160)	\$ (30,580)
Professional Fees	2,921	2,761	1,461	2,176	9,318	27,455
Other Income/(Expenses)	(103)	(101)	(100)	(350)	(654)	(156,434)
Operating Gain/(Loss)	\$ (6,079)	\$ (4,961)	\$ (2,719)	\$ (8,371)	\$ (22,131)	\$ (214,470)
Realized and Unrealized Gain/(Loss)						
Other Realized Gains/(Loss)	-	-	-	(25,587)	(25,587)	(26,078)
Net Realized Gain/(Loss) on Sale of Investment	-	-	-	-	-	(14,510)
Net Change in Unrealized Gain/(Loss) of Investments	-	-	-	-	-	-
Net Realized Gain/(Loss) from Equity Method Investees	-	-	-	-	-	(13,301)
Net Change in Unrealized Gain/(Loss) from Equity Method Investees	-	-	-	-	-	-
Total Realized and Unrealized Gain/(Loss)	\$ -	\$ -	\$ -	\$ (25,587)	\$ (25,587)	\$ (53,889)
Net Income	\$ (6,079)	\$ (4,961)	\$ (2,719)	\$ (33,958)	\$ (47,718)	\$ (268,359)

Highland Capital Management, L.P.
Cash Flow Indirect
(US \$000's)

	Forecast ---->									
	Sep-20	Dec-20	Mar-21	Jun-21	Sep-21	Dec-21	Mar-22	Jun-22	Sep-22	Dec-22
Net (Loss) Income	\$ (16,708)	\$ (14,453)	\$ (173,851)	\$ (11,654)	\$ (9,996)	\$ (25,141)	\$ (6,079)	\$ (4,961)	\$ (2,719)	\$ (33,958)
Cash Flow from Operating Activity										
(Increase) / Decrease in Cash										
Depreciation and amortization	231	231	231	231	-	-	-	-	-	-
Other realized (gain)/ loss	-	-	1,013	(522)	-	-	-	-	-	25,587
Investment realized (gain)/ loss	(1,549)	9,214	168	2,198	4,563	20,882	-	-	-	-
Unrealized (gain) / loss	(9,150)	4,523	-	-	-	-	-	-	-	-
(Increase) Decrease in Current Assets	(470)	(133)	(1,388)	501	450	4,277	1,675	(149)	(150)	908
Increase (Decrease) in Current Liabilities	(7,110)	(4,251)	(44,172)	(2,643)	255	(10,503)	-	-	-	-
Net Cash Increase / (Decrease) - Operating Activities	(34,757)	(4,868)	(217,998)	(11,889)	(4,727)	(10,485)	(4,404)	(5,110)	(2,870)	(7,463)
Cash Flow From Investing Activities										
Proceeds from Sale of Fixed Assets	-	-	-	-	-	-	-	-	-	-
Proceeds from Investment Assets	25,650	30,027	2,698	47,152	57,498	102,788	-	21,616	-	7,960
Net Cash Increase / (Decrease) - Investing Activities	25,650	30,027	2,698	47,152	57,498	102,788	-	21,616	-	7,960
Cash Flow from Financing Activities										
Claims payable	-	-	(73,997)	-	-	-	-	-	-	-
Claim reclasses/(paid)	-	-	278,747	(5,528)	(50,000)	-	(50,000)	(25,000)	-	(69,865)
Maple Avenue Holdings	-	-	(4,975)	-	-	-	-	-	-	-
Frontier Note	-	-	(5,195)	-	-	-	-	-	-	-
Net Cash Increase / (Decrease) - Financing Activities	-	-	194,580	(5,528)	(50,000)	-	(50,000)	(25,000)	-	(69,865)
Net Change in Cash	\$ (9,107)	\$ 25,159	\$ (20,719)	\$ 29,735	\$ 2,770	\$ 92,303	\$ (54,404)	\$ (8,495)	\$ (2,870)	\$ (69,368)
Beginning Cash	14,994	5,888	31,047	10,328	40,063	42,833	135,137	80,733	72,238	69,368
Ending Cash	\$ 5,888	\$ 31,047	\$ 10,328	\$ 40,063	\$ 42,833	\$ 135,137	\$ 80,733	\$ 72,238	\$ 69,368	\$ -

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EXHIBIT B

61. “*Estate Claims*” has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [D.I. 354].

62. “*Exculpated Parties*” means, collectively, (i) the Debtor and its successors and assigns, ~~direct and indirect majority-owned subsidiaries, and the Managed Funds~~, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii); *provided, however*, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), NexBank, SSB (and any of its subsidiaries), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term “Exculpated Party.”

63. “*Executory Contract*” means a contract to which the Debtor is a party that is subject to assumption or rejection under sections 365 or 1123 of the Bankruptcy Code.

64. “*Exhibit*” means an exhibit annexed hereto or to the Disclosure Statement (as such exhibits are amended, modified or otherwise supplemented from time to time), which are incorporated by reference herein.

65. “*Federal Judgment Rate*” means the post-judgment interest rate set forth in 28 U.S.C. § 1961 as of the Effective Date.

66. “*File*” or “*Filed*” or “*Filing*” means file, filed or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Case.

67. “*Final Order*” means an order or judgment of the Bankruptcy Court, which is in full force and effect, and as to which the time to appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing has expired and as to which no appeal, petition for *certiorari*, or other proceedings for a new trial, reargument or rehearing shall then be pending or as to which any right to appeal, petition for *certiorari*, new trial, reargument, or rehearing shall have been waived in writing in form and substance satisfactory to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, or, in the event that an appeal, writ of *certiorari*, new trial, reargument, or rehearing thereof has been sought, such order of the Bankruptcy Court shall have been determined by the highest court to which such order was appealed, or *certiorari*, new trial, reargument or rehearing shall have been denied and the time to take any further appeal, petition for *certiorari*, or move for a new trial, reargument or rehearing shall have expired; *provided, however*, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be Filed with respect to such order shall not preclude such order from being a Final Order.

126. “*Strand*” means Strand Advisors, Inc., the Debtor’s general partner.

127. “*Sub-Servicer*” means a third-party selected by the Claimant Trustee to service or sub-service the Reorganized Debtor Assets.

128. “*Sub-Servicer Agreement*” means the agreement that may be entered into providing for the servicing of the Reorganized Debtor Assets by the Sub-Servicer.

129. “*Subordinated Claim*” means any Claim that is subordinated to the Convenience Claims and General Unsecured Claims pursuant to ~~11 U.S.C. § 510~~ or an order entered by the Bankruptcy Court (including any other court having jurisdiction over the Chapter 11 Case) after notice and a hearing.

130. “*Subordinated Claimant Trust Interests*” means the Claimant Trust Interests to be distributed to Holders of Allowed Subordinated Claims under the Plan, which such interests shall be subordinated in right and priority to the Claimant Trust Interests distributed to Holders of Allowed General Unsecured Claims as provided in the Claimant Trust Agreement.

131. “*Trust Distribution*” means the transfer of Cash or other property by the Claimant Trustee to the Claimant Trust Beneficiaries.

132. “*Trustees*” means, collectively, the Claimant Trustee and Litigation Trustee.

133. “*UBS*” means, collectively, UBS Securities LLC and UBS AG London Branch.

134. “*Unexpired Lease*” means a lease to which the Debtor is a party that is subject to assumption or rejection under section 365 of the Bankruptcy Code.

135. “*Unimpaired*” means, with respect to a Class of Claims or Equity Interests that is not impaired within the meaning of section 1124 of the Bankruptcy Code.

136. “*Voting Deadline*” means the date and time by which all Ballots to accept or reject the Plan must be received in order to be counted under the under the Order of the Bankruptcy Court approving the Disclosure Statement as containing adequate information pursuant to section 1125(a) of the Bankruptcy Code and authorizing the Debtor to solicit acceptances of the Plan.

137. “*Voting Record Date*” means November 23, 2020.

Professional Fee Claim Objection Deadline. Each Holder of an Allowed Professional Fee Claim will be paid by the Debtor or the Claimant Trust, as applicable, in Cash within ten (10) Business Days of entry of the order approving such Allowed Professional Fee Claim.

On the Effective Date, the Claimant Trustee shall establish the Professional Fee Reserve. The Professional Fee Reserve shall vest in the Claimant Trust and shall be maintained by the Claimant Trustee in accordance with the Plan and Claimant Trust Agreement. The Claimant Trust shall fund the Professional Fee Reserve on the Effective Date in an estimated amount determined by the Debtor in good faith prior to the Confirmation Date and that approximates the total projected amount of unpaid Professional Fee Claims on the Effective Date. Following the payment of all Allowed Professional Fee Claims, any excess funds in the Professional Fee Reserve shall be released to the Claimant Trust to be used for other purposes consistent with the Plan and the Claimant Trust Agreement.

C. Priority Tax Claims

On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Priority Tax Claim is an Allowed Priority Tax Claim as of the Effective Date or (ii) the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, each Holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Priority Tax Claim, at the election of the Debtor: (a) Cash in an amount of a total value as of the Effective Date of the Plan equal to the amount of such Allowed Priority Tax Claim, ~~(b) in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, or (b) if paid over time,~~ payment of such Allowed Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code; or (c) such other less favorable treatment as agreed to in writing by the Debtor and such Holder. Payment of statutory fees due pursuant to 28 U.S.C. § 1930(a)(6) will be made at all appropriate times until the entry of a final decree; *provided, however,* that the Debtor may prepay any or all such Claims at any time, without premium or penalty.

**ARTICLE III.
CLASSIFICATION AND TREATMENT OF
CLASSIFIED CLAIMS AND EQUITY INTERESTS**

A. Summary

All Claims and Equity Interests, except Administrative Expense Claims and Priority Tax Claims, are classified in the Classes set forth below. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims, and Priority Tax Claims have not been classified.

The categories of Claims and Equity Interests listed below classify Claims and Equity Interests for all purposes including, without limitation, confirmation and distribution pursuant to the Plan and pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan deems a Claim or Equity Interest to be classified in a particular Class only to the extent that the Claim or Equity Interest qualifies within the description of that Class and will be deemed classified in a different Class to the extent that any remainder of such Claim or Equity Interest qualifies within

I. Special Provision Governing Unimpaired Claims

Except as otherwise provided in the Plan, nothing under the Plan will affect the Debtor's rights in respect of any Unimpaired Claims, including, without limitation, all rights in respect of legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claims.

J. Subordinated Claims

The allowance, classification, and treatment of all Claims under the Plan shall take into account and conform to the contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. ~~Under section 510 of the Bankruptcy Code, upon~~ Upon written notice and hearing, the Debtor the Reorganized Debtor, and the Claimant Trustee reserve the right to seek entry of an order by the Bankruptcy Court to re-classify or to subordinate any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan that becomes a subordinated Claim at any time shall be modified to reflect such subordination.

**ARTICLE IV.
MEANS FOR IMPLEMENTATION OF THIS PLAN**

A. Summary

As discussed in the Disclosure Statement, the Plan will be implemented through (i) the Claimant Trust, (ii) the Litigation Sub-Trust, and (iii) the Reorganized Debtor.

On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to this Plan and the Claimant Trust Agreement, and the Litigation Trustee will pursue, if applicable, the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan. The Reorganized Debtor will administer the Reorganized Debtor Assets and, if needed, with the utilization of a Sub-Servicer, which administration will include, among other things, managing the wind down of the Managed Funds.

Notwithstanding anything herein to the contrary, the Debtor shall assume or reject that certain real property lease with Crescent TC Investors L.P. (“Landlord”) for the Debtor’s headquarters located at 200/300 Crescent Ct., Suite #700, Dallas, Texas 75201 (the “Lease”) in accordance with the notice to Landlord, procedures and timing required by 11 U.S.C. §365(d)(4), as modified by that certain *Agreed Order Granting Motion to Extend Time to Assume or Reject Unexpired Nonresidential Real Property Lease* [Docket No. 1122].

B. Claims Based on Rejection of Executory Contracts or Unexpired Leases

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Confirmation Date shall be deemed rejected, pursuant to the Confirmation Order. Any Person asserting a Rejection Claim shall File a proof of claim within thirty days of the Effective Confirmation Date. Any Rejection Claims that are not timely Filed pursuant to this Plan shall be forever disallowed and barred. If one or more Rejection Claims are timely Filed, the Claimant Trustee may File an objection to any Rejection Claim.

Rejection Claims shall be classified as General Unsecured Claims and shall be treated in accordance with ARTICLE III of this Plan.

C. Cure of Defaults for Assumed or Assigned Executory Contracts and Unexpired Leases

Any monetary amounts by which any Executory Contract or Unexpired Lease to be assumed or assigned hereunder is in default shall be satisfied, under section 365(b)(1) of the Bankruptcy Code, by the Debtor upon assumption or assignment thereof, by payment of the default amount in Cash as and when due in the ordinary course or on such other terms as the parties to such Executory Contracts may otherwise agree. The Debtor may serve a notice on the Committee and parties to Executory Contracts or Unexpired Leases to be assumed or assigned reflecting the Debtor’s or Reorganized Debtor’s intention to assume or assign the Executory Contract or Unexpired Lease in connection with this Plan and setting forth the proposed cure amount (if any).

If a dispute regarding (1) the amount of any payments to cure a default, (2) the ability of the Debtor, the Reorganized Debtor, or any assignee to provide “adequate assurance of future performance” (within the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed or assigned or (3) any other matter pertaining to assumption or assignment, the cure payments required by section 365(b)(1) of the Bankruptcy Code will be made following the entry of a Final Order or orders resolving the dispute and approving the assumption or assignment.

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

forth in the Plan Documents; (ii) the provisions of the Confirmation Order and this Plan are nonseverable and mutually dependent; (iii) the implementation of this Plan in accordance with its terms is authorized; (iv) pursuant to section 1146 of the Bankruptcy Code, the delivery of any deed or other instrument or transfer order, in furtherance of, or in connection with this Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under this Plan, shall not be subject to any Stamp or Similar Tax; and (v) the vesting of the Claimant Trust Assets in the Claimant Trust and the Reorganized Debtor Assets in the Reorganized Debtor, in each case as of the Effective Date free and clear of liens and claims to the fullest extent permissible under applicable law pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.

- All documents and agreements necessary to implement this Plan, including without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, in each case in form and substance reasonably acceptable to the Debtor and the Committee, shall have (a) been tendered for delivery, and (b) been effected by, executed by, or otherwise deemed binding upon, all Entities party thereto and shall be in full force and effect. All conditions precedent to such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements.
- All authorizations, consents, actions, documents, approvals (including any governmental approvals), certificates and agreements necessary to implement this Plan, including, without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, shall have been obtained, effected or executed and delivered to the required parties and, to the extent required, filed with the applicable governmental units in accordance with applicable laws and any applicable waiting periods shall have expired without any action being taken or threatened by any competent authority that would restrain or prevent effectiveness or consummation of the Restructuring.
- The Debtor shall have obtained applicable directors' and officers' insurance coverage that is acceptable to each of the Debtor, the Committee, the Claimant Trust Oversight Committee, the Claimant Trustee and the Litigation Trustee.
- The Professional Fee Reserve shall be funded pursuant to this Plan in an amount determined by the Debtor in good faith.

B. Waiver of Conditions

The conditions to effectiveness of this Plan set forth in this ARTICLE VIII (other than that the Confirmation Order shall have been entered) may be waived in whole or in part by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee) ~~and any applicable parties in Section VII.A of this Plan~~, without notice, leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or

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EXHIBIT DD

Schedule of Causes of Action

The Causes of Action shall include, *without limitation*, any cause of action based on the following:

breach of fiduciary duties, breach of duty of care, breach of duty of loyalty, usurpation of corporate opportunities, breach of implied covenant of good faith and fair dealing, conversion, misappropriation of assets, misappropriation of trade secrets, unfair competition, breach of contract, breach of warranty, fraud, constructive fraud, negligence, gross negligence, fraudulent conveyance, fraudulent transfer, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, fraudulent inducement, tortious interference, *quantum meruit*, unjust enrichment, abuse of process, alter ego, substantive consolidation, recharacterization, business disparagement, indemnity, claims for recovery of distributions or dividends, claims for indemnification, promissory estoppel, quasi-contract claims, any counterclaims, equitable subordination, avoidance actions provided for under sections 544 or 547 of the Bankruptcy Code, claims brought under state law, claims brought under federal law, claims under any common-law theory of tort or law or equity, and any claims similar in nature to the foregoing claims.

The Causes of Action shall include, *without limitation*, any cause of action against the following persons and entities:

James Dondero, Mark Okada, Grant Scott, John Honis, any current or former insider of the Debtor, the Dugaboy Investment Trust, Charitable DAF Holdco, Ltd, Hunter Mountain Investment Trust, Nexbank Capital, Inc. Highland Capital Management Services, Inc., NexPoint Advisors GP, LLC, NexPoint Advisors, L.P., Strand Advisors XVI, Inc., Highland Capital Management Fund Advisors, L.P., NexAnnuity Holdings, Inc., the entities listed on the attached **Annex 1** hereto, any current or former employee of the Debtor, and any entity directly or indirectly owned, controlled, or operated for the benefit of the foregoing persons or entities.

The Causes of Action shall include, *without limitation*, any cause of action arising from the following transactions:

The transfer of ownership interests in the Debtor to Hunter Mountain Investment Trust, the creation or transfer of any notes receivable from the Debtor or from any entity related to the Debtor, the creation or transfer of assets to or from any charitable foundation or trust, the formation, performance, or breach of any contract for the Debtor to provide investment management, support services, or any other services, and the distribution of assets or cash from the Debtor to partners of the Debtor.

Annex 1

11 Estates Lane, LLC
1110 Waters, LLC
140 Albany, LLC
1525 Dragon, LLC
17720 Dickerson, LLC
1905 Wylie LLC
2006 Milam East Partners GP, LLC
2006 Milam East Partners, L.P.
201 Tarrant Partners, LLC
2014 Corpus Weber Road LLC
2325 Stemmons HoldCo, LLC
2325 Stemmons Hotel Partners, LLC
2325 Stemmons TRS, Inc.
300 Lamar, LLC
3409 Rosedale, LLC
3801 Maplewood, LLC
3801 Shenandoah, L.P.
3820 Goar Park LLC
400 Seaman, LLC
401 Ame, L.P.
4201 Locust, L.P.
4312 Belclaire, LLC
5833 Woodland, L.P.
5906 DeLoache, LLC
5950 DeLoache, LLC
7758 Ronnie, LLC
7759 Ronnie, LLC
AA Shotguns, LLC
Aberdeen Loan Funding, Ltd.
Acis CLO 2017-7 Ltd
Acis CLO Management GP, LLC
Acis CLO Management GP, LLC (*fka Acis CLO Opportunity Funds GP, LLC*)
Acis CLO Management Holdings, L.P.
Acis CLO Management Intermediate Holdings I, LLC
Acis CLO Management Intermediate Holdings II, LLC
Acis CLO Management, LLC (*fka Acis CLO Opportunity Funds SLP, LLC*)
Acis CLO Trust
Acis CLO Value Fund II Charitable DAF Ltd.
Acis CMOA Trust
Advisors Equity Group LLC
Alamo Manhattan Hotel I, LLC
(Third Party)
Allenby, LLC
Allisonville RE Holdings, LLC
AM Uptown Hotel, LLC
Apex Care, L.P
Asbury Holdings, LLC (*fka HCSLR Camelback Investors (Delaware), LLC*)
Ascendant Advisors
Atlas IDF GP, LLC
Atlas IDF, LP
BB Votorantim Highland Infrastructure, LLC
BDC Toys Holdco, LLC
Beacon Mountain, LLC
Bedell Trust Ireland Limited (Charitable trust account)
Ben Roby (third party)
BH Equities, LLC
BH Heron Pointe, LLC
BH Hollister, LLC
BH Willowdale Manager, LLC
Big Spring Partners, LLC
Blair Investment Partners, LLC
Bloomdale, LLC
Brave Holdings III Inc.
Brentwood CLO, Ltd.
Brentwood Investors Corp.
Brian Mitts
Bristol Bay Funding Ltd.
Bristol Bay Funding, Ltd.
BVP Property, LLC
C-1 Arbors, Inc.
C-1 Cutter's Point, Inc.
C-1 Eaglecrest, Inc.
C-1 Silverbrook, Inc.
Cabi Holdco GP, LLC
Cabi Holdco I, Ltd
Cabi Holdco I, Ltd.

Cabi Holdco, L.P.
California Public Employees' Retirement System
Camelback Residential Investors, LLC
Camelback Residential Investors, LLC
(*fka Sevilla Residential Partners, LLC*)
Camelback Residential Partners, LLC
Capital Real Estate - Latitude, LLC
Castle Bio Manager, LLC
Castle Bio, LLC
Cayco Admin Ltd.
Cayco Insolvency Ltd.
CG Works, Inc.
CG Works, Inc.
(*fka Common Grace Ventures, Inc.*)
Charitable DAF Fund, L.P.
Charitable DAF GP, LLC
Charitable DAF HoldCo, Ltd
Charitable DAF HoldCo, Ltd.
Claymore Holdings, LLC
CLO HoldCo, Ltd
CLO Holdco, Ltd.
Corbusier, Ltd.
Cornerstone Healthcare Group Holding, Inc.
Corpus Weber Road Member LLC
CP Equity Hotel Owner, LLC
CP Equity Land Owner, LLC
CP Equity Owner, LLC
CP Hotel TRS, LLC
CP Land Owner, LLC
CP Tower Owner, LLC
CRE - Lat, LLC
Credit Suisse, Cayman Islands Branch
Crossings 2017 LLC
Crown Global Insurance Company (third party)
Dallas Cityplace MF SPE Owner LLC
Dallas Lease and Finance, L.P.
Dana Scott Breault
James Dondero
Reese Avry Dondero
Jameson Drue Dondero
Dana Sprong (Third Party)

David c. Hopson
De Kooning, Ltd.
deKooning, Ltd.
DFA/BH Autumn Ridge, LLC
Dolomiti, LLC
DrugCrafters, L.P.
Dugaboy Investment Trust
Dugaboy Management, LLC
Dugaboy Project Management GP, LLC
Eagle Equity Advisors, LLC
Eames, Ltd.
Eastland CLO, Ltd.
Eastland Investors Corp.
EDS Legacy Heliport, LLC
EDS Legacy Partners Owner, LLC
EDS Legacy Partners, LLC
Empower Dallas Foundation, Inc.
ENA 41, LLC
Entegra Strat Superholdco, LLC
Entegra-FRO Holdco, LLC
Entegra-FRO Superholdco, LLC
Entegra-HOCF Holdco, LLC
Entegra-NHF Holdco, LLC
Entegra-NHF Superholdco, LLC
Entegra-RCP Holdco, LLC
Estates on Maryland Holdco, LLC
Estates on Maryland Owners SM, Inc.
Estates on Maryland Owners, LLC
Estates on Maryland, LLC
Falcon E&P Four Holdings, LLC
Falcon E&P One, LLC
Falcon E&P Opportunities Fund, L.P.
Falcon E&P Opportunities GP, LLC
Falcon E&P Royalty Holdings, LLC
Falcon E&P Six, LLC
Falcon E&P Two, LLC
Falcon Four Midstream, LLC
Falcon Four Upstream, LLC
Falcon Incentive Partners GP, LLC
Falcon Incentive Partners, LP
Falcon Six Midstream, LLC
Flamingo Vegas Holdco, LLC (*fka Cabi Holdco, LLC*)

Four Rivers Co-Invest GP, LLC	GAF REIT, LLC
Four Rivers Co-Invest, L.P.	GAF Toys Holdco, LLC
FRBH Abbington SM, Inc.	Gardens of Denton II, L.P.
FRBH Abbington, LLC	Gardens of Denton III, L.P.
FRBH Arbors, LLC	Gleneagles CLO, Ltd.
FRBH Beechwood SM, Inc.	Goverannce RE, Ltd.
FRBH Beechwood, LLC	Governance Re, Ltd.
FRBH C1 Residential, LLC	Governance, Ltd.
FRBH Courtney Cove SM, Inc.	Grant Scott
FRBH Courtney Cove, LLC	Grant Scott, Trustee of The SLHC Trust
FRBH CP, LLC	Grayson CLO, Ltd.
FRBH Duck Creek, LLC	Grayson Investors Corp.
FRBH Eaglecrest, LLC	Greater Kansas City Community Foundation (third party)
FRBH Edgewater JV, LLC	Greenbriar CLO, Ltd.
FRBH Edgewater Owner, LLC	Greg Busseyt
FRBH Edgewater SM, Inc.	Gunwale LLC
FRBH JAX-TPA, LLC	Gunwale, LLC
FRBH Nashville Residential, LLC	Hakusan, LLC
FRBH Regatta Bay, LLC	Hammark Holdings LLC
FRBH Sabal Park SM, Inc.	Hampton Ridge Partners, LLC
FRBH Sabal Park, LLC	Harko, LLC
FRBH Silverbrook, LLC	Harry Bookey/Pam Bookey (third party)
FRBH Timberglen, LLC	Haverhill Acquisition Co., LLC
FRBH Willow Grove SM, Inc.	Haygood, LLC
FRBH Willow Grove, LLC	HB 2015 Family LP (third party)
FRBH Woodbridge SM, Inc.	HCBH 11611 Ferguson, LLC
FRBH Woodbridge, LLC	HCBH Buffalo Pointe II, LLC
Freedom C1 Residential, LLC	HCBH Buffalo Pointe III, LLC
Freedom Duck Creek, LLC	HCBH Buffalo Pointe, LLC
Freedom Edgewater, LLC	HCBH Hampton Woods SM, Inc.
Freedom JAX-TPA Residential, LLC	HCBH Hampton Woods, LLC
Freedom La Mirage, LLC	HCBH Overlook SM, Inc.
Freedom LHV LLC	HCBH Overlook, LLC
Freedom Lubbock LLC	HCBH Rent Investors, LLC
Freedom Miramar Apartments, LLC	HCMS Falcon GP, LLC
Freedom Sandstone, LLC	HCMS Falcon, L.P.
Freedom Willowdale, LLC	HCO Holdings, LLC
Fundo de Investimento em Direitos Creditorios BB Votorantim Highland Infraestrutura	HCOF Preferred Holdings, L.P.
G&E Apartment REIT The Heights at Olde Towne, LLC	HCOF Preferred Holdings, LP
G&E Apartment REIT The Myrtles at Olde Towne, LLC	HCOF Preferred Holdings, Ltd.
	HCRE 1775 James Ave, LLC
	HCRE Addison TRS, LLC

HCRE Addison, LLC (<i>fka HWS Addison, LLC</i>)	HFP CDO Construction Corp.
HCRE Hotel Partner, LLC (<i>fka HCRE HWS Partner, LLC</i>)	HFP GP, LLC
HCRE Las Colinas TRS, LLC	HFRO Sub, LLC
HCRE Las Colinas, LLC (<i>fka HWS Las Colinas, LLC</i>)	Hibiscus HoldCo, LLC
HCRE Plano TRS, LLC	Highland - First Foundation Income Fund
HCRE Plano, LLC (<i>fka HWS Plano, LLC</i>)	Highland 401(k) Plan
HCRE-I Holding Corp.	Highland 401K Plan
HCRE-II Holding Corp.	Highland Argentina Regional Opportunity Fund GP, LLC
HCRE-III Holding Corp.	Highland Argentina Regional Opportunity Fund, L.P.
HCRE-IV Holding Corp.	Highland Argentina Regional Opportunity Fund, Ltd.
HCRE-IX Holding Corp.	Highland Argentina Regional Opportunity Master Fund, L.P.
HCRE-V Holding Corp.	Highland Brasil, LLC
HCRE-VI Holding Corp.	Highland Capital Brasil Gestora de Recursos (<i>fka Highland Brasilinvest Gestora de Recursos, LTDA; fka HBI Consultoria Empresarial, LTDA</i>)
HCRE-VII Holding Corp.	Highland Capital Management (Singapore) Pte Ltd
HCRE-VIII Holding Corp.	Highland Capital Management AG
HCRE-XI Holding Corp.	Highland Capital Management AG (Highland Capital Management SA)
HCRE-XII Holding Corp.	(Highland Capital Management Ltd)
HCRE-XIII Holding Corp.	Highland Capital Management Fund Advisors, L.P.
HCRE-XIV Holding Corp.	Highland Capital Management Fund Advisors, L.P. (<i>fka Pyxis Capital, L.P.</i>)
HCRE-XV Holding Corp.	Highland Capital Management Korea Limited
HCSLR Camelback Investors (Cayman), Ltd.	Highland Capital Management Latin America, L.P.
HCSLR Camelback, LLC	Highland Capital Management LP Retirement Plan and Trust
HCT Holdco 2 Ltd.	Highland Capital Management Multi-Strategy Insurance Dedicated Fund, L.P.
HCT Holdco 2, Ltd.	Highland Capital Management Real Estate Holdings I, LLC
HE 41, LLC	Highland Capital Management Real Estate Holdings II, LLC
HE Capital 232 Phase I Property, LLC	Highland Capital Management Services, Inc.
HE Capital 232 Phase I, LLC	Highland Capital Management, L.P.
HE Capital Asante, LLC	
HE Capital Fox Trails, LLC	
HE Capital KR, LLC	
HE Capital, LLC	
HE CLO Holdco, LLC	
HE Mezz Fox Trails, LLC	
HE Mezz KR, LLC	
HE Peoria Place Property, LLC	
HE Peoria Place, LLC	
Heron Pointe Investors, LLC	
Hewett's Island CLO I-R, Ltd.	
HFP Asset Funding II, Ltd.	
HFP Asset Funding III, Ltd.	

Highland Capital Management, L.P. Charitable Fund

Highland Capital Management, L.P. Retirement Plan and Trust

Highland Capital Management, L.P., as trustee of Acis CMOA Trust and nominee for and on behalf of Highland CLO Assets Holdings Limited

Highland Capital Management, L.P., as trustee of Highland Latin America Trust and nominee for and on behalf of Highland Latin America LP, Ltd.

Highland Capital Management, L.P., as trustee of Highland Latin America Trust and nominee for and on behalf of Highland Latin America LP, Ltd.

Highland Capital Management, LP
Highland Capital Management, LP Charitable Fund

Highland Capital Multi-Strategy Fund, LP

Highland Capital of New York, Inc.

Highland Capital Special Allocation, LLC

Highland CDO Holding Company

Highland CDO Opportunity Fund GP, L.P.

Highland CDO Opportunity Fund, L.P.

Highland CDO Opportunity Fund, Ltd.

Highland CDO Opportunity GP, LLC

Highland CDO Opportunity Master Fund, L.P.

Highland CDO Trust

Highland CLO 2018-1, Ltd.

Highland CLO Assets Holdings Limited

Highland CLO Funding, Ltd.

Highland CLO Funding, Ltd.

Highland CLO Funding, Ltd. (*fka Acis Loan Funding, Ltd.*)

Highland CLO Gaming Holdings, LLC

Highland CLO Holdings Ltd.

Highland CLO Holdings, Ltd. (as of 12.19.17)

Highland CLO Management Ltd.

Highland CLO Trust

Highland Credit Opportunities CDO Asset Holdings GP, Ltd.

Highland Credit Opportunities CDO Asset Holdings, L.P.

Highland Credit Opportunities CDO Financing, LLC

Highland Credit Opportunities CDO, Ltd.

Highland Credit Opportunities Holding Corporation

Highland Credit Opportunities Japanese Feeder Sub-Trust

Highland Credit Opportunities Japanese Unit Trust (Third Party)

Highland Credit Strategies Fund, L.P.

Highland Credit Strategies Fund, Ltd.

Highland Credit Strategies Holding Corporation

Highland Credit Strategies Holding Corporation

Highland Credit Strategies Master Fund, L.P.

Highland Dallas Foundation, Inc.

Highland Dynamic Income Fund GP, LLC

Highland Dynamic Income Fund GP, LLC (*fka Highland Capital Loan GP, LLC*)

Highland Dynamic Income Fund, L.P.

Highland Dynamic Income Fund, L.P. (*fka Highland Capital Loan Fund, L.P.*)

Highland Dynamic Income Fund, Ltd.

Highland Dynamic Income Fund, Ltd. (*fka Highland Loan Fund, Ltd.*)

Highland Dynamic Income Master Fund, L.P.

Highland Dynamic Income Master Fund, L.P. (*fka Highland Loan Master Fund, L.P.*)

Highland Employee Retention Assets LLC

Highland Energy Holdings, LLC

Highland Energy MLP Fund (*fka Highland Energy and Materials Fund*)

Highland Equity Focus Fund, L.P.

Highland ERA Management, LLC

Highland eSports Private Equity Fund

Highland Financial Corp.

Highland Financial Partners, L.P.

Highland Fixed Income Fund

Highland Flexible Income UCITS Fund

Highland Floating Rate Fund

Highland Floating Rate Opportunites Fund	Highland Multi Strategy Credit Fund, L.P. (<i>fka Highland Credit Opportunities Fund, L.P., fka Highland Credit Opportunities CDO, L.P.</i>)
Highland Floating Rate Opportunities Fund	
Highland Fund Holdings, LLC	
Highland Funds I	
Highland Funds II	Highland Multi Strategy Credit Fund, Ltd.
Highland Funds III	Highland Multi Strategy Credit Fund, Ltd. (<i>fka Highland Credit Opportunities Fund, Ltd.</i>)
Highland GAF Chemical Holdings, LLC	Highland Multi Strategy Credit GP, LLC
Highland General Partner, LP	Highland Multi Strategy Credit GP, LLC (<i>fka Highland Credit Opportunities CDO GP, LLC</i>)
Highland Global Allocation Fund	
Highland Global Allocation Fund (<i>fka Highland Global Allocation Fund II</i>)	
Highland GP Holdings, LLC	Highland Multi-Strategy Fund GP, LLC
Highland HCF Advisor Ltd.	Highland Multi-Strategy Fund GP, LP
Highland HCF Advisor, Ltd., as Trustee for and on behalf of Acis CLO Trust, as nominee for and on behalf of Highland CLO Funding, Ltd. (as of 3.29.18)	Highland Multi-Strategy IDF GP, LLC
	Highland Multi-Strategy Master Fund, L.P.
Highland Healthcare Equity Income and Growth Fund	Highland Multi-Strategy Master Fund, LP
Highland iBoxx Senior Loan ETF	Highland Multi-Strategy Onshore Master SubFund II, LLC
Highland Income Fund	Highland Multi-Strategy Onshore Master Subfund, LLC
Highland Income Fund (<i>fka Highland Floating Rate Opportunities Fund</i>)	Highland Opportunistic Credit Fund
Highland Kansas City Foundation, Inc.	Highland Park CDO 1, Ltd.
Highland Latin America Consulting, Ltd.	Highland Park CDO I, Ltd.
Highland Latin America GP, Ltd.	Highland Premier Growth Equity Fund
Highland Latin America LP, Ltd.	Highland Premium Energy & Materials Fund
Highland Latin America Trust	Highland Prometheus Feeder Fund I, L.P.
Highland Legacy Limited	Highland Prometheus Feeder Fund I, LP
Highland LF Chemical Holdings, LLC	Highland Prometheus Feeder Fund II, L.P.
Highland Loan Funding V, LLC	Highland Prometheus Feeder Fund II, LP
Highland Loan Funding V, Ltd.	Highland Prometheus Master Fund, L.P.
Highland Long/Short Equity Fund	Highland Receivables Finance I, LLC
Highland Long/Short Healthcare Fund	Highland Restoration Capital Partners GP, LLC
Highland Marcal Holding, Inc.	Highland Restoration Capital Partners Master, L.P.
Highland Merger Arbitrage Fund	Highland Restoration Capital Partners Offshore, L.P.
Highland Multi Strategy Credit Fund GP, L.P.	Highland Restoration Capital Partners, L.P.
Highland Multi Strategy Credit Fund GP, L.P. (<i>fka Highland Credit Opportunities CDO GP, L.P.</i>)	Highland Santa Barbara Foundation, Inc.
	Highland Select Equity Fund GP, L.P.
Highland Multi Strategy Credit Fund, L.P.	Highland Select Equity Fund, L.P.
	Highland Select Equity GP, LLC
	Highland Select Equity Master Fund, L.P.

Highland Small-Cap Equity Fund
Highland Socially Responsible Equity Fund
Highland Socially Responsible Equity Fund
(*fka Highland Premier Growth Equity Fund*)

Highland Special Opportunities Holding
Company

Highland SunBridge GP, LLC

Highland Tax-Exempt Fund

Highland TCI Holding Company, LLC

Highland Total Return Fund

Highland's Roads Land Holding Company,
LLC

Hinduja Bank (Switzerland) Ltd

Hirst, Ltd.

HMCF PB Investors, LLC

HMX2 Investment Trust
(Matt McGraner)

Hockney, Ltd.

HRT North Atlanta, LLC

HRT Timber Creek, LLC

HRTBH North Atlanta, LLC

HRTBH Timber Creek, LLC

Huber Funding LLC

Hunter Mountain Investment Trust

HWS Investors Holdco, LLC

Internal Investors

Intertrust

James D. Dondero

Reese Avry Dondero

Jameson Drue Dondero

James Dondero

James Dondero and Mark Okada

James Dondero

Reese Avry Dondero

Jameson Drue Dondero

Japan Trustee Services Bank, Ltd.

Jasper CLO, Ltd.

Jewelry Ventures I, LLC

JMIJM, LLC

Joanna E. Milne Irrevocable Trust dated Nov
25 1998 (third party)

John Honis

John L. Holt, Jr.

John R. Sears, Jr.

Karisopolis, LLC

Keelhaul LLC

KHM Interests, LLC (third party)

Kuilima Montalban Holdings, LLC

Kuilima Resort Holdco, LLC

KV Cameron Creek Owner, LLC

Lakes at Renaissance Park Apartments
Investors, L.P.

Lakeside Lane, LLC

Landmark Battleground Park II, LLC

Lane Britain

Larry K. Anders

LAT Battleground Park, LLC

LAT Briley Parkway, LLC

Lautner, Ltd.

Leawood RE Holdings, LLC

Liberty Cayman Holdings, Ltd.

Liberty CLO Holdco, Ltd.

Liberty CLO, Ltd.

Liberty Sub, Ltd.

Long Short Equity Sub, LLC

Longhorn Credit Funding LLC

Longhorn Credit Funding LLC - A

Longhorn Credit Funding LLC - B

Longhorn Credit Funding LLC (LHB)

Longhorn Credit Funding, LLC

Lurin Real Estate Holdings V, LLC

Maple Avenue Holdings, LLC

MaplesFS Limited

Marc C. Manzo

Mark and Pam Okada Family Trust - Exempt
Descendants' Trust

Mark and Pam Okada Family Trust - Exempt
Trust #2

Mark and Pamela Okada Family Trust -
Exempt Descendants' Trust

Mark and Pamela Okada Family Trust -
Exempt Descendants' Trust #2

Mark and Pamela Okada Family Trust -
Exempt Trust #2

Mark K. Okada

Mark Okada	NexPoint Capital, Inc. (<i>fka NexPoint Capital, LLC</i>)
Mark Okada and Pam Okada	
Mark Okada and Pam Okada, as joint owners	NexPoint CR F/H DST, LLC
Mark Okada/Pamela Okada	NexPoint Credit Strategies Fund
Markham Fine Jewelers, L.P.	NexPoint Discount Strategies Fund
Markham Fine Jewelers, LP	(<i>fka NexPoint Discount Yield Fund</i>)
Matt McGraner	NexPoint DRIP
Meritage Residential Partners, LLC	NexPoint Energy and Materials Opportunities Fund (<i>fka NexPoint Energy Opportunities Fund</i>)
MGM Studios HoldCo, Ltd.	
Michael Rossi	
ML CLO XIX Sterling (Cayman), Ltd.	NexPoint Event-Driven Fund
N/A	(<i>fka NexPoint Merger Arbitrage Fund</i>)
Nancy Dondero	NexPoint Flamingo DST
NCI Apache Trail LLC	NexPoint Flamingo Investment Co, LLC
NCI Assets Holding Company LLC	NexPoint Flamingo Leaseco, LLC
NCI Country Club LLC	NexPoint Flamingo Manager, LLC
NCI Fort Worth Land LLC	NexPoint Flamingo Property Manager, LLC
NCI Front Beach Road LLC	NexPoint Healthcare Opportunities Fund
NCI Minerals LLC	NexPoint Hospitality Trust
NCI Royses City Land LLC	NexPoint Hospitality, Inc.
NCI Stewart Creek LLC	NexPoint Hospitality, LLC
NCI Storage, LLC	NexPoint Insurance Distributors, LLC
Neil Labatte	NexPoint Insurance Solutions GP, LLC
Neutra, Ltd.	NexPoint Insurance Solutions GP, LLC
New Jersey Tissue Company Holdco, LLC	(<i>fka Highland Capital Insurance Solutions GP, LLC</i>)
(<i>fka Marcal Paper Mills Holding Company, LLC</i>)	
NexAnnuity Holdings, Inc.	NexPoint Insurance Solutions, L.P.
NexBank Capital Trust I	(<i>fka Highland Capital Insurance Solutions, L.P.</i>)
NexBank Capital, Inc.	NexPoint Latin American Opportunities Fund
NexBank Land Advisors, Inc.	NexPoint Legacy 22, LLC
NexBank Securities Inc.	NexPoint Lincoln Porte Equity, LLC
NexBank Securities, Inc.	NexPoint Lincoln Porte Manager, LLC
	NexPoint Lincoln Porte, LLC
NexBank SSB	(<i>fka NREA Lincoln Porte, LLC</i>)
NexBank Title, Inc.	NexPoint Multifamily Capital Trust, Inc.
(dba NexVantage Title Services)	NexPoint Multifamily Capital Trust, Inc.
NexBank, SSB	(<i>fka NexPoint Multifamily Realty Trust, Inc., fka Highland Capital Realty Trust, Inc.</i>)
NexPoint Advisors GP, LLC	
NexPoint Advisors, L.P.	NexPoint Multifamily Operating Partnership, L.P.
NexPoint Capital REIT, LLC	
NexPoint Capital, Inc.	NexPoint Peoria, LLC
	NexPoint Polo Glen DST

NexPoint Polo Glen Holdings, LLC
 NexPoint Polo Glen Investment Co, LLC
 NexPoint Polo Glen Leaseco, LLC
 NexPoint Polo Glen Manager, LLC
 NexPoint RE Finance Advisor GP, LLC
 NexPoint RE Finance Advisor, L.P.
 NexPoint Real Estate Advisors GP, LLC
 NexPoint Real Estate Advisors II, L.P.
 NexPoint Real Estate Advisors II, L.P.
 NexPoint Real Estate Advisors III, L.P.
 NexPoint Real Estate Advisors IV, L.P.
 NexPoint Real Estate Advisors V, L.P.
 NexPoint Real Estate Advisors VI, L.P.
 NexPoint Real Estate Advisors VII GP, LLC
 NexPoint Real Estate Advisors VII, L.P.
 NexPoint Real Estate Advisors VIII, L.P.
 NexPoint Real Estate Advisors, L.P.
 NexPoint Real Estate Capital, LLC
 NexPoint Real Estate Capital, LLC (*fka Highland Real Estate Capital, LLC, fka Highland Multifamily Credit Fund, LLC*)
 NexPoint Real Estate Finance OP GP, LLC
 NexPoint Real Estate Finance Operating Partnership, L.P.
 NexPoint Real Estate Finance, Inc.
 NexPoint Real Estate Opportunities, LLC
 NexPoint Real Estate Opportunities, LLC (*fka Freedom REIT LLC*)
 NexPoint Real Estate Partners, LLC
 (fka HCRE Partners, LLC)
 NexPoint Real Estate Partners, LLC (fka HCRE Partners, LLC)
 NexPoint Real Estate Strategies Fund
 NexPoint Residential Trust Inc.
 NexPoint Residential Trust Operating Partnership GP, LLC
 NexPoint Residential Trust Operating Partnership, L.P.
 NexPoint Residential Trust Operating Partnership, L.P.
 NexPoint Residential Trust, Inc.
 NexPoint Securities, Inc.
 (*fka Highland Capital Funds Distributor, Inc.*)
 (*fka Pyxis Distributors, Inc.*)
 NexPoint Strategic Income Fund
 (*fka NexPoint Opportunistic Credit Fund, fka NexPoint Distressed Strategies Fund*)
 NexPoint Strategic Opportunities Fund
 NexPoint Strategic Opportunities Fund
 (*fka NexPoint Credit Strategies Fund*)
 NexPoint Texas Multifamily Portfolio DST
 (*fka NREA Southeast Portfolio Two, DST*)
 NexPoint WLIF I Borrower, LLC
 NexPoint WLIF I, LLC
 NexPoint WLIF II Borrower, LLC
 NexPoint WLIF II, LLC
 NexPoint WLIF III Borrower, LLC
 NexPoint WLIF III, LLC
 NexPoint WLIF, LLC (Series I)
 NexPoint WLIF, LLC (Series II)
 NexPoint WLIF, LLC (Series III)
 NexStrat LLC
 NexVest, LLC
 NexWash LLC
 NFRO REIT Sub, LLC
 NFRO TRS, LLC
 NHF CCD, Inc.
 NHT 2325 Stemmons, LLC
 NHT Beaverton TRS, LLC
 (*fka NREA Hotel TRS, Inc.*)
 NHT Beaverton, LLC
 NHT Bend TRS, LLC
 NHT Bend, LLC
 NHT Destin TRS, LLC
 NHT Destin, LLC
 NHT DFW Portfolio, LLC
 NHT Holdco, LLC
 NHT Holdings, LLC
 NHT Intermediary, LLC
 NHT Nashville TRS, LLC
 NHT Nashville, LLC
 NHT Olympia TRS, LLC
 NHT Olympia, LLC
 NHT Operating Partnership GP, LLC

NHT Operating Partnership II, LLC
NHT Operating Partnership, LLC
NHT Salem, LLC
NHT SP Parent, LLC
NHT SP TRS, LLC
NHT SP, LLC
NHT Tigard TRS, LLC
NHT Tigard, LLC
NHT TRS, Inc.
NHT Uptown, LLC
NHT Vancouver TRS, LLC
NHT Vancouver, LLC
NLA Assets LLC
NMRT TRS, Inc.
NREA Adair DST Manager, LLC
NREA Adair Investment Co, LLC
NREA Adair Joint Venture, LLC
NREA Adair Leaseco Manager, LLC
NREA Adair Leaseco, LLC
NREA Adair Property Manager LLC
NREA Adair, DST
NREA Ashley Village Investors, LLC
NREA Cameron Creek Investors, LLC
NREA Cityplace Hue Investors, LLC
NREA Crossing Investors LLC
NREA Crossings Investors, LLC
NREA Crossings Ridgewood Coinvestment, LLC (*fka NREA Crossings Ridgewood Investors, LLC*)
NREA DST Holdings, LLC
NREA El Camino Investors, LLC
NREA Estates Inc.
NREA Estates Investment Co, LLC
NREA Estates Leaseco, LLC
NREA Estates Manager, LLC
NREA Estates Property Manager, LLC
NREA Estates, DST
NREA Gardens DST Manager LLC
NREA Gardens DST Manager, LLC
NREA Gardens Investment Co, LLC
NREA Gardens Leaseco Manager, LLC
NREA Gardens Leaseco, LLC
NREA Gardens Property Manager, LLC
NREA Gardens Springing LLC
NREA Gardens Springing Manager, LLC
NREA Gardens, DST
NREA Hidden Lake Investment Co, LLC
NREA Hue Investors, LLC
NREA Keystone Investors, LLC
NREA Meritage Inc.
NREA Meritage Investment Co, LLC
NREA Meritage Leaseco, LLC
NREA Meritage Manager, LLC
NREA Meritage Property Manager, LLC
NREA Meritage, DST
NREA Oaks Investors, LLC
NREA Retreat Investment Co, LLC
NREA Retreat Leaseco, LLC
NREA Retreat Manager, LLC
NREA Retreat Property Manager, LLC
NREA Retreat, DST
NREA SE MF Holdings LLC
NREA SE MF Holdings, LLC
NREA SE MF Investment Co, LLC
NREA SE MF Investment Co, LLC
NREA SE Multifamily LLC
NREA SE Multifamily, LLC
NREA SE One Property Manager, LLC
NREA SE Three Property Manager, LLC
NREA SE Two Property Manager, LLC
NREA SE1 Andros Isles Leaseco, LLC
NREA SE1 Andros Isles Manager, LLC
NREA SE1 Andros Isles, DST
(Converted from DK Gateway Andros, LLC)
NREA SE1 Arborwalk Leaseco, LLC
NREA SE1 Arborwalk Manager, LLC
NREA SE1 Arborwalk, DST
(Converted from MAR Arborwalk, LLC)
NREA SE1 Towne Crossing Leaseco, LLC
NREA SE1 Towne Crossing Manager, LLC
NREA SE1 Towne Crossing, DST
(Converted from Apartment REIT Towne Crossing, LP)
NREA SE1 Walker Ranch Leaseco, LLC
NREA SE1 Walker Ranch Manager, LLC

NREA SE1 Walker Ranch, DST
(Converted from SOF Walker Ranch Owner, L.P.)
NREA SE2 Hidden Lake Leaseco, LLC
NREA SE2 Hidden Lake Manager, LLC
NREA SE2 Hidden Lake, DST
NREA SE2 Hidden Lake, DST
(Converted from SOF Hidden Lake SA Owner, L.P.)
NREA SE2 Vista Ridge Leaseco, LLC
NREA SE2 Vista Ridge Manager, LLC
NREA SE2 Vista Ridge, DST
NREA SE2 Vista Ridge, DST
(Converted from MAR Vista Ridge, L.P.)
NREA SE2 West Place Leaseco, LLC
NREA SE2 West Place Manager, LLC
NREA SE2 West Place, DST
(Converted from Landmark at West Place, LLC)
NREA SE3 Arboleda Leaseco, LLC
NREA SE3 Arboleda Manager, LLC
NREA SE3 Arboleda, DST
(Converted from G&E Apartment REIT Arboleda, LLC)
NREA SE3 Fairways Leaseco, LLC
NREA SE3 Fairways Manager, LLC
NREA SE3 Fairways, DST
(Converted from MAR Fairways, LLC)
NREA SE3 Grand Oasis Leaseco, LLC
NREA SE3 Grand Oasis Manager, LLC
NREA SE3 Grand Oasis, DST
(Converted from Landmark at Grand Oasis, LP)
NREA Southeast Portfolio One Manager, LLC
NREA Southeast Portfolio One, DST
NREA Southeast Portfolio One, DST
NREA Southeast Portfolio Three Manager, LLC
NREA Southeast Portfolio Three, DST
NREA Southeast Portfolio Three, DST
NREA Southeast Portfolio Two Manager, LLC
NREA Southeast Portfolio Two, DST
NREA Southeast Portfolio Two, LLC

NREA SOV Investors, LLC
NREA Uptown TRS, LLC
NREA VB I LLC
NREA VB II LLC
NREA VB III LLC
NREA VB IV LLC
NREA VB Pledgor I LLC
NREA VB Pledgor I, LLC
NREA VB Pledgor II LLC
NREA VB Pledgor II, LLC
NREA VB Pledgor III LLC
NREA VB Pledgor III, LLC
NREA VB Pledgor IV LLC
NREA VB Pledgor IV, LLC
NREA VB Pledgor V LLC
NREA VB Pledgor V, LLC
NREA VB Pledgor VI LLC
NREA VB Pledgor VI, LLC
NREA VB Pledgor VII LLC
NREA VB Pledgor VII, LLC
NREA VB SM, Inc.
NREA VB V LLC
NREA VB VI LLC
NREA VB VII LLC
NREA Vista Ridge Investment Co, LLC
NREC AR Investors, LLC
NREC BM Investors, LLC
NREC BP Investors, LLC
NREC Latitude Investors, LLC
NREC REIT Sub, Inc.
NREC TRS, Inc.
NREC WW Investors, LLC
NREF OP I Holdco, LLC
NREF OP I SubHoldco, LLC
NREF OP I, L.P.
NREF OP II Holdco, LLC
NREF OP II SubHoldco, LLC
NREF OP II, L.P.
NREF OP IV REIT Sub TRS, LLC
NREF OP IV REIT Sub, LLC
NREF OP IV, L.P.
NREO NW Hospitality Mezz, LLC
NREO NW Hospitality, LLC

NREO Perilune, LLC
NREO SAFStor Investors, LLC
NREO TRS, Inc.
NRESF REIT Sub, LLC
NXRT Abbingtion, LLC
NXRT Atera II, LLC
NXRT Atera, LLC
NXRT AZ2, LLC
NXRT Barrington Mill, LLC
NXRT Bayberry, LLC
NXRT Bella Solara, LLC
NXRT Bella Vista, LLC
NXRT Bloom, LLC
NXRT Brandywine GP I, LLC
NXRT Brandywine GP I, LLC
NXRT Brandywine GP II, LLC
NXRT Brandywine GP II, LLC
NXRT Brandywine LP, LLC
NXRT Brandywine LP, LLC
NXRT Brentwood Owner, LLC
NXRT Brentwood, LLC
NXRT Cedar Pointe Tenant, LLC
NXRT Cedar Pointe, LLC
NXRT Cityview, LLC
NXRT Cornerstone, LLC
NXRT Crestmont, LLC
NXRT Crestmont, LLC
NXRT Enclave, LLC
NXRT Glenview, LLC
NXRT H2 TRS, LLC
NXRT Heritage, LLC
NXRT Hollister TRS LLC
NXRT Hollister, LLC
NXRT LAS 3, LLC
NXRT Master Tenant, LLC
NXRT Nashville Residential, LLC
NXRT Nashville Residential, LLC (*fka Freedom Nashville Residential, LLC*)
NXRT North Dallas 3, LLC
NXRT Old Farm, LLC
NXRT Pembroke Owner, LLC
NXRT Pembroke, LLC
NXRT PHX 3, LLC
NXRT Radbourne Lake, LLC
NXRT Rockledge, LLC
NXRT Sabal Palms, LLC
NXRT SM, Inc.
NXRT Steeplechase, LLC
NXRT Stone Creek, LLC
NXRT Summers Landing GP, LLC
NXRT Summers Landing LP, LLC
NXRT Torreyana, LLC
NXRT Vanderbilt, LLC
NXRT West Place, LLC
NXRTBH AZ2, LLC
NXRTBH Barrington Mill Owner, LLC
NXRTBH Barrington Mill SM, Inc.
NXRTBH Barrington Mill, LLC
NXRTBH Bayberry, LLC
NXRTBH Cityview, LLC
NXRTBH Colonnade, LLC
NXRTBH Cornerstone Owner, LLC
NXRTBH Cornerstone SM, Inc.
NXRTBH Cornerstone, LLC
NXRTBH Dana Point SM, Inc.
NXRTBH Dana Point, LLC
NXRTBH Foothill SM, Inc.
NXRTBH Foothill, LLC
NXRTBH Heatherstone SM, Inc.
NXRTBH Heatherstone, LLC
NXRTBH Hollister Tenant, LLC
NXRTBH Hollister, LLC
NXRTBH Madera SM, Inc.
NXRTBH Madera, LLC
NXRTBH McMillan, LLC
NXRTBH North Dallas 3, LLC
NXRTBH Old Farm II, LLC
NXRTBH Old Farm Tenant, LLC
NXRTBH Old Farm, LLC
NXRTBH Radbourne Lake, LLC
NXRTBH Rockledge, LLC
NXRTBH Sabal Palms, LLC
NXRTBH Steeplechase, LLC
(dba Southpoint Reserve at Stoney Creek)-VA
NXRTBH Stone Creek, LLC
NXRTBH Vanderbilt, LLC

NXRTBH Versailles SM, Inc.
NXRTBH Versailles, LLC
Oak Holdco, LLC
Oaks CGC, LLC
Okada Family Revocable Trust
Oldenburg, Ltd.
Pam Capital Funding GP Co. Ltd.
Pam Capital Funding, L.P.
PamCo Cayman Ltd.
Park West 1700 Valley View Holdco, LLC
Park West 2021 Valley View Holdco, LLC
Park West Holdco, LLC
Park West Portfolio Holdco, LLC
Participants of Highland 401K Plan
Patrick Willoughby-McCabe
PCMG Trading Partners XXIII, L.P.
PCMG Trading Partners XXIII, LP
PDK Toys Holdco, LLC
Pear Ridge Partners, LLC
Penant Management GP, LLC
Penant Management LP
PensionDanmark Holding A/S
PensionDanmark
Pensionsforsikringsaktieselskab
Peoria Place Development, LLC
(30% cash contributions - profit participation only)
Perilune Aero Equity Holdings One, LLC
Perilune Aviation LLC
PetroCap Incentive Holdings III. L.P.
PetroCap Incentive Partners II GP, LLC
PetroCap Incentive Partners II, L.P.
PetroCap Incentive Partners III GP, LLC
PetroCap Incentive Partners III, LP
PetroCap Management Company LLC
PetroCap Partners II GP, LLC
PetroCap Partners II, L.P.
PetroCap Partners III GP, LLC
PetroCap Partners III, L.P.
Pharmacy Ventures I, LLC
Pharmacy Ventures II, LLC
Pollack, Ltd.
Powderhorn, LLC
PWM1 Holdings, LLC
PWM1, LLC
RADCO - Bay Meadows, LLLP
RADCO - Bay Park, LLLP
RADCO NREC Bay Meadows Holdings, LLC
RADCO NREC Bay Park Holdings, LLC
Ramarim, LLC
Rand Advisors Series I Insurance Fund
Rand Advisors Series II Insurance Fund
Rand Advisors, LLC
Rand PE Fund I, L.P.
Rand PE Fund I, L.P. - Series 1
Rand PE Fund Management, LLC
Rand PE Holdco, LLC
Realdania
Red River CLO, Ltd.
Red River Investors Corp.
Riverview Partners SC, LLC
Rockwall CDO II Ltd.
Rockwall CDO II, Ltd.
Rockwall CDO, Ltd.
Rockwall Investors Corp.
Rothko, Ltd.
RTT Bella Solara, LLC
RTT Bloom, LLC
RTT Financial, Inc.
RTT Hollister, LLC
RTT Rockledge, LLC
RTT Torreyana, LLC
SALI Fund Partners, LLC
SAS Management
SAS Asset Recovery Ltd.
San Diego County Employees Retirement Association
Sandstone Pasadena Apartments, LLC
Sandstone Pasadena, LLC
Santa Barbara Foundation (third party)
Saturn Oil & Gas LLC
SBC Master Pension Trust
Scott Matthew Siekielski
SE Battleground Park, LLC
SE Battleground Park, LLC

SE Glenview, LLC
SE Governors Green Holdings, L.L.C.
SE Governors Green Holdings, L.L.C.
(fka SCG Atlas Governors Green Holdings, L.L.C.)
SE Governors Green I, LLC
SE Governors Green II, LLC
SE Governors Green II, LLC
SE Governors Green REIT, L.L.C.
SE Governors Green REIT, L.L.C.
(fka SCG Atlas Governors Green REIT, L.L.C.)

SE Governors Green, LLC
(fka SCG Atlas Governors Green, L.L.C.)
SE Gulfstream Isles GP, LLC
SE Gulfstream Isles GP, LLC
SE Gulfstream Isles LP, LLC
SE Gulfstream Isles LP, LLC
SE Heights at Olde Towne, LLC
SE Heights at Olde Towne, LLC
SE Lakes at Renaissance Park GP I, LLC
SE Lakes at Renaissance Park GP II, LLC
SE Lakes at Renaissance Park GP II, LLC
SE Lakes at Renaissance Park LP, LLC
SE Lakes at Renaissance Park LP, LLC
SE Multifamily Holdings LLC
SE Multifamily Holdings, LLC
SE Multifamily REIT Holdings LLC
SE Myrtles at Olde Towne, LLC
SE Myrtles at Olde Towne, LLC
SE Oak Mill I Holdings, LLC
SE Oak Mill I Holdings, LLC *(fka SCG Atlas Oak Mill I Holdings, L.L.C.)*
SE Oak Mill I Owner, LLC *(fka SCG Atlas Oak Mill I, L.L.C.)*
SE Oak Mill I REIT, LLC
SE Oak Mill I REIT, LLC *(fka SCG Atlas Oak Mill I REIT, L.L.C.)*
SE Oak Mill I, LLC
SE Oak Mill I, LLC
SE Oak Mill II Holdings, LLC
SE Oak Mill II Holdings, LLC *(fka SCG Atlas Oak Mill II Holdings, L.L.C.)*

SE Oak Mill II Owner, LLC *(fka SCG Atlas Oak Mill II, L.L.C.)*
SE Oak Mill II REIT, LLC
SE Oak Mill II REIT, LLC *(fka SCG Atlas Oak Mill II REIT, L.L.C.)*
SE Oak Mill II, LLC
SE Oak Mill II, LLC
SE Quail Landing, LLC
SE River Walk, LLC
SE Riverwalk, LLC
SE SM, Inc.
SE Stoney Ridge Holdings, L.L.C. *(fka SCG Atlas Stoney Ridge Holdings, L.L.C.)*
SE Stoney Ridge Holdings, LLC
SE Stoney Ridge I, LLC
SE Stoney Ridge I, LLC
SE Stoney Ridge II, LLC
SE Stoney Ridge II, LLC
SE Stoney Ridge REIT, L.L.C. *(fka SCG Atlas Stoney Ridge REIT, L.L.C.)*
SE Stoney Ridge REIT, LLC
SE Stoney Ridge, LLC *(fka SCG Atlas Stoney Ridge, L.L.C.)*
SE Victoria Park, LLC
SE Victoria Park, LLC
Sentinel Re Holdings, Ltd.
Sentinel Reinsurance Ltd.
Sentinel Reinsurance Limited
SFH1, LLC
SFR WLIF I, LLC
(fka NexPoint WLIF I, LLC)
SFR WLIF II, LLC
(NexPoint WLIF II, LLC)
SFR WLIF III, LLC
(NexPoint WLIF III, LLC)
SFR WLIF Manager, LLC
(NexPoint WLIF Manager, LLC)
SFR WLIF, LLC
(NexPoint WLIF, LLC)
SFR WLIF, LLC Series I
SFR WLIF, LLC Series II
SFR WLIF, LLC Series III
SH Castle BioSciences, LLC

Small Cap Equity Sub, LLC	The Mark and Pamela Okada Family Trust - Exempt Descendants' Trust
Socially Responsible Equity Sub, LLC	The Mark and Pamela Okada Family Trust - Exempt Trust #2
SOF Brandywine I Owner, L.P.	The Ohio State Life Insurance Company
SOF Brandywine II Owner, L.P.	The Okada Family Foundation, Inc.
SOF-X GS Owner, L.P.	The Okada Insurance Rabbi Trust
Southfork Cayman Holdings, Ltd.	The SLHC Trust
Southfork CLO, Ltd.	The Trustees of Columbia University in the City of New York
Specialty Financial Products Designated Activity Company (<i>fka Specialty Financial Products Limited</i>)	The Twentysix Investment Trust (Third Party Investor)
Spiritus Life, Inc.	Thomas A. Neville
SRL Sponsor LLC	Thread 55, LLC
SRL Whisperwod LLC	Tihany, Ltd.
SRL Whisperwood Member LLC	Todd Travers
SRL Whisperwood Venture LLC	Tranquility Lake Apartments Investors, L.P.
SSB Assets LLC	Tuscany Acquisition, LLC
Starck, Ltd.	Uptown at Cityplace Condominium Association, Inc.
Stemmons Hospitality, LLC	US Gaming OpCo, LLC
Steve Shin	US Gaming SPV, LLC
Stonebridge Capital, Inc.	US Gaming, LLC
Stonebridge-Highland Healthcare Private Equity Fund	Valhalla CLO, Ltd.
Strand Advisors III, Inc.	VB GP LLC
Strand Advisors IV, LLC	VB Holding, LLC
Strand Advisors IX, LLC	VB One, LLC
Strand Advisors V, LLC	VB OP Holdings LLC
Strand Advisors XIII, LLC	VBAnnex C GP, LLC
Strand Advisors XVI, Inc.	VBAnnex C Ohio, LLC
Strand Advisors, Inc.	VBAnnex C, LP
Stratford CLO, Ltd.	Ventoux Capital, LLC (Matt Goetz)
Summers Landing Apartment Investors, L.P.	VineBrook Annex B, L.P.
Term Loan B (10% cash contributions - profit participation only)	VineBrook Annex I, L.P.
The Dallas Foundation	VineBrook Homes Merger Sub II LLC
The Dallas Foundation (third party)	VineBrook Homes Merger Sub LLC
The Dondero Insurance Rabbi Trust	VineBrook Homes OP GP, LLC
The Dugaboy Investment Trust	VineBrook Homes Operating Partnership, L.P.
The Dugaboy Investment Trust U/T/A Dated Nov 15, 2010	VineBrook Homes Trust, Inc.
The Get Good Non-Exempt Trust No. 1	VineBrook Partners I, L.P.
The Get Good Non-Exempt Trust No. 2	VineBrook Partners II, L.P.
The Get Good Trust	VineBrook Properties, LLC

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Virginia Retirement System
Vizcaya Investment, LLC
Wake LV Holdings II, Ltd.
Wake LV Holdings, Ltd.
Walter Holdco GP, LLC
Walter Holdco I, Ltd.
Walter Holdco, L.P.
Warhol, Ltd.
Warren Chang
Westchester CLO, Ltd.
William L. Britain
Wright Ltd.
Wright, Ltd.
Yellow Metal Merchants, Inc.

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EXHIBIT EE

accounting or seek approval of any court with respect to the administration of the Claimant Trust, or as a condition for managing any payment or distribution out of the Claimant Trust Assets.

(b) The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

(c) The Claimant Trustee may dispose some or all of the books and records maintained by the Claimant Trustee at the later of (i) such time as the Claimant Trustee determines, with the unanimous consent of the Oversight Board, that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Claimant Trust, or (ii) upon the termination and winding up of the Claimant Trust under Article IX of this Agreement; provided, however, the Claimant Trustee shall not dispose of any books and records related to the Estate Claims or Employee Claims without the consent of the Litigation Trustee. Notwithstanding the foregoing, the Claimant Trustee shall cause the Reorganized Debtor and its subsidiaries to retain such books and records, and for such periods, as are required to be retained pursuant to Section 204-2 of the Investment Advisers Act or any other applicable laws, rules, or regulations.

3.13 Compensation and Reimbursement; Engagement of Professionals.

(a) Compensation and Expenses.

(i) Compensation. As compensation for any services rendered by the Claimant Trustee in connection with this Agreement, the Claimant Trustee shall receive compensation of \$150,000 per month ~~(the "Base Salary")~~. Within the first forty-five days following the Confirmation Date, the Claimant Trustee, on the one hand, and the Committee, if prior to the Effective Date, or the Oversight Board, if on or after the Effective Date, on the other, will negotiate go-forward compensation for the Claimant Trustee which will include (a) ~~the Base Salary~~ a base salary, (b) a success fee, and (c) severance.

(ii) Expense Reimbursements. All reasonable out-of-pocket expenses of the Claimant Trustee in the performance of his or her duties hereunder, shall be reimbursed as Claimant Trust Expenses paid by the Claimant Trust.

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EXHIBIT FF

Schedule of Contracts and Leases to Be Assumed

1. Advisory Services Agreement, dated November 21, 2011, effective June 20, 2011, by and between Carey International, Inc., and Highland Capital Management, L.P.
2. Amended and Restated Advisory Services Agreement, dated March 4, 2013, by and between Trussway Holdings, Inc., and Highland Capital Management, L.P.
3. Reference Portfolio Management Agreement, dated March 4, 2004, by and between Highland Capital Management, L.P., and Citibank N.A.
4. Advisory Services Agreement, dated May 25, 2011, by and between CCS Medical, Inc., and Highland Capital Management, L.P.
5. Amended and Restated Advisory Services Agreement, dated February 28, 2013, by and between Cornerstone Healthcare Group Holding, Inc., and Highland Capital Management, L.P.
6. Prime Brokerage Agreement by and between Jefferies LLC and Highland Capital Management, L.P., dated May 24, 2013.
7. Amended and Restated Shared Services Agreement, dated August 21, 2015, by and between Highland Capital Management, L.P., and Falcon E&P Opportunities GP, LLC.
8. Amended and Restated Administrative Services Agreement, effective as of August 21, 2015, by and between Highland Capital Management, L.P., and Petrocap Partners II GP, LLC.
9. Office Lease, between Crescent Investors, L.P., and Highland Capital Management, L.P.
10. Paylocity Corporation Services Agreement, between Highland Capital Management, L.P., and Paylocity Corporation, dated November 19, 2012.
11. Electronic Trading Services Agreement, between SunTrust Robinson Humphrey Inc., and Highland Capital Management, L.P., dated February 6, 2019.
12. Letter Agreement, between FTI Consulting, Inc., and Highland Capital Management, L.P., dated November 19, 2018.
13. Administrative Services Agreement, dated January 1, 2018, between Highland Capital Management, L.P., and Liberty Life Assurance Company of Boston.
14. Electronic Communications: Customer Authorization & Indemnification, between Highland Capital Management, L.P., and The Bank of New York Mellon Corporation, dated August 9, 2016.
15. Letter Agreement, dated August 9, 2016, Electronic Access Terms and Conditions, by and between The Bank of New York Mellon Trust Company, N.A., and Highland Capital Management, L.P.
16. Shared Services Agreement by and between Highland HCF Advisor, Ltd., and Highland Capital Management, L.P., dated effective October 27, 2017.

17. Sub-Advisory Agreement, by and between Highland HCF Advisors, Ltd., and Highland Capital Management, dated effective October 27, 2017.
18. Collateral Management Agreement, dated November 2, 2006, by and between Highland Credit Opportunities CDO Ltd. and Highland Capital Management, L.P.
19. Management Agreement, dated November 15, 2007, between Highland Restoration Capital Partners, L.P., Highland Restoration Capital Partners Offshore, L.P., Highland Restoration Capital Partners Master L.P., Highland Restoration Capital Partners GP, LLC, and Highland Capital Management, L.P.
20. Investment Management Agreement, between Highland Capital Multi-Strategy Fund, L.P., and Highland Capital Management, L.P., dated July 31, 2006.
21. Investment Management Agreement, between Highland Capital Multi-Strategy Master Fund, L.P., and Highland Capital Management, L.P., dated July 31, 2006.
22. Management Agreement, dated August 22, 2007, between and among Highland Capital Management, L.P., and Walkers Fund Services Limited, as trustee of Highland Credit Opportunities Japanese Unit Trust.
23. Third Amended and Restated Investment Management Agreement, by and among Highland Multi Strategy Credit Fund, Ltd., Highland Multi Strategy Credit Fund, L.P., and Highland Capital Management, L.P., dated November 1, 2013.
24. Investment Management Agreement, dated March 31, 2015, by and among Highland Select Equity Master Fund, L.P., Highland Select Equity Fund GP, L.P., and Highland Capital Management, L.P.
25. Amended and Restated Investment Management Agreement, dated February 27, 2017, by and among Highland Prometheus Master Fund L.P., Highland Prometheus Feeder Fund I, L.P., Highland Prometheus Feeder Fund II, L.P., Highland SunBridge GP, LLC, and Highland Capital Management, L.P.
26. Servicing Agreement, dated December 20, 2007, by and among Greenbriar CLO, Ltd., and Highland Capital Management, L.P.
27. Investment Management Agreement, dated November 1, 2007, by and between Longhorn Credit Funding, LLC, and Highland Capital Management, L.P. (as amended)
28. Reference Portfolio Management Agreement, dated August 1, 2016, by and between Highland Capital Management, L.P., and Valhalla CLO, Ltd.
29. Collateral Servicing Agreement, dated December 20, 2006, by and among Highland Park CDO I, Ltd., and Highland Capital Management, L.P.
30. Portfolio Management Agreement, dated March 15, 2005, by and among Southfork CLO Ltd., and Highland Capital Management, L.P.
31. Amended and Restated Portfolio Management Agreement, dated November 30, 2005, by and among Jasper CLO Ltd., and Highland Capital Management, L.P.
32. Servicing Agreement, dated May 31, 2007, by and among Westchester CLO, Ltd., and Highland Capital Management, L.P.

33. Servicing Agreement, dated May 10, 2006, by and among Rockwall CDO Ltd. and Highland Capital Management, L.P. (as amended)
34. Portfolio Management Agreement, dated December 8, 2005, by and between Liberty CLO, Ltd., and Highland Capital Management, L.P.
35. Servicing Agreement, dated March 27, 2008, by and among Aberdeen Loan Funding, Ltd., and Highland Capital Management, L.P.
36. Servicing Agreement, dated May 9, 2007, by and among Rockwall CDO II Ltd. and Highland Capital Management, L.P.
37. Collateral Management Agreement, by and between, Highland Loan Funding V Ltd. and Highland Capital Management, L.P., dated August 1, 2001.
38. Collateral Management Agreement, dated August 18, 1999, by and between Highland Legacy Limited and Highland Capital Management, L.P.
39. Servicing Agreement, dated November 30, 2006, by and among Grayson CLO Ltd., and Highland Capital Management, L.P. (as amended)
40. Servicing Agreement, dated October 25, 2007, by and among Stratford CLO Ltd., and Highland Capital Management, L.P.
41. Servicing Agreement, dated August 3, 2006, by and among Red River CLO Ltd., and Highland Capital Management, L.P. (as amended)
42. Servicing Agreement, dated December 21, 2006, by and among Brentwood CLO, Ltd., and Highland Capital Management, L.P.
43. Servicing Agreement, dated March 13, 2007, by and among Eastland CLO Ltd., and Highland Capital Management, L.P.
44. Portfolio Management, Agreement, dated October 13, 2005, by and among Gleneagles CLO, Ltd., and Highland Capital Management, L.P.
45. AT&T Managed Internet Service, between Highland Capital Management, L.P. and AT&T Corp., dated February 24, 2015.
46. ViaWest, Master Service Agreement, dated October 3, 2011, between Highland Capital Management, L.P. and ViaWest
47. Stockholders' Agreement, dated April 15, 2005, by and between American Banknote Corporation and Highland Capital Management, L.P.
48. Stockholders' Agreement and Amendment No. 1, dated January 25, 2011, by and between Carey Holdings, Inc. and Highland Capital Management, L.P.
49. Stockholders' Agreement and Amendment, dated March 24, 2010, by and between Cornerstone Healthcare Group Holding, Inc. and Highland Capital Management, L.P.
50. Members' Agreement and Amendment, dated November 15, 2017, by and between Highland CLO Funding, Ltd. and Highland Capital Management, L.P.
51. Stock Purchase and Sale Agreement and Amendment, dated January 16, 2013, by and between Progenics Pharmaceuticals, Inc. and Highland Capital Management, L.P.

52. Stockholders' Agreement and Amendments, dated October 24, 2008, by and between JHT Holdings, Inc. and Highland Capital Management, L.P.
53. Amended and Restated Limited Partnership Agreement of Highland Dynamic Income Fund, L.P., dated February 25, 2013, by and between Highland Dynamic Income Fund GP, LLC and Highland Capital Management, L.P.
54. Highland Multi-Strategy Fund, L.P. Limited Partnership Agreement, dated July 6, 2006, by and between Highland Multi-Strategy Fund GP, L.P. and Highland Capital Management, L.P.
55. Operating Agreement of HE Capital, LLC (as amended), dated September 27, 2007, by and between ENA Capital, LLC Ellman Management Group, Inc. and Highland Capital Management, L.P.
56. Limited Liability Company Agreement of Highland Multi-Strategy Onshore Master SubFund II, LLC, dated February 27, 2007, by and between Highland Multi-Strategy Master Fund, L.P. and Highland Capital Management, L.P.
57. Limited Liability Company Agreement of Highland Multi-Strategy Onshore Master SubFund, LLC, dated July 19, 2006, by and between Highland Multi-Strategy Master Fund, L.P. and Highland Capital Management, L.P.
58. Highland Capital Management, L.P., Limited Liability Company Agreement of Highland Receivables Finance 1, LLC, by and between Highland Capital Management, L.P. and Highland Capital Management, L.P.
59. Agreement of Limited Partnership of Highland Restoration Capital Partners, L.P. and Amendments, dated November 6, 2007, by and between Highland Restoration Capital Partners GP, LLC and Highland Capital Management, L.P.
60. Agreement of Limited Partnership of Highland Select Equity Fund GP, L.P., dated October 2005, by and between Highland Select Equity Fund GP, LLC and Highland Capital Management, L.P.
61. Agreement of Limited Partnership of Penant Management LP, dated December 12, 2012, by and between Penant Management GP, LLC and Highland Capital Management, L.P.
62. Agreement of Limited Partnership of Petrocap Incentive Partners III, LP, dated April 12, 2018, by and between Petrocap Incentive Partners III GP, LLC, Petrocap Incentive Holdings III, LP and Highland Capital Management, L.P.
63. Amended and Restated Agreement of Limited Partnership of Petrocap Partners II, LP, dated October 30, 2014, by and between Petrocap Partners II GP, LLC, Petrocap Incentive Partners II, LP and Highland Capital Management, L.P.
64. Agreement of Limited Partnership of Highland Credit Opportunities CDO GP, L.P., dated December 29, 2005, by and between Highland Credit Opportunities CDO GP, LLC and Highland Capital Management, L.P.
65. Fourth Amended and Restated Limited Partnership Agreement of Highland Multi Strategy Credit Fund, L.P., dated November 1, 2014, by and between Highland Multi Strategy Credit Fund GP, L.P. and Highland Capital Management, L.P.

66. DUO Security, 2 factor authentication, by and between DUO Security and Highland Capital Management, L.P.
67. GoDaddy Domain Registrations, by and between GoDaddy and Highland Capital Management, L.P.
68. Highland Loan Fund, Ltd. et al, Investment Management Agreement, dated July 31, 2001, by and between Highland Loan Fund, Ltd. et al and Highland Capital Management, L.P.
69. E Mailflow Monitoring, by and between Mxtoolbox and Highland Capital Management, L.P.
70. Cloud single sign on for HR related employee login, by and between Onelogin and Highland Capital Management, L.P.
71. Collateral Management Agreement, dated May 19, 1998, by and between Pam Capital Funding LP, Ranger Asset Mgt LP and Highland Capital Management, L.P.
72. Collateral Management Agreement, dated August 6, 1997, by and between Pamco Cayman Ltd., Ranger Asset Mgt LP and Highland Capital Management, L.P.
73. Order Addenda, dated January 28, 2020, by and between CenturyLink Communications, LLC and Highland Capital Management, L.P.
74. Service Agreement (as amended), dated April 1, 2005, by and between Intex Solutions, Inc. and Highland Capital Management, L.P.
75. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Red River CLO Ltd. et al
76. Interim Collateral Management Agreement, June 15, 2005, between Highland Capital Management, L.P. and Rockwall CDO Ltd
77. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Rockwall CDO Ltd
78. Collateral Servicing Agreement dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.; The Bank of New York Trust Company, National Association
79. Representations and Warranties Agreement, dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.
80. Collateral Administration Agreement, dated March 27, 2008, between Highland Capital Management, L.P. and Aberdeen Loan Funding, Ltd.; State Street Bank and Trust Company
81. Collateral Administration Agreement, dated December 20, 2007, between Highland Capital Management, L.P. and Greenbriar CLO, Ltd.; State Street Bank and Trust Company
82. Collateral Acquisition Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd

83. Collateral Administration Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd. and Investors Bank and Trust Company
84. Collateral Administration Agreement, dated October 13, 2005, between Highland Capital Management, L.P. and Gleneagles CLO, Ltd.; JPMorgan Chase Bank, National Association
85. Collateral Acquisition Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.
86. Collateral Administration Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.; Investors Bank & Trust Company
87. Collateral Acquisition Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.
88. Collateral Administration Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.; U.S. Bank National Association
89. Master Warehousing and Participation Agreement, dated April 19, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company
90. Master Warehousing and Participation Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
91. Master Warehousing and Participation Agreement (Amendment No. 2), dated May 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
92. Master Warehousing and Participation Agreement (Amendment No. 1), dated April 12, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
93. Master Warehousing and Participation Agreement (Amendment No. 3), dated June 22, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
94. Master Warehousing and Participation Agreement (Amendment No. 4), dated July 17, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
95. Collateral Administration Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; U.S. Bank National Association; IXIS Financial Products Inc.
96. Collateral Administration Agreement, dated April 18, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company; U.S. Bank National Association
97. Master Participation Agreement, dated June 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Grand Central Asset Trust

98. A&R Asset Acquisition Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Smith Barney Inc.; Highland Loan Funding V Ltd.
99. A&R Master Participation Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Brothers Holding Company; Highland Loan Funding V Ltd.
100. Collateral Acquisition Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.
101. Collateral Administration Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.; JPMorgan Chase Bank, National Association
102. Master Warehousing and Participation Agreement, dated March 24, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.
103. Master Warehousing and Participation Agreement (Amendment No. 1), dated May 16, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.
104. Securities Account Control Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Highland CDO Opportunity Fund, Ltd.; JPMorgan Chase Bank, National Association
105. Collateral Administration Agreement, dated December 8, 2005, between Highland Capital Management, L.P. and Liberty CLO Ltd.
106. Collateral Administration Agreement, dated May 10, 2006, between Highland Capital Management, L.P. and Rockwall CDO Ltd; JPMorgan Chase Bank, National Association
107. Collateral Administration Agreement, dated May 9, 2007, between Highland Capital Management, L.P. and Rockwall CDO II, Ltd.; Investors Bank & Trust Company
108. Collateral Administration Agreement, dated March 15, 2005, between Highland Capital Management, L.P. and Southfork CLO Ltd.; JPMorgan Chase Bank, National Association
109. Collateral Administration Agreement, dated October 25, 2007, between Highland Capital Management, L.P. and Stratford CLO Ltd.; State Street
110. Collateral Administration Agreement, dated August 18, 2004, between Highland Capital Management, L.P. and Valhalla CLO, Ltd.; JPMorgan Chase Bank
111. Extension/Buy-Out Agreement, dated August 18, 2004, between Highland Capital Management, L.P. and Citigroup Financial Products Inc.; Citigroup Global Markets Inc.
112. Collateral Acquisition Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.
113. Collateral Administration Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.; Investors Bank & Trust Company
114. Collateral Administration Agreement, dated December 21, 2006, between Highland Capital Management, L.P. and Brentwood CLO, Ltd.; Investors Bank & Trust Company

115. Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and James Seery
116. Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and John Dubel
117. Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and Russell Nelms
118. Colocation Service Order dated October 14, 2019 between Highland Capital Management and Dawn US Holdings, LLC d/b/a Evoque Data Center Solutions
119. Tradesuite Web Module Services/Agreement between Highland Capital Management and DTCC ITP LLC
120. Bloomberg (Terminal) Agreement No. 306371 between Highland Capital Management and Bloomberg Finance, L.P.¹
121. Master Service Agreement between Highland Capital Management and Via West
122. Amendment to Bloomberg Order Management System Addendum and Bloomberg Order Management System Schedule of Services Account No. 167969 between Highland Capital Management and Bloomberg Finance, L.P.
123. Fourth Amendment to Software License and Services Agreement between Highland Capital Management and Markit WSO Corporation
124. Master Services Agreement, First Amendment to Master Services Agreement, Second Amendment and Restatement of Master Services Agreement between Highland Capital Management and Siepe Services, LLC
125. Internet Agreement Account No. 831-000-7888-651 between Highland Capital Management and AT&T
126. Landline Fax Agreement Account No. 831-000-2532-176 between Highland Capital Management and AT&T
127. Amazon Web Services Account No. 353534426569 between Highland Capital Management and Amazon Web Service, Inc.
128. Website Hosting Agreement Account No. 325667 between Highland Capital Management and WP Engine

¹ The Debtor is currently in discussions with Bloomberg regarding the assumption of this agreement.

EXHIBIT 11

PACHULSKI STANG ZIEHL & JONES LLP
 Jeffrey N. Pomerantz (CA Bar No.143717) (admitted *pro hac vice*)
 Ira D. Kharasch (CA Bar No. 109084) (admitted *pro hac vice*)
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Counsel for the Debtor

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

)	
In re:	)	Chapter 11
)	
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
)	
Debtor.)	
)	

**NOTICE OF OCCURRENCE OF EFFECTIVE DATE OF
 CONFIRMED FIFTH AMENDED PLAN OF REORGANIZATION
 OF HIGHLAND CAPITAL MANAGEMENT, L.P.**

PLEASE TAKE NOTICE that on February 22, 2021, the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”) entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1943] (the “Confirmation Order”) confirming the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1808] (as

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



amended, supplemented, or modified, the “Plan”). Unless otherwise defined in this notice, capitalized terms used in this notice shall have the meanings ascribed to them in the Plan and the Confirmation Order, as applicable.

PLEASE TAKE FURTHER NOTICE that the Effective Date of the Plan occurred on August 11, 2021.

PLEASE TAKE FURTHER NOTICE that, except with respect to Administrative Expense Claims that are Professional Fee Claims or as otherwise set forth in the Plan, requests for payment of an Administrative Expense Claim must be Filed with the Bankruptcy Court **no later than forty-five (45) days after the Effective Date** (the “Administrative Expense Claims Bar Date”). **HOLDERS OF ADMINISTRATIVE EXPENSE CLAIMS THAT ARE REQUIRED TO FILE AND SERVE A REQUEST FOR PAYMENT OF SUCH ADMINISTRATIVE EXPENSE CLAIMS BY THE ADMINISTRATIVE EXPENSE CLAIMS BAR DATE THAT DO NOT FILE AND SERVE SUCH A REQUEST BY THE ADMINISTRATIVE EXPENSE CLAIMS BAR DATE SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH ADMINISTRATIVE EXPENSE CLAIMS AGAINST THE DEBTOR OR THE REORGANIZED DEBTOR.**

PLEASE TAKE FURTHER NOTICE that, unless otherwise ordered by the Bankruptcy Court, all final requests for payment of Professional Fee Claims must be Filed **no later than sixty (60) days after the Effective Date.**

PLEASE TAKE FURTHER NOTICE that the terms of the Plan shall be immediately effective and enforceable and deemed binding upon the Debtor or the Reorganized Debtor, as applicable, and any and all Holders of Claims or Interests (regardless of whether such Claims or Interests are deemed to have accepted or rejected the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, and injunctions described in the Plan and Confirmation Order, including, without limitation: the injunction with respect to the commencement of claims and causes of action against Protected Parties set forth in Section IX.F of the Plan and Sections AA and BB of the Confirmation Order, the duration of injunction and stays set forth in Section IX.G of the Plan and Section AA of the Confirmation Order, and the continuance of the January 9 Order and July 16 Order set forth in Section IX.H of the Plan and Section CC of the Confirmation Order.

PLEASE TAKE FURTHER NOTICE that on the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor’s formation documents, including the Limited Partnership Agreement.

PLEASE TAKE FURTHER NOTICE that the Confirmation Order and the Plan

are available for inspection. If you would like to obtain copies you may: (a) access the Debtor's restructuring website at <http://www.kccllc.net/hcmlp>; (b) call toll free: (877) 573-3984 or international: (310) 751-1829; or (c) email HighlandInfo@kccllc.com and reference "Highland" in the subject line. You may also obtain copies of any pleadings filed in this case for a fee via PACER at: pacer.uscourts.gov.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

Dated: August 11, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

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Counsel for the Debtor

EXHIBIT 12



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 24, 2021

United States Bankruptcy Judge

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	Adversary Proceeding No.
Plaintiff,	§	
vs.	§	Case No. 21-03010-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P.,	§	
	§	
Defendants.	§	

ORDER

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

This matter having come before the Court on the *Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 2] (the “Motion”)² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff in the above-captioned adversary proceeding, and this Court having considered (i) the Motion; (ii) *Plaintiff Highland Capital Management, L.P.’s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* [Docket No. 1] (the “Complaint”); (iii) the arguments and law cited in the Debtor’s *Memorandum of Law in Support of its Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 3] (the “Memorandum of Law,” and together with the Motion and Complaint, the “Debtor’s Papers”); (iv) the *Objection to Mandatory Injunction and Brief in Support Thereof* [Docket No. 20] (the “Objection”), filed on February 22, 2021, by the Advisors; (v) the testimonial and documentary evidence admitted into evidence during the hearing held on February 23, 2021 (the “Hearing”), including the credibility of witnesses Mr. James P. Seery, Jr., Mr. James Dondero, and Mr. Dustin Norris; and (vi) the arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding³ pursuant to 28 U.S.C. § 157(b)(2);

² Capitalized terms used but not herein defined shall have the meanings ascribed to such terms in the Motion.

³ **The court orally stated at the hearing that, at a minimum, there is bankruptcy subject matter jurisdiction in this action, since: (a) there is a conceivable effect on the bankruptcy estate being administered (i.e., the pre-confirmation test for bankruptcy subject matter jurisdiction), since there is a risk of potential liability or regulatory actions being pursued against the estate, if the Debtor does not obtain relief in this action, and, also (b) the outcome of this action could bear on the interpretation, implementation, and execution of a confirmed plan (i.e., the post-confirmation test for bankruptcy subject matter jurisdiction). The court also concluded, upon further analysis, that the action should be deemed to present a “core” matter, with regard to which the bankruptcy court may issue final orders and exercise Constitutional authority, since, among other things, the relief sought is, in essence, supplemental to the confirmation order and in furtherance of implementation of the confirmed plan. See 11 U.S.C. § 1142(b). In all events, should this order ever be subject to an appeal, and the District Court concludes that “noncore” matters are involved, the bankruptcy**

and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate and that no other notice need be provided; and upon all of the proceedings had before this Court, the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted at the Hearing; and after due deliberation and sufficient cause appearing therefor, and for the reasons set forth in the record on this Motion, the Court makes the following findings of fact:

1. Each of the Advisors is controlled by Mr. Dondero.
2. The Debtor had the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice.
3. The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice.
4. The HCMFA Shared Services Agreement and the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement terminated on February 19, 2021.
5. The Debtor had the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice.
6. The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice.
7. The NPA Shared Services Agreement and the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement terminated on February 19, 2021.

court requests that the District Court regard this ruling as a *proposed* set of findings, conclusions and order from the bankruptcy court and that the District Court adopt this ruling, pursuant to 28 U.S.C. § 157(c)(1).

8. Except as expressly set forth herein, effective as of February 19, 2021, the Debtor has no obligation to provide any services, software, or assistance to any of HCMFA, NPA, the Funds, or any servicer or personnel retained by any of HMCFA, NPA, or the Funds.

9. As of February 20, 2021, each of HCMFA and NPA had adopted an operating plan to obtain or provide all services previously provided by the Debtor that are necessary to fully perform under their agreements with the Funds without the aid or assistance of the Debtor.

10. Except as expressly set forth herein, as of February 20, 2021, neither HCMFA nor NPA needs any services, including contractual arrangements and software, previously provided by the Debtor or its employees under the Shared Services Agreements that are necessary to fully perform under their agreements with the Funds.

11. On or prior to February 28, 2021, the Advisors will promptly provide the Debtor with written notice of the documents, data, and books and records (collectively, the “Data”) that the Advisors’ believe constitute their property. If the Debtor in reasonable good faith determines such Data is the Advisors’ property, the Debtor will take reasonable efforts to provide the Advisors with a copy of such Data. **Subject to paragraph 13 below, on and prior to February 28, 2021, each party will bear its own costs and expenses associated with the copying of the Data.** Under no circumstances will the Debtor be required to erase or otherwise remove any Data from the Debtor’s systems. For the avoidance of doubt, the Debtor will have no obligation to provide any Data that constitutes the Debtor’s privileged, confidential, or proprietary information.

12. Subject to paragraph 14, the Debtor will have no obligation to provide any Data to the Advisors after February 28, 2021. If the Debtor in reasonable good faith cannot satisfy any request for Data made pursuant to paragraph 11 by the close of business on February 28, 2021, the Debtor will have no further obligation to provide such Data.

13. The Debtor will not be required to incur any *material* time, cost, or expense in furtherance of its obligations set forth in paragraph 11—**the Advisors’ witness having represented to the court that the copying and/or transfer of the Data would be fairly easy to achieve and that the Advisors stood by ready to receive the Data.** To the extent any requests require material time, cost, or expense, the Debtor may petition this Court for the payment of any fees, costs, or expenses incurred in connection with the fulfillment of its obligations under paragraph 11 (including the cost of such petition) and shall have no obligation to provide such Data until the Court has ruled on such petition.

14. If the Debtor cannot in reasonable good faith provide requested Data by February 28, 2021, or if the Advisors request any Data after February 28, 2021, and in each case if the parties cannot agree on the propriety of such request after conferring in good faith, the Advisors may petition this Court for access to such Data. Regardless, the Advisors will bear any and all costs associated with any requests for Data and the delivery of such Data under this paragraph.

15. Notwithstanding anything herein to the contrary, the delivery of Data to the Advisors will not constitute a waiver of any privileges, including attorney-client privilege, or any confidentiality requirements.

16. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

17. Based on the foregoing, the Motion is dismissed as moot.

End of Order

EXHIBIT 13

1 Dondero - 5-28-2021

2 IN THE UNITED STATES BANKRUPTCY COURT

3 FOR THE NORTHERN DISTRICT OF TEXAS

4 DALLAS DIVISION

5 In re:)

6 HIGHLAND CAPITAL) Case No.

MANAGEMENT, LP,) 19-34054 L.P.

7) Chapter 11

Debtor,)

8 -----)

HIGHLAND CAPITAL MANAGEMENT,)

9 LP,)

10 Plaintiff,) Adversary No.

) 21-03003-sgi

11 vs.)

)

12 JAMES D. DONDERO,)

)

13 Defendant.)

14

15 REMOTE DEPOSITION OF

16 JAMES DONDERO

17

18 Pages 103 - 282

19 Dallas, Texas

20 Friday, 28th day of May, 2021

21

22

23 Job No. 194690

24 Reported by:

25 Daniel J. Skur, Notary Public and CSR

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1 Dondero - 5-28-2021

2

3

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5

6

7

8 28th day of May, 2021

9 9:33 a.m. - 1:59 p.m.

10

11

12 Remote Deposition of JAMES DONDERO,

13 located in Dallas, Texas, before Daniel J.

14 Skur, Notary Public and Certified Shorthand

15 Reporter in and for the State of Texas

16 located in Waxahachie, Texas.

17

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1 Dondero - 5-28-2021

2

3 IT IS HEREBY STIPULATED AND AGREED

4 by and between the attorneys for the respective

5 parties herein, that filing and sealing be and

6 the same are hereby waived.

7 IT IS FURTHER STIPULATED AND AGREED

8 that all objections, except as to the form of

9 the question, shall be reserved to the

10 time of the trial.

11 IT IS FURTHER STIPULATED AND AGREED

12 that the within deposition may be sworn to and

13 signed before any officer authorized to

14 administer an oath, with the same force and

15 effect as if signed and sworn to before the

16 Court.

17 - oOo -

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1 Dondero - 5-28-2021

2 A P P E A R A N C E S:

3 Pachulski Stang Ziehl & Jones

4 Attorney(s) for Debtor

5 780 Third Avenue

6 New York, New York 10017

7 BY: John Morris, Esq.

8 Gregory Demo, Esq.

9

10 Stinson

11 Attorney(s) for The Witness

12 3102 Oak Lawn Avenue

13

14 Dallas, Texas 75219

15

16 BY: Deborah Deitsch-Perez

17

18 Michael Aigen, Esq.

19

20 Paul Lackey, Esq.

21

22 Sidley Austin

23 Attorney(s) for The Committee

24 2021 McKinney Avenue

25

26 Dallas, Texas 75201

27

28 BY: Paige Montgomery, Esq.

29

30

31 ALSO PRESENT:

32 Davor Rukavina, NexPoint

33 La Asia Canty

34

35

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1 Dondero - 5-28-2021

2 PROCEEDINGS

3 REMOTE ORAL DEPOSITION OF

4 JAMES DONDERO

5 (REPORTER NOTE: This deposition is

6 being conducted remotely in accordance with

7 the Current Emergency Order regarding the

8 COVID-19 State of Disaster.

9 Today's date is the 28th day of

10 May, 2021. The time is 9:33 a.m. Daylight

11 Savings Time. The witness is located in

12 Dallas, Texas.)

13 JAMES DONDERO,

14 having been duly cautioned and sworn to tell

15 the truth, the whole truth and nothing but the

16 truth, testified as follows:

17 (9:33 A.M.)

18 EXAMINATION

19 BY MR. MORRIS:

20 Q. Good morning, Mr. Dondero.

21 A. Morning.

22 Q. It's John Morris, again, from

23 Pachulski on behalf of the debtor. We're here

24 for your deposition today.

25 Do you understand that?

Page 108

1 Dondero - 5-28-2021
 2 A. Yes.
 3 Q. Okay. We've done this a few times,
 4 so I'm going to kind of cut to the chase; but I
 5 do want to remind you that we're going to be
 6 looking at a number of documents today.
 7 And because of the difficulty
 8 sometimes of doing this on a Zoom or by video,
 9 if, at any time, you believe you need to see
 10 other portions of the document, please let me
 11 know that. Okay?
 12 A. Sure.
 13 Q. Okay.
 14 MR. MORRIS: Can we put up the first
 15 exhibit, please?
 16 (Exhibit 1 introduced.)
 17 BY MR. MORRIS:
 18 Q. Okay. This is a document that's got
 19 a title, "Promissory Note." It's dated
 20 February 2, 2018, and the amount of the note is
 21 \$3,825,000.
 22 Do you see that?
 23 A. Yes.
 24 MR. MORRIS: Can we just go to the
 25 signature line, please?

Page 110

1 Dondero - 5-28-2021
 2 A. I -- I believe so. I don't have
 3 direct awareness, but I believe so.
 4 Q. Okay. And did you sign this
 5 promissory note in exchange for that cash that
 6 you believe you received?
 7 A. Yes.
 8 Q. Okay. Are you familiar with the
 9 term "demand note"?
 10 A. Yes.
 11 Q. Can you describe for me your
 12 understanding of what a demand note is?
 13 A. It's a note that's -- maturity is
 14 defined by the term "demand" versus a -- a
 15 stipulated date.
 16 Q. And if we look down to paragraph 2,
 17 at the time that you signed this document on
 18 February 2, 2018, did you understand, based on
 19 paragraph 2, that you were signing a demand
 20 note, as you've characterized it?
 21 A. Yes.
 22 Q. Okay.
 23 MR. MORRIS: Can we go back to the
 24 top of the document?
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 BY MR. MORRIS:
 3 Q. Is that your signature, sir?
 4 A. I believe that's my assistant on my
 5 behalf.
 6 Q. Did you authorize --
 7 (Audio distortion.)
 8 A. I'm sorry?
 9 BY MR. MORRIS:
 10 Q. I don't want to step on your words.
 11 Were you finished with your answer?
 12 MS. DEITSCH-PEREZ: Yeah. Can
 13 you -- yeah, can you ask it again?
 14 MR. MORRIS: Sure.
 15 BY MR. MORRIS:
 16 Q. Is that your signature, sir?
 17 A. Yes, for -- yes.
 18 MR. MORRIS: Can we go back to the
 19 top of the document?
 20 BY MR. MORRIS:
 21 Q. And was this document signed on or
 22 around February 2, 2018?
 23 A. Yes.
 24 Q. Did you receive \$3,825,000 from the
 25 debtor on or around February 2nd, 2018?

Page 111

1 Dondero - 5-28-2021
 2 Q. Is it fair to say that under this
 3 demand note, you promised to pay Highland
 4 Capital Management, L.P., the sum of
 5 \$3,825,000?
 6 A. Yes.
 7 Q. Okay. And at the time that you
 8 signed this document on February 2nd, 2018, did
 9 you intend to repay to Highland Capital
 10 Management, L.P., \$3,825,000 plus interest?
 11 A. Yes.
 12 Q. And at the time you signed this
 13 document, did you intend to repay the principal
 14 amount plus interest upon demand by HCMLP?
 15 A. Whatever was appropriate to pay,
 16 what hadn't been paid if it -- if it had --
 17 yeah, if it had -- whatever the terms are, the
 18 terms are.
 19 Q. Okay. Did you read the promissory
 20 note before you signed it?
 21 A. No.
 22 Q. Is there anything about the
 23 promissory note today that you don't
 24 understand?
 25 A. I haven't looked at it closely. I'm

Page 112

1 Dondero - 5-28-2021
 2 aware of it but – you know, but I'm not aware.
 3 I haven't looked at it closely.
 4 Q. Well, but you do know that the
 5 debtor has sued you to collect on this note,
 6 right?
 7 A. Yes.
 8 Q. Okay. And can you identify anything
 9 in this note today that you don't understand?
 10 MS. DEITSCH-PEREZ: Object to the
 11 form.
 12 A. Again, I don't want to make any
 13 legal interpretation or analysis of the
 14 contract.
 15 BY MR. MORRIS:
 16 Q. And I appreciate that.
 17 And to be clear, I'm not asking you
 18 for any legal opinion or any legal analysis.
 19 I'm asking for facts.
 20 As a factual matter, as a layperson,
 21 is there anything about this note today that
 22 you do not understand?
 23 MS. DEITSCH-PEREZ: Object, no
 24 foundation.
 25 A. And I can't say.

Page 114

1 Dondero - 5-28-2021
 2 foundation.
 3 A. Yeah, I believe largely at the time,
 4 yes.
 5 BY MR. MORRIS:
 6 Q. In fact, if we go to paragraph 8,
 7 there's – the last sentence is what's commonly
 8 referred to as an integration clause.
 9 Do you see that last sentence of
 10 paragraph 8?
 11 A. Yes.
 12 Q. And did you agree with the debtor
 13 that the terms and provisions of the paragraph
 14 control and supersede every other provision of
 15 all other agreements between the payee and the
 16 maker in conflict herewith?
 17 A. I see it. I mean, I read it. But
 18 what's – what's the question?
 19 Q. Withdrawn. It's okay. It speaks
 20 for itself.
 21 You were the CEO of Highland at the
 22 time that you signed the note, correct?
 23 A. Yes.
 24 Q. And you controlled Highland at that
 25 time; is that fair?

Page 113

1 Dondero - 5-28-2021
 2 BY MR. MORRIS:
 3 Q. Okay. You're not aware of anything;
 4 is that fair?
 5 MS. DEITSCH-PEREZ: Object, no
 6 foundation.
 7 A. No. I'm saying I can't give an
 8 opinion.
 9 BY MR. MORRIS:
 10 Q. All right. I'll try one more time a
 11 slightly different way.
 12 Can you identify any language in
 13 this promissory note that you, as the maker of
 14 the note and as a layperson, as a matter of
 15 fact, do not understand?
 16 MS. DEITSCH-PEREZ: Objection, no
 17 foundation.
 18 A. I – I don't have – I haven't
 19 reviewed it. I don't have a comment.
 20 BY MR. MORRIS:
 21 Q. At the time that you signed this,
 22 did you believe that this note reflected all of
 23 the terms and conditions with respect to the
 24 subject matter of the note?
 25 MS. DEITSCH-PEREZ: Object, no

Page 115

1 Dondero - 5-28-2021
 2 A. Yes.
 3 Q. And at the time that you signed the
 4 note, the Redeemer Committee had not yet
 5 obtained a judgment against Highland Capital
 6 Management or anybody else; is that – any
 7 other Highland entity; is that right?
 8 A. I – and I don't recall the – the
 9 timing –
 10 Q. Okay.
 11 A. – of their arbitration award or...
 12 Q. Let me ask you to just go back in
 13 time, February of 2018. Do you recall having
 14 any concern in February 2018 that you might
 15 lose control of Highland?
 16 A. No, I don't recall.
 17 Q. While you were the CEO, did
 18 Highland – withdrawn.
 19 I'm going to refer to Highland
 20 Capital Management, L.P., variously today as
 21 either the debtor, Highland, or HCMLP; is that
 22 fair?
 23 MS. DEITSCH-PEREZ: John, I think
 24 it's a little confusing if you do that. I
 25 mean, if you could refer to the

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1 Dondero - 5-28-2021
 2 post-bankruptcy entity as "the debtor" and,
 3 when you're talking about prebankruptcy,
 4 call it "Highland" or "HCM"?
 5 MR. MORRIS: Okay.
 6 MS. DEITSCH-PEREZ: I -- I think
 7 that would probably be clearer.
 8 MR. MORRIS: That's fair. I'll try
 9 and do just that. Thank you very much.
 10 BY MR. MORRIS:
 11 Q. While you were the CEO of HCMLP, did
 12 HCMLP, prepare, in the ordinary course of
 13 business, a document called a "Monthly
 14 Reporting Package"?
 15 A. I don't know -- I don't know the
 16 name -- I don't know that name in particular,
 17 but we did do monthly financials, I believe.
 18 Q. Okay. And did you personally review
 19 the monthly financials each month that they
 20 were prepared?
 21 A. No.
 22 Q. Do you know who was responsible for
 23 preparing the monthly financials?
 24 A. It would have been in accounting. I
 25 don't know who in accounting.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: I mean, do you
 3 mean the report specifically or Highland's
 4 financials generally?
 5 MR. MORRIS: The Monthly Operating
 6 Reports that we're talking about.
 7 And I would appreciate it, Deborah,
 8 if you have an objection, just say "Object
 9 to the form of the question"; and I'll do
 10 the best I can to -- to try to understand
 11 what you're saying, but I'd prefer no
 12 speaking objections.
 13 BY MR. MORRIS:
 14 Q. Do you recall ever speaking with
 15 anybody in accounting with respect to any
 16 Monthly Operating Report that they prepared?
 17 A. I don't recall.
 18 Q. Okay.
 19 MR. MORRIS: Can we put up Exhibit
 20 Number 2, please?
 21 (Exhibit 2 introduced.)
 22 BY MR. MORRIS:
 23 Q. Looking at the first page, sir, does
 24 this appear to be what we've been describing as
 25 a Monthly Operating Report for Highland Capital

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1 Dondero - 5-28-2021
 2 Q. Was Frank Waterhouse responsible for
 3 preparing the Monthly Operating Reports?
 4 A. He was our CFO. So everything,
 5 ultimately, in accounting reported up through
 6 him, but I don't know his involvement in that
 7 report.
 8 Q. Can you identify any person who was
 9 responsible for preparing the Monthly Operating
 10 Reports for HCMLP, while you were the CEO?
 11 A. No.
 12 Q. Do you know what the Monthly
 13 Operating Reports were used for?
 14 Withdrawn.
 15 What was the purpose of preparing
 16 Monthly Operating Reports, if you know?
 17 A. I don't know.
 18 Q. Were they delivered to you each
 19 month, even if you didn't read them?
 20 A. I don't believe so. Not physically,
 21 that I can remember. If there was an email, I
 22 don't remember.
 23 Q. Did you ever discuss any of the
 24 Monthly Operating Reports with Mr. Waterhouse?
 25 A. I can't -- I can't recall.

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1 Dondero - 5-28-2021
 2 Management?
 3 A. It says "Operating Results." I -- I
 4 have no recollection of seeing this cover sheet
 5 before.
 6 Q. Okay.
 7 MR. MORRIS: Can we go to the second
 8 page, please?
 9 Stop right there.
 10 BY MR. MORRIS:
 11 Q. This is the second page of the
 12 Operating Results for February 2018, and it's
 13 headed "Significant Items Impacting HCMLP's
 14 Balance Sheet."
 15 Do you see that?
 16 A. Yes.
 17 Q. Do you know whether the accounting
 18 department was charged with the responsibility
 19 of identifying on a monthly basis significant
 20 items that would impact Highland's balance
 21 sheet?
 22 A. I have no particular awareness.
 23 Q. Okay. Do you see at the bottom
 24 under the title "Other," it's \$3.8 million and
 25 it's referred to as "Partner Loan"?

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1 Dondero - 5-28-2021

2 A. Yes.

3 Q. Do you have an understanding that

4 that 3.8 million-dollar partner loan refers to

5 what we just looked at as Exhibit 1, the

6 promissory note?

7 MS. DEITSCH-PEREZ: Object, no

8 foundation.

9 A. I have – I have no particular

10 awareness other than the amounts are similar.

11 BY MR. MORRIS:

12 Q. And – and do you know whether

13 Highland recorded the promissory note as an

14 asset on its balance sheet as of February 2018?

15 A. I – I don't know.

16 Q. So, you signed a promissory note for

17 \$3.8 million in February 2018; and as the CEO,

18 you don't know if Highland carried that

19 promissory note on its balance sheet. Do I

20 have that right?

21 A. I'm saying I don't have particular

22 knowledge. I – I am a CPA and GAAP accounting

23 would suggest that it was, but I don't have –

24 I don't have particular knowledge on how it was

25 accounted for.

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1 Dondero - 5-28-2021

2 Q. And did you, in fact, sign this

3 promissory note in exchange for that

4 \$2.5 million?

5 A. Yes.

6 MR. MORRIS: Can we go down to

7 paragraph 2, please?

8 (Scrolling.)

9 BY MR. MORRIS:

10 Q. Looking at paragraph 2, would you

11 characterize this as a demand note, using the

12 understanding that you described earlier today?

13 A. Yes.

14 Q. And – and this note, like the

15 other, because they're demand notes, there's no

16 conditions for – for the demand, is that

17 right, at least as drafted.

18 Withdrawn. That wasn't a great

19 question.

20 Were these unconditional demand

21 notes, these two documents that we've

22 looked at?

23 A. I – I don't want to make a legal

24 interpretation.

25 Q. I'm just asking for your

Page 121

1 Dondero - 5-28-2021

2 Q. Okay. Later in the year, you signed

3 two more promissory notes in favor of Highland;

4 is that right?

5 A. I – I believe so. Yeah.

6 MR. MORRIS: Can you put up

7 Exhibit 3, please?

8 (Exhibit 3 introduced.)

9 BY MR. MORRIS:

10 Q. And can we go to the signature line?

11 (Scrolling.)

12 BY MR. MORRIS:

13 Q. Is that your signature, sir?

14 A. Yes.

15 MR. MORRIS: Go to the top of the

16 page.

17 BY MR. MORRIS:

18 Q. Did you sign a promissory note on or

19 about August 1st, 2018, in the amount of

20 \$2.5 million in favor of Highland?

21 A. Yes.

22 Q. Did you receive from Highland

23 Capital Management, L.P., \$2.5 million on or

24 about August 1st, 2018?

25 A. I believe so.

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1 Dondero - 5-28-2021

2 understanding as the person who signed the

3 note. At the time you signed it, at that time,

4 did you understand that there were any

5 conditions placed on Highland's ability to make

6 a demand?

7 A. I don't know.

8 Q. Okay. Did you understand that under

9 these demand notes, that if you defaulted, all

10 amounts that were due and payable would

11 accelerate?

12 MS. DEITSCH-PEREZ: Object to the

13 form.

14 A. I don't know.

15 BY MR. MORRIS:

16 Q. Did you read this – did you read

17 this promissory note before you signed it?

18 A. No.

19 Q. Do you know whose idea it was to

20 give you the principal amount of these notes

21 and for you to execute the promissory notes in

22 exchange?

23 A. I – again, I think it's proper

24 accounting consistent with what we've done

25 with – we've done historically – or Highland

Page 124

1 Dondero - 5-28-2021
 2 did historically and what Highland did
 3 historically for other employees.
 4 Q. Okay. I'm not asking about that.
 5 I'm asking just about you and the two notes
 6 that we've looked at so far: Who made the
 7 decision at the respective moments in time to
 8 transfer to you the principal amount of the
 9 notes and for you to execute the notes?
 10 A. I believe it would have come from
 11 accounting.
 12 Q. Who decided – who decided the
 13 principal amount of the note?
 14 A. I don't know. It would – I don't
 15 know.
 16 Q. Did you ask to borrow money?
 17 Did you ask the folks in accounting
 18 for a loan from Highland in the principal
 19 amount of the notes and request that they
 20 document it accordingly?
 21 A. No.
 22 Q. Who was your assistant at this time?
 23 A. My accounting assistant at this time
 24 was Melissa Schroth.
 25 Q. And was she authorized to sign these

Page 126

1 Dondero - 5-28-2021
 2 foundation.
 3 A. I – I don't want to make a legal
 4 interpretation on a legal document.
 5 BY MR. MORRIS:
 6 Q. I appreciate that, but I have no
 7 ability to ask any follow-up questions. So let
 8 me ask it just a different way: Is there
 9 anything about this document that you don't
 10 understand today?
 11 MS. DEITSCH-PEREZ: Object, no
 12 foundation.
 13 BY MR. MORRIS:
 14 Q. You can answer.
 15 A. I don't know.
 16 Q. Okay. Do you understand that if
 17 there was something that – that you did not
 18 understand, you have an obligation to tell me
 19 that right now?
 20 MS. DEITSCH-PEREZ: Object, no
 21 foundation.
 22 A. I – I – the answer is the same. I
 23 don't know.
 24 MR. MORRIS: Can we go to Exhibit
 25 Number 4, please?

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1 Dondero - 5-28-2021
 2 notes on your behalf?
 3 A. I – that – sometimes she signs
 4 stuff. I don't know on this. I'm – I'm not
 5 denying that it's a bona fide – signed by me.
 6 Or if it wasn't signed by me, it was –
 7 somebody who was authorized signed it on my
 8 behalf.
 9 Q. Okay. I appreciate that. Thank
 10 you.
 11 Is there anything about –
 12 withdrawn.
 13 Was there anything about this
 14 promissory note that you didn't understand at
 15 the time that either you signed it or it was
 16 signed on your behalf?
 17 MS. DEITSCH-PEREZ: Object, no
 18 foundation.
 19 A. Again, I didn't evaluate it
 20 carefully, and I didn't actually even read it.
 21 BY MR. MORRIS:
 22 Q. Okay. As you sit here today, can
 23 you identify anything in this document that you
 24 do not understand?
 25 MS. DEITSCH-PEREZ: Object, no

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1 Dondero - 5-28-2021
 2 (Exhibit 4 introduced.)
 3 MR. MORRIS: Can we go to the
 4 signature line when you get there?
 5 BY MR. MORRIS:
 6 Q. Is that your signature, sir?
 7 A. Yes.
 8 Q. And did you sign this document or –
 9 or – let me ask two questions first. Did you
 10 personally sign this document?
 11 A. And again, it was either me or
 12 someone with my approval, but that doesn't look
 13 like my typical signature, but it's close.
 14 Q. Okay. And whoever signed it had the
 15 authority from you to sign on your behalf, is
 16 that fair?
 17 A. Yes.
 18 Q. Okay.
 19 MR. MORRIS: Can we go to the top of
 20 the page, please?
 21 BY MR. MORRIS:
 22 Q. And did you or somebody acting on
 23 your behalf sign this promissory note on
 24 August 13, 2018, in the amount of \$2.5 million?
 25 A. Yes.

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1 Dondero - 5-28-2021
 2 MR. MORRIS: Can we go to
 3 paragraph 2, please?
 4 BY MR. MORRIS:
 5 Q. Looking at paragraph 2 and the term
 6 contained therein, would you agree that this is
 7 a demand note, using the definition that you
 8 supplied earlier today?
 9 A. Yes.
 10 Q. At the time that this note was
 11 signed on your behalf, did you intend to comply
 12 with the terms of this note?
 13 A. Yes.
 14 Q. At the time that this note was
 15 signed on your behalf, did you intend to pay
 16 all unpaid principal and accrued, but unpaid,
 17 interest upon demand of the payee?
 18 A. Let me say I – I expected to honor
 19 the agreement. I don't know if I can answer
 20 that with regard to that one term.
 21 Q. Well, I do just want to make sure
 22 that – withdrawn.
 23 You understood at the time you
 24 signed this document, or it was signed on your
 25 behalf, that it was a demand note, correct?

Page 130

1 Dondero - 5-28-2021
 2 by you or signed by someone you authorized to
 3 sign, what did you understand the payment terms
 4 to be?
 5 A. I – I didn't. I didn't have an
 6 understanding at the time.
 7 Q. So – but – but you would agree
 8 that your intention was to comply with the
 9 terms of the note; is that fair?
 10 A. In aggregate, yes.
 11 Q. Okay.
 12 MR. MORRIS: Go to Exhibit 5,
 13 please.
 14 (Exhibit 5 introduced.)
 15 BY MR. MORRIS:
 16 Q. Is it your practice to sign
 17 documents or to have people sign documents on
 18 your behalf that you haven't read?
 19 A. Yes.
 20 Q. This is a document that's entitled
 21 "Operating Results" for August 2018. Do you
 22 see that?
 23 A. Yes.
 24 MR. MORRIS: And if we could just go
 25 to the second page.

Page 129

1 Dondero - 5-28-2021
 2 A. That it was structured – no. I
 3 think what I've testified or tried to testify
 4 to is that they are demand notes or they're
 5 written as demand notes. I didn't read them or
 6 pay attention at the time to the structure of
 7 the note.
 8 Q. Okay. And as demand notes, you
 9 understood that any unpaid principal and
 10 interest would be due upon demand, correct?
 11 A. Again, I don't want to make – I
 12 don't want to make – I don't want to affirm
 13 that statement. I would say I don't know
 14 because I don't want to – I don't know the
 15 rest of the context of the rest of the note and
 16 how it all interplays.
 17 Q. All right. Well, I'm happy to –
 18 to – it's a very short document, so we can
 19 look at it for as long as you want, but I
 20 really need to know what – what you, as the
 21 maker, understood when you signed the note. So
 22 I'm going to ask a very simple question, and I
 23 encourage you to – to ask to see whatever
 24 portions of the document you want, okay?
 25 When these three notes were signed

Page 131

1 Dondero - 5-28-2021
 2 BY MR. MORRIS:
 3 Q. Do you see under Significant Items
 4 Impacting Highland's bank – balance sheet for
 5 August 2018 at the bottom, there's a reference
 6 to \$5 million in "partner loan." Do you see
 7 that?
 8 A. Yes.
 9 Q. Do you have an understanding as to
 10 whether or not that refers to the two
 11 2.5 million-dollar notes that we just looked at
 12 that were signed in August 2018?
 13 A. I don't know.
 14 Q. Do you have any recollection at
 15 all or – withdrawn.
 16 Were you personally referred to as a
 17 partner of Highland in August 2018?
 18 A. I believe so.
 19 Q. Are you aware of any partner loans
 20 that were made by Highland in August 2018 other
 21 than the two loans that we just looked at?
 22 A. I don't know.
 23 Q. You're not aware of any; is that
 24 fair?
 25 MS. DEITSCH-PEREZ: Object, no

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 2 foundation.
 3 A. I don't know.
 4 BY MR. MORRIS:
 5 Q. There came a time when the debtor
 6 made demand on these three notes, right?
 7 A. I don't know. I believe – I don't
 8 know specifically, but I believe so.
 9 MR. MORRIS: Can we put up
 10 Exhibit 6, please?
 11 (Exhibit 6 introduced.)
 12 BY MR. MORRIS:
 13 Q. Do you see this is a – it's a
 14 letter dated December 3rd, and it's addressed
 15 to you.
 16 And if we scroll down a little bit,
 17 it's signed by Mr. Seery as the CEO and CRO of
 18 Highland Capital Management.
 19 Do you see that?
 20 A. Yes.
 21 Q. Do you recall on or around
 22 December 3rd, 2020, the debtor made a demand
 23 for all outstanding principal and interest due
 24 under the three notes that we just looked at?
 25 A. I – I see the letter. I don't have

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1 Dondero - 5-28-2021
 2 Q. Did you make any payment to the
 3 debtor in response to that demand?
 4 A. No.
 5 Q. Did you or anybody acting on your
 6 behalf respond to the debtor's demand in any
 7 way?
 8 MS. DEITSCH-PEREZ: Object to the
 9 form.
 10 BY MR. MORRIS:
 11 Q. Withdrawn. That's fair.
 12 Let me ask a different question.
 13 Did you or anybody acting on your
 14 behalf respond to the debtor's demand at any
 15 time prior to the commencement of this
 16 adversary proceeding?
 17 MS. DEITSCH-PEREZ: Object to the
 18 form.
 19 A. Can you repeat it one more time?
 20 BY MR. MORRIS:
 21 Q. Sure. Did you or anybody acting on
 22 your behalf respond to the debtor's demand for
 23 payment of all unpaid principal and interest at
 24 any time prior to the commencement of this
 25 lawsuit?

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 2 a recollection.
 3 Q. All right. Do you understand that
 4 in December 2020, the debtor made a demand for
 5 payment of all unpaid principal and interest
 6 under the three notes that we just looked at,
 7 even if you don't remember this particular
 8 letter?
 9 A. I'm sorry. What was – yeah, I
 10 accept the letter, and I'll accept that it was
 11 delivered.
 12 What – what's your question,
 13 please?
 14 Q. I'm trying to just get – get your
 15 understanding.
 16 And I think you testified that you
 17 don't recall seeing this letter. Do I have
 18 that right?
 19 A. That's correct.
 20 Q. Okay. So, putting the letter to the
 21 side, did you become aware in December 2020
 22 that the debtor had demanded that you pay all
 23 unpaid principal and interest due under the
 24 three promissory notes that we just looked at?
 25 A. Again, just generally.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. I want – I want to answer that
 5 question as – as follows: I'm not saying on
 6 my behalf, but I know there was a lot of
 7 conversations with lawyers and business people
 8 around the notes and their shared services and
 9 the split and the overpayments to Highland and
 10 – trying to reach some amicable resolution of
 11 shared services – in fact, the entire
 12 estate – but I don't – I don't – I don't
 13 recall specifically or – what lawyers or what
 14 business people were saying what to the debtor,
 15 but I – I know there were a lot of
 16 conversations that were going on.
 17 BY MR. MORRIS:
 18 Q. Can you identify any aspect of any
 19 of the conversations you just described that
 20 pertained to the debtor's demand for payment of
 21 all unpaid principal and interest on the three
 22 notes?
 23 A. Not – not specifically.
 24 Q. Okay. There came a time when an
 25 answer to the debtor's complaint was filed on

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1 Dondero - 5-28-2021
 2 your behalf.
 3 Do you remember that?
 4 A. No, but I'm willing to be refreshed.
 5 Q. Okay.
 6 MR. MORRIS: Can we please put up
 7 Exhibit 7?
 8 (Exhibit 7 introduced.)
 9 MR. MORRIS: And if we could just
 10 scroll down to the title.
 11 BY MR. MORRIS:
 12 Q. Do you see that this document is
 13 called "Defendant James Dondero's Original
 14 Answer"?
 15 A. Yes.
 16 Q. And if we scroll back to the top of
 17 the document, do you see that it was filed on
 18 the docket on March 16, 2021?
 19 A. Yes.
 20 Q. Did you personally read this
 21 document before it was filed?
 22 A. No.
 23 Q. Did you have an understanding as to
 24 the contents of the document before it was
 25 filed?

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1 Dondero - 5-28-2021
 2 THE WITNESS: Yep, keep going.
 3 (Scrolling.)
 4 THE WITNESS: Hold on. Could you go
 5 back a little bit, please? It just goes --
 6 stop right there.
 7 A. I do remember paragraph 5. I think
 8 that was recently tried last week or so, but I
 9 think that was always the -- always the way it
 10 was described to me by lawyers, was that these
 11 notes shouldn't be in her Court.
 12 MS. DEITSCH-PEREZ: Okay. And I'll
 13 just -- I'll just caution the witness to
 14 not disclose communications with counsel,
 15 but it's okay if something catches your eye
 16 and you, at least, remember that part, say,
 17 "Oh, yeah, I remember that one," but
 18 without going into details as to any
 19 communications with your lawyers.
 20 MR. MORRIS: And -- and that's fine.
 21 That's fine. I'm certainly not looking for
 22 that.
 23 BY MR. MORRIS:
 24 Q. The question is really simple: Have
 25 you ever seen this document before and --

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1 Dondero - 5-28-2021
 2 A. No.
 3 Q. Did you authorize Bonds Ellis to
 4 file this document on your behalf?
 5 A. Not specifically that I remember.
 6 Q. Did you know on or around March 16,
 7 2021, that Bonds Ellis had filed "Defendant
 8 James Dondero's Original Answer" in this
 9 adversary proceeding?
 10 A. Not specifically. There's a lot
 11 going on.
 12 Q. As you sit here right now--and,
 13 again, happy to page through the document--can
 14 you tell me whether you have ever read
 15 Defendant James Dondero's Original Answer?
 16 A. Not that I recall.
 17 Q. So, as of -- and that's true as of
 18 today; is that fair?
 19 A. Can we scroll through this, please?
 20 Q. Yes. Just let us know if you want
 21 us to slow down or speed up.
 22 MS. DEITSCH-PEREZ: Yeah, just go
 23 slow enough so he could sort of eyeball
 24 each page.
 25 MR. MORRIS: You bet.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: John, I think he
 3 said he needs to scroll through it to see
 4 if anything --
 5 MR. MORRIS: I understand.
 6 MS. DEITSCH-PEREZ: -- triggers a
 7 recollection. He just said he's looking at
 8 5, yeah, that looks familiar. If you want
 9 to keep going, we could find out if there
 10 are any others that -- that look familiar
 11 to him.
 12 THE WITNESS: Let's keep going.
 13 (Scrolling.)
 14 MS. DEITSCH-PEREZ: You'll agree
 15 that most answers are not particularly
 16 memorable when they say things like --
 17 (Simultaneous conversation.)
 18 MR. MORRIS: Please stop. Please
 19 stop. Please stop talking. Please stop
 20 talking. It's inappropriate.
 21 MS. DEITSCH-PEREZ: I -- I know.
 22 It's your deposition, and you could do all
 23 this stuff, but --
 24 (Simultaneous conversation.)
 25 MR. MORRIS: Please stop talking.

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1 Dondero - 5-28-2021
 2 Please stop talking.
 3 MS. DEITSCH-PEREZ: I hear you.
 4 THE WITNESS: Keep -- keep going.
 5 (Scrolling.)
 6 THE WITNESS: Okay. Keep going.
 7 (Scrolling.)
 8 THE WITNESS: It looks to me like --
 9 MS. DEITSCH-PEREZ: Keep -- let --
 10 let him go through the whole thing.
 11 THE WITNESS: Sure. Keep going.
 12 (Scrolling.)
 13 THE WITNESS: Okay. Is that it?
 14 MR. MORRIS: Yes.
 15 THE WITNESS: Okay.
 16 BY MR. MORRIS:
 17 Q. Do you recall ever seeing this
 18 document before, sir?
 19 A. The -- the substance of it, again,
 20 some of it I -- I remember, and the -- there --
 21 it strikes me as a legal argument and defenses
 22 regarding the payment of the notes, and I do
 23 remember a lot of conversation regarding it
 24 being -- it should be outside -- it should be
 25 in a different court, and it should be a jury

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1 Dondero - 5-28-2021
 2 A. Yes.
 3 Q. Okay. Have I read that accurately?
 4 A. Yes.
 5 Q. Did the plaintiff ever agree that
 6 plaintiff would not collect on the notes?
 7 A. Yes.
 8 Q. You subsequently amended this
 9 defense; isn't that right?
 10 A. I believe so.
 11 Q. And do you understand that you
 12 amended it to add a few words relating to
 13 conditions subsequent?
 14 A. I -- I -- other than for
 15 clarification and completeness, the -- it was
 16 amended. I don't have specific knowledge of
 17 what was amended.
 18 Q. Okay. When did the plaintiff agree
 19 that the plaintiff would not collect on the
 20 notes?
 21 A. Boy, that was early on in the case.
 22 Every proposal, every POT plan, every
 23 settlement discussion never included value for
 24 notes.
 25 Q. All right. I'm going to ask the

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1 Dondero - 5-28-2021
 2 trial. And those are two main points in here,
 3 but it seems like there are a bunch of other
 4 defenses listed.
 5 Q. Okay.
 6 A. And I have -- and I have an
 7 awareness of it, but I'm not a lawyer.
 8 Q. I appreciate that you're not a
 9 lawyer; but looking at the document, does that
 10 refresh your recollection that you read and
 11 reviewed this document before it was filed on
 12 your behalf?
 13 A. I have -- I have an awareness of it,
 14 but I wouldn't -- I wouldn't have been deeply
 15 involved in its drafting or detailed approval.
 16 MR. MORRIS: Can we go to page 6 of
 17 8, please?
 18 BY MR. MORRIS:
 19 Q. And directing your attention to
 20 paragraph 40, do you see it says, as the first
 21 affirmative defense, quote, "Defendant asserts
 22 that plaintiff's claims should be barred
 23 because it was previously agreed by plaintiff
 24 that plaintiff would not collect on the notes."
 25 Do you see that?

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1 Dondero - 5-28-2021
 2 question again: When did the plaintiff agree
 3 that it would not collect on the notes?
 4 MS. DEITSCH-PEREZ: Are you talking
 5 about the subsequent agreements in the next
 6 pleading?
 7 MR. MORRIS: I'm asking for an
 8 answer as to when the agreement referred to
 9 in paragraph 40 was entered into.
 10 A. First quarter of -- first quarter of
 11 2020.
 12 BY MR. MORRIS:
 13 Q. So it was after the petition date?
 14 MS. DEITSCH-PEREZ: Are you asking
 15 about the 2018 notes?
 16 MR. MORRIS: Yes, those are defined
 17 to be "the notes."
 18 BY MR. MORRIS:
 19 Q. So -- so did -- this is your
 20 defense.
 21 Is it your position, Mr. Dondero,
 22 that in the first quarter of 2020, the
 23 plaintiff agreed that it would not collect on
 24 the notes?
 25 A. I -- I -- I don't -- I want to leave

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1 Dondero - 5-28-2021
 2 my testimony as what I just said a minute ago.
 3 The notes were never part of any POT plan or
 4 suggested POT plan or suggested grand bargain
 5 or suggested as having any value starting in
 6 the first quarter of '20 – or most of the
 7 year, I believe, until the -- towards the end
 8 of the year.
 9 Q. All right. Was there ever an
 10 agreement between you and the plaintiff that
 11 the plaintiff would not collect on the notes if
 12 there was no grand bargain or no POT plan?
 13 A. Yeah, the -- I'm sorry. Repeat
 14 again.
 15 Q. Who entered the agreement on behalf
 16 of the debtor that the plaintiff would not
 17 collect on the notes?
 18 A. (Indiscernible speech.)
 19 Agreement on -- you know, the --
 20 the -- you know the -- I think I'm looking at
 21 this question from a perspective of the
 22 negotiation, you know, at that time and not
 23 including the subsequent conditions that were
 24 overlaid on the notes, I guess. So I guess
 25 it's a combination of both.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: It is not. You
 3 agreed --
 4 MR. MORRIS: Please let me finish.
 5 Please let me finish.
 6 He has described the conversations
 7 as taking place in 2020. I should be
 8 referring to the debtor. He is
 9 describing --
 10 MS. DEITSCH-PEREZ: Right.
 11 MR. MORRIS: -- the context --
 12 MS. DEITSCH-PEREZ: But if you want
 13 to know about something that happened
 14 before bankruptcy, ask about Highland.
 15 MR. MORRIS: But I'm not. I
 16 don't -- please stop interrupting.
 17 MS. DEITSCH-PEREZ: It's your
 18 deposition. If you want a muddy record, be
 19 my guest.
 20 MR. MORRIS: I would really
 21 appreciate it. I think I know what I'm
 22 doing.
 23 BY MR. MORRIS:
 24 Q. Mr. Dondero, who, on behalf of the
 25 debtor, during these conversations about a

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1 Dondero - 5-28-2021
 2 Q. I'm asking you to identify the
 3 person who acted on behalf of the debtor in
 4 reaching the agreement with you that the
 5 plaintiff would not collect on the notes. Who
 6 did that?
 7 MS. DEITSCH-PEREZ: John, I think
 8 the problem is you're referring to the
 9 debtor, so he's looking at post-bankruptcy.
 10 You might ask it two questions, one --
 11 MR. MORRIS: No. Please stop.
 12 Please stop. Please stop.
 13 (Simultaneous conversation.)
 14 MS. DEITSCH-PEREZ: You agreed to
 15 that condition. You agreed to distinguish
 16 between the debtor --
 17 (Simultaneous conversation.)
 18 MR. MORRIS: Deborah --
 19 MS. DEITSCH-PEREZ. -- bankruptcy --
 20 MR. MORRIS: Deborah --
 21 (Simultaneous conversation.)
 22 THE REPORTER: I can't -- I can't
 23 write two people at the same time.
 24 MR. MORRIS: This is so improper.
 25 He has --

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1 Dondero - 5-28-2021
 2 grand bargain and a POT plan told you or
 3 entered into the agreement that the plaintiff
 4 would not collect on the notes?
 5 A. I -- I -- during the bankruptcy,
 6 we're talking about, right?
 7 Q. I'm just following up on your
 8 statement that the conversation -- that the
 9 agreement was entered into in the first quarter
 10 of 2020.
 11 Do I have that right, or is that
 12 wrong?
 13 A. Well --
 14 Q. Let's start again. Let's start
 15 again.
 16 This affirmative defense refers to
 17 an agreement. Do you see that?
 18 A. Yes.
 19 Q. This is your affirmative defense;
 20 isn't that correct?
 21 A. Yes.
 22 Q. And according to this affirmative
 23 defense, the agreement was that the plaintiff
 24 would not collect on the notes. Do I have that
 25 right?

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1 Dondero - 5-28-2021
 2 A. Yes.
 3 Q. Let's start with: When was that
 4 agreement entered into?
 5 A. Okay. I'm going to have to parse,
 6 and I'm going to have to answer your question
 7 as accurately as I can.
 8 The subsequent conditions for
 9 forgiveness of the notes were established
 10 during a comp period in early 2019 for these
 11 notes that were drafted in '18.
 12 And the agreement was reached
 13 with – I believe it's a majority of, whatever,
 14 the Class A holders in the fourth amended
 15 Highland Capital partnership – partnership
 16 agreement. And that's what set up the
 17 subsequent conditions and the ability for the
 18 loans to be forgiven.
 19 When you get into bankruptcy,
 20 whether it was Seery, the independent board, or
 21 whoever, no one ever put any value nor was it
 22 ever included in any – were the notes included
 23 in any settlement discussions, period.
 24 Q. All right. So, it's your testimony
 25 that the debtor in settlement negotiations

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 2 offer – I think it was even titled that – I
 3 think I threw more money than everybody
 4 deserved or was entitled to, to try and resolve
 5 it. And implicitly, there was – because it
 6 was more than everybody was entitled to, I
 7 think implicitly it included value for the
 8 notes.
 9 Q. And is it your testimony that at no
 10 time prior to the delivery of the demand letter
 11 did the debtor ever make an offer to you or –
 12 of any kind that included any repayment of any
 13 principal or interest due under the three
 14 notes?
 15 A. I'm willing to be refreshed, but not
 16 that I recall.
 17 Q. Okay. And is it your testimony that
 18 anybody acting on behalf of the debtor ever
 19 agreed not to collect on the notes?
 20 A. I'm sorry. Repeat that one more
 21 time, just –
 22 Q. Is it your testimony – withdrawn.
 23 Did anybody acting on behalf of the
 24 debtor ever agree with you that it would not
 25 collect on the notes, irrespective of whether

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1 Dondero - 5-28-2021
 2 never, ever, ever asked for or demanded the
 3 repayment of any unpaid principal or interest
 4 under these three notes?
 5 That's your sworn testimony?
 6 A. No.
 7 Q. So how did I get that wrong, then?
 8 A. Well, a few minutes ago we went over
 9 a letter from the debtor making a demand, but
 10 that was, I believe, this year or – yeah, I
 11 believe that was this year or the end of '20.
 12 What I'm saying is through '20, the
 13 full year of '20 when we were trying to work on
 14 a POT plan or global settlement before Seery
 15 betrayed the estate, we were – we never –
 16 there was never value assigned to the notes.
 17 Q. And you never offered to make any
 18 payment of any kind, principal or interest, on
 19 any of the notes in connection with any
 20 proposal you ever made as part of the grand
 21 bargain or POT plan; is that right?
 22 A. I think – I believe on the – not
 23 through 2020. I'll say that.
 24 By the time 2021 came along, on the
 25 eve of trial when I sent over a capitulation

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1 Dondero - 5-28-2021
 2 there was a settlement?
 3 MS. DEITSCH-PEREZ: Object to form.
 4 A. Yeah. Again, that was my
 5 understanding through 2020.
 6 BY MR. MORRIS:
 7 Q. Do you have –
 8 THE WITNESS: Let's – let's –
 9 before the next question, let's take a
 10 ten-minute break, ten-minute bathroom
 11 break, please.
 12 MR. MORRIS: No problem.
 13 MS. DEITSCH-PEREZ: Okay. We've
 14 been going an hour, so we'll come back
 15 at – 10:30, come back at 10:40?
 16 MR. MORRIS: That's fine. Thank
 17 you.
 18 (Recess held.)
 19 BY MR. MORRIS:
 20 Q. Is the agreement that you're
 21 referring to and that's referred to in
 22 paragraph 40, is that reflected in any document
 23 that you're aware of?
 24 A. Not that I'm aware of.
 25 Q. And I believe you mentioned – and

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1 Dondero - 5-28-2021
 2 we'll talk about this more later, but the part
 3 about the subsequent conditions or the
 4 conditions subsequent, that was the agreement
 5 that was entered into, did you say the – in
 6 part – as part of a compensation committee
 7 meeting?
 8 A. As part of our compensation process
 9 in – early in 2019.
 10 Q. Okay. And when you say "early
 11 2019," can you – do you recall what month?
 12 A. In January/February.
 13 Q. So, it's your testimony that in
 14 January or February 2019, you and the debtor
 15 reached the agreement that's referred to in
 16 paragraph 40 as subsequently amended by your
 17 amended answer; is that right?
 18 MS. DEITSCH-PEREZ: Object to the
 19 form.
 20 John, I thought you were going to
 21 agree to call Highland Highland –
 22 MR. MORRIS: That's fine. That's
 23 fine.
 24 (Simultaneous conversation.)
 25 MS. DEITSCH-PEREZ: -- thereafter.

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1 Dondero - 5-28-2021
 2 A. They were amended – they were
 3 amended – they were amended verbally.
 4 Q. Okay. And did that verbal agreement
 5 take place in January or February 2019?
 6 A. Yes.
 7 Q. Was there any verbal agreement
 8 related to the notes that occurred other than
 9 the one you're referring to in January or
 10 February 2019?
 11 A. Well, I gave my testimony during
 12 bankruptcy in 2020, the substance of all
 13 negotiations never assigned value to the – the
 14 notes.
 15 Q. But you never reached an agreement
 16 with the debtor on – on any settlement that
 17 would include either payment for or forgiveness
 18 of the notes; is that fair?
 19 You never reached an agreement?
 20 A. Not in writing, but I believe we
 21 were operating with an understanding that
 22 the – weren't likely to have value to the
 23 estate.
 24 MR. MORRIS: Okay. I move to
 25 strike, and I'll ask the question again.

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1 Dondero - 5-28-2021
 2 MR. MORRIS: That's fine. So, let
 3 me rephrase the question.
 4 BY MR. MORRIS:
 5 Q. I just want to make sure that I have
 6 this right, Mr. Dondero. It's your
 7 recollection that in January or February of
 8 2019, you reached an agreement with Highland
 9 that's reflected in paragraph 40 as
 10 subsequently amended to include the phrase
 11 "conditions subsequent." Do I have that right?
 12 A. I gave my testimony. I don't know
 13 if – I don't want to opine on the legal
 14 document and whether the legal document
 15 captures it there or somewhere else, but my –
 16 my recollection regarding pre-bankruptcy and
 17 post-bankruptcy is as I – as I stated already.
 18 Q. Let me – let me try this a
 19 different way.
 20 We looked at the three promissory
 21 notes. Were those promissory notes ever
 22 amended, to the best of your knowledge?
 23 A. No, not that – I mean, not – not
 24 in writing.
 25 Q. Okay.

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1 Dondero - 5-28-2021
 2 BY MR. MORRIS:
 3 Q. Do you have any agreement with the
 4 debtor – agreement with the debtor with
 5 respect to any of the three notes?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. I believe the debtor in bankruptcy
 9 inherits that subsequent condition agreements
 10 from the first quarter of 2019; and I believe
 11 in 2020, the debtor operated and participated
 12 and acted in a way all negotiations that
 13 suggested the notes had – were unlikely to
 14 have any value to the estate.
 15 MR. MORRIS: Okay. I move to
 16 strike.
 17 BY MR. MORRIS:
 18 Q. And I'd ask you to please listen
 19 carefully to my question and only answer the
 20 question that's asked.
 21 Is there any agreement that pertains
 22 to the notes other than –
 23 MS. DEITSCH-PEREZ: Objection,
 24 asked –
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 Q. – with –
 3 A. Yeah, I'm going to stick with my
 4 same answer that I've given twice.
 5 Q. I'm actually – I'm actually asking
 6 a different question; and if you would let me
 7 finish, this would go a lot more smoothly.
 8 Is there any agreement, written or
 9 verbal, between you and the debtor concerning
 10 the notes other than the verbal agreement that
 11 you contend was entered into in January and
 12 February 2019?
 13 I don't want to know about
 14 operations or offers or settlement discussions.
 15 I want to know about agreements: Is there any
 16 agreement pertaining to the notes other than
 17 the verbal agreement entered into in January or
 18 February 2019?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. Yes.
 22 BY MR. MORRIS:
 23 Q. What other agreement exists?
 24 A. The agreement between, I guess, me
 25 and to the extent other related parties that

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 2 (Exhibit 8 introduced.)
 3 BY MR. MORRIS:
 4 Q. Did you –
 5 MR. MORRIS: If we could scroll down
 6 a little bit.
 7 BY MR. MORRIS:
 8 Q. Are you aware that the debtor served
 9 discovery in connection with this action?
 10 A. Not specifically.
 11 Q. Do you see that these are your
 12 objections and responses to the debtor's
 13 requests for admission?
 14 A. Yes.
 15 Q. Have you ever seen this document
 16 before?
 17 And we can scroll down, if you'd
 18 like.
 19 MS. DEITSCH-PEREZ: Scroll through
 20 it, please.
 21 THE WITNESS: Yeah, let's scroll
 22 through it.
 23 (Scrolling.)
 24 THE WITNESS: Can you keep going,
 25 please?

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1 Dondero - 5-28-2021
 2 had notes with the debtor, beginning in the
 3 first quarter after the bankruptcy, that the
 4 notes were unlikely to have any value to the
 5 estate or have any value in settlement.
 6 Q. Okay. I don't want to know about
 7 value. I want to know if there is an agreement
 8 not to collect.
 9 So let me try and answer – ask the
 10 question differently.
 11 Other than the agreement that you
 12 assert was entered into in January or
 13 February 2019, did anybody acting on behalf of
 14 Highland or the debtor enter into any other
 15 agreement pursuant to which the debtor agreed
 16 not to collect on the notes?
 17 A. I'm – I'm going – same answer:
 18 Implicitly, yes.
 19 Q. Okay. Is that – is that implicit
 20 agreement written down anywhere?
 21 You know what? I'm going to move
 22 on, Mr. Dondero, and I look forward to the jury
 23 trial.
 24 MR. MORRIS: Can we put up the next
 25 exhibit, Number 8?

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1 Dondero - 5-28-2021
 2 MR. MORRIS: That's the end.
 3 THE WITNESS: Okay.
 4 BY MR. MORRIS:
 5 Q. Have you ever seen this document
 6 before, sir?
 7 A. I'm aware of it – I mean, yes, but
 8 I don't remember – ask whatever questions you
 9 want about it, and we'll go from there.
 10 Q. Did you see this document before –
 11 before it was sent to my firm on April 28th,
 12 2021?
 13 A. I mean, I'm sure I did and – or I'm
 14 sure I did if I was supposed to approve it, but
 15 I don't specifically remember.
 16 Q. And did you, in fact, authorize your
 17 attorneys to serve this particular document?
 18 A. I – I believe so.
 19 MR. MORRIS: Can we just go to the
 20 very last request for admission, number 14?
 21 (Scrolling.)
 22 BY MR. MORRIS:
 23 Q. You'll see that Request For
 24 Admission Number 14 asks you to admit that as
 25 of January 22nd, 2021, you hadn't paid the

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1 Dondero - 5-28-2021
 2 debtor the outstanding amount.
 3 Do you see that?
 4 A. Yes.
 5 Q. And the definition of an
 6 "outstanding amount" is the number that's just
 7 above that.
 8 And in response, you admitted only
 9 that you hadn't paid the debtor the amount the
 10 debtor asserts is due on the notes in the
 11 amount of approximately \$9 million. Do you see
 12 that?
 13 A. Yes.
 14 Q. Okay. I just want to ask a slightly
 15 different question: Have you paid any amounts
 16 to the debtor on account of the notes since
 17 December 1st, 2020?
 18 A. I – I don't – I don't know for
 19 sure, but I don't believe so.
 20 Q. Okay.
 21 MR. MORRIS: Can we go to the next
 22 exhibit, please, Number 9?
 23 (Exhibit 9 introduced.)
 24 MR. MORRIS: Okay. And if we can
 25 scroll down just a little bit.

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 2 interrogatories?
 3 A. Yes.
 4 Q. And did you swear that the answers
 5 were true and correct?
 6 A. Yes.
 7 Q. Okay.
 8 MR. MORRIS: Now let's go back to
 9 the top of the document.
 10 BY MR. MORRIS:
 11 Q. Did you, in fact, read this document
 12 before you signed the Verification in front of
 13 a notary?
 14 A. Yes.
 15 Q. Okay.
 16 MR. MORRIS: Go to page 4 of 6,
 17 please.
 18 BY MR. MORRIS:
 19 Q. Just to help you out, do you see
 20 there's a reference to "Purported Agreement" in
 21 the first interrogatory, 1(a)?
 22 A. Uh-huh.
 23 Q. That's a "yes," sir, is that right?
 24 A. Yes.
 25 Q. Okay. The Purported Agreement

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 2 BY MR. MORRIS:
 3 Q. You'll see that these are the
 4 "Objections and Answers" that were tendered on
 5 your behalf in response to the debtor's first
 6 set of interrogatories.
 7 Do you see that?
 8 A. Yes.
 9 MR. MORRIS: And if we can go to the
 10 last page.
 11 MS. DEITSCH-PEREZ: Could you also
 12 scroll through it so he could –
 13 MR. MORRIS: Well, I'm happy to do
 14 it. I'd like to do it my way, please.
 15 Thank you.
 16 Can we go to the last page, please?
 17 (Scrolling.)
 18 BY MR. MORRIS:
 19 Q. Is that your signature there, sir?
 20 A. Yes.
 21 Q. And did you sign this document in
 22 front of a notary public?
 23 A. Yes.
 24 Q. And did you certify that you had
 25 read the document and the objections to the

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1 Dondero - 5-28-2021
 2 refers back to the agreement that we were
 3 looking at in paragraph 40 of the answer – and
 4 I can just read it again – that says – the
 5 agreement says, quote, "Plaintiff would not
 6 collect on the Notes."
 7 And I asked you three questions in
 8 the interrogatory. Did this interrogatory
 9 accurately state, to the best of your
 10 knowledge, that you, personally, entered into
 11 the Purported Agreement on behalf of the
 12 debtor?
 13 A. Which – which one are you – which
 14 agreement are you talking about?
 15 Q. Just the one that we were talking
 16 about earlier – and I'll just read it again
 17 for you. We can call it back on the screen, if
 18 it's helpful – but the agreement that you
 19 referred to in your answer that, quote,
 20 "plaintiff would not collect on the notes."
 21 That's the Purported Agreement.
 22 And so, I just want you to confirm
 23 that in your answer to Interrogatory No. 1, you
 24 stated that it was true and accurate that you
 25 entered into that agreement on behalf of the

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1 Dondero - 5-28-2021
 2 debtor.
 3 Do I have that right?
 4 A. I'm -- I'm going to say no because I
 5 think you're using the wrong description of the
 6 debtor versus Highland prebankruptcy.
 7 Q. I appreciate that. I apologize.
 8 Let me rephrase the question. That's a fair
 9 point.
 10 Did you enter into the agreement
 11 referred to in your answer on behalf of
 12 Highland?
 13 A. The -- the agreement on behalf of
 14 Highland prebankruptcy was agreed to by
 15 majority of the Class A members, which I
 16 believe at the time was Dugaboy.
 17 Q. All right. That doesn't say that in
 18 your answer here, does it?
 19 A. Again, there was an original, I
 20 think, answers; and then there were amended
 21 answers. I think the lawyers did the best they
 22 could to capture -- but, evidently, the parsing
 23 between pre-bankruptcy agreements and
 24 post-bankruptcy agreements was done the best it
 25 could be by the lawyers but I -- I -- I don't

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 2 estate. I don't -- I don't know which this is
 3 referring to.
 4 Q. You understand that the definition
 5 of the "debtor" includes Highland Capital
 6 Management, L.P.?
 7 A. I think we started off the depo by
 8 saying that there was a Highland prior to
 9 bankruptcy and then there was a Highland in
 10 bankruptcy and the debtor is Highland in
 11 bankruptcy.
 12 Q. Let me just ask you this question,
 13 sir: Is that first sentence accurate, or is it
 14 wrong?
 15 I didn't write it, so -- and you
 16 swore to it. You're the one who said it was
 17 true and accurate. So now I'm asking you: Is
 18 it actually true and accurate?
 19 A. I'm going to stick with my testimony
 20 so far. I don't want to opine on that. I
 21 think it depends -- it's not -- maybe it's not
 22 perfectly written, but...
 23 Q. Sir, with all due respect, please
 24 answer my question: Is the first sentence true
 25 and correct, as you verified?

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1 Dondero - 5-28-2021
 2 want to comment on the legal.
 3 Q. I don't want to comment on legal
 4 stuff, either; but you signed this document,
 5 you verified this document, and you verified
 6 that it was true and accurate. Correct?
 7 A. Yes.
 8 Q. Okay. And in the first sentence to
 9 your answer in Interrogatory 1, you wrote, or
 10 somebody wrote on your behalf, quote: "The
 11 agreements were entered into on behalf of the
 12 debtor by James Dondero, subsequent to the time
 13 each note was executed."
 14 Is that an accurate statement, or is
 15 it an inaccurate statement?
 16 A. Again, it was between me and the
 17 Class A, the majority of the Class A members.
 18 It was a Class A -- the Class A members were
 19 representing Highland, never the debtor,
 20 because the debtor didn't exist yet.
 21 But then, again, I don't know if
 22 this paragraph refers to, again, how we
 23 operated in bankruptcy, which was the
 24 assumption that the notes had -- were likely --
 25 were not likely to have any value for the

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: He already
 3 answered your question, John.
 4 MR. MORRIS: That's fine. You can
 5 have the objection, asked and answered.
 6 I'm asking him to answer again.
 7 BY MR. MORRIS:
 8 Q. Is that first sentence true and
 9 correct as you verified it?
 10 A. "Behalf" probably isn't, like I
 11 said, the right word. It should be "between"
 12 the debtor and James Dondero. So that's how I
 13 would wordsmith that.
 14 Q. Okay. So this -- this first
 15 sentence is not true and correct, to the best
 16 of your knowledge; is that fair?
 17 A. I -- I don't want to say that other
 18 than I think it could be stated better.
 19 Q. Okay. But as stated right now, it
 20 says that the agreement was entered into on
 21 behalf of the debtor by James Dondero. Have I
 22 read that correctly?
 23 A. Yeah. I mean, that is what it says.
 24 Again, I feel like I'm interpreting legal
 25 phraseology here, like "on behalf of the

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1 Dondero - 5-28-2021
 2 debtor." If it was an agreement between the
 3 debtor and the Class A entered into –
 4 MS. DEITSCH-PEREZ: Mr. Morris knows
 5 very well there's another – that there's
 6 an amendment to this. I don't know why
 7 he's doing this.
 8 Mr. Morris –
 9 (Simultaneous conversation.)
 10 MR. MORRIS: Please stop. Please
 11 stop.
 12 I'm allowed to go through his sworn
 13 statements. Give me a break. Please stop.
 14 Don't coach –
 15 MS. DEITSCH-PEREZ: You've been
 16 asking the same question over and over and
 17 over.
 18 MR. MORRIS: You know, I'm going to
 19 shut this down if you do it one more time.
 20 I will, and I'm happy to make the motion to
 21 the Judge. I'm begging you, please stop
 22 interfering.
 23 My apologies, Mr. Dondero. Never
 24 directed at you personally.
 25 BY MR. MORRIS:

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 2 it prior to the time it was served and filed on
 3 your behalf?
 4 A. Probably.
 5 Q. Did you authorize it to be filed on
 6 your behalf?
 7 A. Yes.
 8 MR. MORRIS: Can we please go to
 9 page 6 of 8?
 10 (Scrolling.)
 11 MR. MORRIS: And if we can scroll
 12 just down to the "Affirmative Defenses."
 13 BY MR. MORRIS:
 14 Q. All right. Do you see
 15 paragraph 40 –
 16 A. Yeah.
 17 Q. – as compared to the prior version
 18 of your answer, has added the words, quote,
 19 "upon fulfillment of conditions subsequent."
 20 Do you see that?
 21 A. Yes.
 22 Q. Why were those words added?
 23 MS. DEITSCH-PEREZ: Object to the
 24 form.
 25 A. I think to make this document more

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 2 Q. The second sentence of the answer,
 3 have you been able to identify any documents
 4 that reflect or memorialize the agreements?
 5 A. I mean, I – I – I don't – I don't
 6 know, but I don't think so.
 7 Q. Thank you very much.
 8 MR. MORRIS: Go to the next
 9 document, please.
 10 (Exhibit 10 introduced.)
 11 BY MR. MORRIS:
 12 Q. Do you see that this is the "Amended
 13 Answer" that was filed on your behalf?
 14 MS. DEITSCH-PEREZ: Let's please –
 15 THE WITNESS: Yes.
 16 MS. DEITSCH-PEREZ: – scroll
 17 through.
 18 THE WITNESS: Yeah, please scroll
 19 through.
 20 (Scrolling.)
 21 BY MR. MORRIS:
 22 Q. All right. Have you seen this
 23 document before, sir?
 24 A. Yes, generally.
 25 Q. Did you – do you recall if you saw

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1 Dondero - 5-28-2021
 2 complete and more clarified as things were
 3 learned and investigated.
 4 BY MR. MORRIS:
 5 Q. And were things "learned and
 6 investigated" after the time that you submitted
 7 the – withdrawn.
 8 Were things "learned and
 9 investigated" after the time the original
 10 answer was served and filed on your behalf?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 And I would also just caution the
 14 witness before he speaks to think – to
 15 make sure he doesn't disclose
 16 attorney-client communications.
 17 A. I'm sorry, could you please repeat
 18 the question?
 19 BY MR. MORRIS:
 20 Q. Sure. Did you, personally, learn or
 21 discover anything related to this amended
 22 paragraph 40 after the time that the original
 23 answer was filed on your behalf?
 24 MS. DEITSCH-PEREZ: Same objection.
 25 A. We went through the – the –

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: When you say
 3 "we," are you talking about you and
 4 lawyers?
 5 THE WITNESS: Yes.
 6 MS. DEITSCH-PEREZ: Don't disclose
 7 your communications with lawyers.
 8 BY MR. MORRIS:
 9 Q. All right. I don't want to know
 10 anything about your communications with
 11 lawyers, but I'm going to ask you for facts.
 12 What facts, if any, did you learn
 13 after the original answer was filed that relate
 14 to the words, quote, "upon fulfillment of
 15 conditions subsequent."
 16 A. The "conditions subsequent" involved
 17 in the first quarter of 2019 were always an
 18 event, but it wasn't captured properly or
 19 needed to be clarified in the amendment.
 20 Q. Well, you mentioned that "things
 21 were learned and investigated" after the answer
 22 was filed, and I'm just trying to pin down what
 23 that was?
 24 A. I – I took it more seriously with
 25 the lawyers as it – as the notes became more

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1 Dondero - 5-28-2021
 2 thinking about including anybody else.
 3 BY MR. MORRIS:
 4 Q. Okay. And to be clear, Mr. Dondero,
 5 I'm not – I don't have a view one way or the
 6 other as to whether you should or shouldn't –
 7 who you should have contacted.
 8 I just want to know who – if you
 9 can identify for me the Class A members who
 10 acted to approve the agreement that's referred
 11 to in paragraph 40.
 12 Is there anybody other than Dugaboy?
 13 A. Not – not – not – not
 14 specifically regarding that comp cycle.
 15 Q. Okay. And who acted on behalf of
 16 Dugaboy to enter into the agreement that's
 17 referred to in paragraph 40?
 18 A. The trustee.
 19 Q. The trustee of Dugaboy?
 20 A. Yes.
 21 Q. And who was the trustee of Dugaboy
 22 in the January/February 2019 time period that
 23 entered into this agreement on behalf of the
 24 debtor?
 25 A. My sister Nancy.

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1 Dondero - 5-28-2021
 2 of an issue, and it's – I'm very busy over
 3 here and then spent more time going through the
 4 details, and this needed to be clarified or
 5 stated differently.
 6 Q. Okay. With respect to the agreement
 7 referred to in paragraph 40, whose idea was it
 8 to enter into that agreement?
 9 A. It was – it was mine.
 10 Q. Okay. And who were – who were the
 11 majority of Class A holders that you referred
 12 to earlier?
 13 A. That was the counterparty
 14 decision-maker for Highland prior to
 15 bankruptcy, and like I said, I believe it was
 16 Dugaboy.
 17 Q. Can you think of any other member of
 18 Class A who entered into this agreement on
 19 behalf of the debtor in the early part of 2019
 20 other than Dugaboy?
 21 MS. DEITSCH-PEREZ: Object to the
 22 form.
 23 A. I do believe it was necessary.
 24 Dugaboy alone was the requisite majority. I
 25 didn't – I don't remember or remember even

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1 Dondero - 5-28-2021
 2 Q. Did you and Nancy discuss this
 3 agreement at all?
 4 A. This agreement? No.
 5 Q. Can you describe –
 6 MS. DEITSCH-PEREZ: What do you mean
 7 by "this agreement"?
 8 (Simultaneous conversation.)
 9 A. Not the one that's on the screen.
 10 BY MR. MORRIS:
 11 Q. Yes. That's the only one that I'm
 12 talking about, so –
 13 MS. DEITSCH-PEREZ: So you mean –
 14 MR. MORRIS: Please, please, Deb –
 15 MS. DEITSCH-PEREZ: John, can you
 16 please clarify: Are you asking if he
 17 discussed the answer with Nancy or the –
 18 MR. MORRIS: I didn't use the word
 19 "answer." I used the word "agreement," so
 20 let me –
 21 MS. DEITSCH-PEREZ: I know, but he
 22 pointed to the screen.
 23 (Simultaneous conversation.)
 24 MR. MORRIS: Are you done?
 25 MS. DEITSCH-PEREZ: Yes.

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2 BY MR. MORRIS:

3 Q. Mr. Dondero, can you describe for

4 me – withdrawn.

5 Did you discuss with your sister

6 Nancy, the agreement that's referred to in

7 paragraph 40?

8 A. The agreement to subsequent

9 conditions, yes, absolutely. But this

10 agreement that's on the screen, I've never –

11 I've never – I've never shown her this

12 document or talked to her about it.

13 Q. I'm not asking about the document.

14 I'm not asking about the document. I'm asking

15 about the agreement that's referred to in

16 paragraph 40.

17 Do you understand that?

18 A. Yes. And, yes, we had several

19 conversations about it.

20 Q. Okay. Can you describe for me

21 everything you remember about your discussions

22 with Nancy concerning the agreement that's

23 referred to in paragraph 40?

24 A. That the loans that were in place

25 would be forgiven upon a monetization – the

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2 but..

3 Q. Did anybody participate in any of

4 the conversations you're describing other than

5 you and your sister?

6 A. I don't believe it was necessary, it

7 didn't include anybody else.

8 Q. Okay. Again, I'm not here to

9 question. I'm just looking for facts,

10 Mr. Dondero.

11 So nobody participated in any of

12 these conversations that you can recall other

13 than you and Nancy; is that correct?

14 A. Correct, that I – yes, there was

15 never a third party involved in our

16 conversations. I don't know – I don't think

17 she discussed it with anybody else, but I don't

18 know.

19 Q. Did – was the agreement subject to

20 any negotiation? Did she make any

21 counterproposal of any kind?

22 A. No. No, I – again, I believe both

23 of our views at the time was that it was

24 immaterial to Highland overall or any other

25 agreements.

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2 favorable monetization of certain large or

3 liquid assets on the Highland balance sheet;

4 and the three that were focused on was MGM,

5 Trussway, and Cornerstone.

6 Q. Did she say anything in response?

7 A. Just, "How much are we talking

8 about?" And I told her it was about 9 million

9 in aggregate, and – and I told her that it

10 was – that the forgiveness or the compensation

11 was compliant regarding any credit covenants or

12 Hunter Mountain covenants –

13 Q. Do you recall any –

14 A. – that – that if it were to be

15 forgiven, that additional compensation would be

16 compliant or permitted and really not material

17 relative to any outstanding credit agreements

18 that Highland had or agreements with Hunter

19 Mountain.

20 Q. Is this something that you discussed

21 with her, or is this just information that

22 you're giving me?

23 A. This is what I discussed – that's

24 almost the entirety of the conversation. It

25 happened over a couple different conversations,

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2 Q. Do you know if she sought any

3 independent advice before entering into the

4 agreement that you've described?

5 A. I don't know.

6 Q. Do you recall whether you provided

7 her with any documents of any kind in

8 connection with the discussions that led to the

9 agreement that's referred to in paragraph 40?

10 A. I – I have no – I don't – I don't

11 believe – no, I don't believe I gave her

12 copies of the relevant Hunter Mountain

13 limitations, or whatever. I just spoke to her

14 about it.

15 Q. Okay. I'm just asking – I'm asking

16 a broader question: Do you recall giving her

17 any documents of any kind in connection with

18 the discussions that led to the agreement in

19 paragraph 40?

20 A. Not – not that I recall. She –

21 she may – she may have some, but I don't

22 remember.

23 Q. Do you know if there were any

24 resolutions that were adopted by Highland to

25 reflect the agreement that's referred to in

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1 Dondero - 5-28-2021
 2 paragraph 40?
 3 A. Resolutions that – no, not that I'm
 4 aware of.
 5 Q. Did you give – did you give Nancy a
 6 copy of the three promissory notes that were
 7 the subject of the agreement referred to in
 8 paragraph 40?
 9 A. No.
 10 Q. Did she ask to see any documents
 11 before entering into the agreement that's
 12 referred to in paragraph 40?
 13 A. I – I don't remember.
 14 Q. Did you suggest that she speak with
 15 anybody prior to the time that she entered into
 16 the agreement that's referred to in
 17 paragraph 40?
 18 MS. DEITSCH-PEREZ: Asked and
 19 answered.
 20 A. Yeah. No.
 21 BY MR. MORRIS:
 22 Q. Do you know whether she actually
 23 spoke with anybody concerning the subject
 24 matter of the agreement that's referred to in
 25 paragraph 40 prior to the time it was entered

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1 Dondero - 5-28-2021
 2 Q. Okay. What did Highland receive in
 3 return for its agreement to surrender its right
 4 to make a demand for unpaid principal and
 5 interest, if anything?
 6 A. I think with all forgiveness of
 7 notes, what it gets is it gets focus in terms
 8 of the monetization and it reduces additional
 9 compensation that I could have/would have taken
 10 otherwise, or could have/would have been
 11 entitled to otherwise.
 12 So, it's – yeah, I mean, I think
 13 it's, again, heightened focused for something
 14 that would be great for the debtor or great for
 15 Highland at the time and reduces – that form
 16 of forgiveness becomes compensation when and if
 17 it occurs, and then it – it theoretically
 18 reduces other compensation.
 19 Q. So why not just forgive it at that
 20 moment?
 21 Why tie it to "conditions
 22 subsequent"?
 23 A. I thought it was more appropriate.
 24 Q. Did you and Nancy discuss at all
 25 what the benefit would be to Highland from this

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 2 into?
 3 A. I don't know.
 4 Q. Is there any time period by which
 5 the subsequent – the conditions subsequent
 6 have to be fulfilled, or are they open-ended?
 7 A. I believe it was open-ended.
 8 Q. Under the agreement that's referred
 9 to in paragraph 40, did the debtor surrender
 10 its right to make a demand under the promissory
 11 notes?
 12 MS. DEITSCH-PEREZ: And, again, are
 13 you talking about the debtor as in
 14 post-bankruptcy or –
 15 MR. MORRIS: I apologize. Thank
 16 you. Thank you. Thank you. Thank you.
 17 Withdrawn.
 18 BY MR. MORRIS:
 19 Q. Under the agreement that you reached
 20 with Nancy that's referred to in paragraph 40,
 21 was it your understanding that Highland
 22 surrendered its right to make a demand for
 23 payment of unpaid principal and interest under
 24 the notes?
 25 A. I think essentially, yes.

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 2 arrangement?
 3 A. The focus – the focus parts for
 4 sure.
 5 Q. And without – without the agreement
 6 that's referred to in paragraph 40, you
 7 wouldn't have been focused on maximizing the
 8 enterprises; is that right?
 9 A. No.
 10 Q. So – I'm sorry, maybe I missed it.
 11 When you used the word "focus" –
 12 let me – when you use the word "focus," what
 13 do you mean?
 14 What is the benefit to the debtor?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 He said "heightened focus."
 18 A. Yeah, heightened focused was my
 19 words, which –
 20 BY MR. MORRIS:
 21 Q. Okay.
 22 A. – you know, means beyond normal
 23 focus. It means additional effort just like in
 24 any company or what we do here with other
 25 employees, for things you really want to get

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1 Dondero - 5-28-2021
 2 done or focus on, you provide that extra
 3 incentive.
 4 Q. Okay. So -- so that's the benefit
 5 to Highland, was that you were going to have a
 6 heightened focus on maximizing value; is that
 7 fair?
 8 MS. DEITSCH-PEREZ: Object to the
 9 form.
 10 A. And then also the part 2 of my
 11 answer, right, which, you know, that
 12 forgiveness would be compensation which
 13 would -- in any given year, additional
 14 compensation coming from forgiveness reduces
 15 other compensation.
 16 BY MR. MORRIS:
 17 Q. Was that part of the agreement that
 18 you reached with Nancy? Was that -- was that
 19 when these notes were forgiven, you would forgo
 20 an amount equivalent to the outstanding
 21 principal and unpaid interest?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form, misstates his prior testimony.
 24 A. Yeah. I remember discussing the
 25 focus part with her. The -- I was giving that

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 2 form.
 3 A. Maybe not exactly "the same amount,"
 4 but it would -- it would -- it would reduce
 5 comp -- yes, it would -- it would, like, in the
 6 next cycle, reduce -- or when it was realized,
 7 would likely reduce comp then.
 8 BY MR. MORRIS:
 9 Q. Okay. And by what amount would it
 10 likely reduce comp, then?
 11 A. I don't know. By significant --
 12 by -- by a significant amount, by something
 13 similar to the 9 million bucks.
 14 Q. Okay. So, is there any -- I'm just
 15 trying to understand your perspective.
 16 One of the benefits from entering
 17 into the agreement referred to in paragraph 40
 18 is that upon the realization of the forgiveness
 19 of the debt, Highland or the debtor, whatever
 20 the case may be, in the future would be
 21 relieved from paying you an amount similar to
 22 the principal amount of the notes?
 23 Do I have that right?
 24 A. Yeah, or -- or -- yeah. I guess the
 25 reason why I keep going back and forth on the

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 2 answer when you were asking me what would be
 3 the benefit or consideration to Highland and
 4 then ultimately to debtor. I was giving you
 5 compensation answer.
 6 BY MR. MORRIS:
 7 Q. Okay. So I just -- but I do want to
 8 try to understand from your perspective the
 9 benefit to the debtor.
 10 And, one, you told me about the
 11 heightened focus, and the second --
 12 A. Right.
 13 Q. -- I think you said, and correct me
 14 if I'm wrong, that it would relieve the debtor
 15 of paying some compensation in the future.
 16 Am I mistaken about that?
 17 A. Yeah, I mean -- I'm sorry. Repeat
 18 that one more time, please.
 19 Q. I believe you said that the second
 20 benefit to Highland from entering into the
 21 agreement referred to in paragraph 40 is that
 22 it would relieve them of a future obligation to
 23 pay compensation in the same amount.
 24 Do I have that right?
 25 MS. DEITSCH-PEREZ: Object to the

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 2 exactness of the answer is that if --
 3 there's -- depending on what the compensation
 4 target is and whether or not you wanted to grow
 5 something up or you're looking for a net
 6 amount, but forgiveness of debt becomes a
 7 taxable event with no -- no additional ability
 8 to pay taxes. So it's usually not an exact
 9 offset to future compensation, the way we've
 10 done it here historically.
 11 Q. In the agreement that you reached
 12 with Nancy that's referred to in paragraph 40,
 13 were there any other -- withdrawn.
 14 In the agreement that you reached
 15 with Nancy that's referred to in paragraph 40,
 16 were there any circumstances under which you
 17 would have been obligated to pay all unpaid
 18 principal and interest under the notes?
 19 A. If the illiquid assets weren't -- or
 20 if -- if none of the illiquid assets were
 21 monetized.
 22 Q. But you were -- you were, at the
 23 time you entered into this oral agreement, in
 24 control of whether or not to monetize those
 25 illiquid assets, right?

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2 A. And I expected they would be over

3 time, yes.

4 Q. Okay. So, based on your control of

5 the enterprise at the time that you entered

6 into the agreement, is there any – did you

7 have any – any scenario under which you

8 believed you might actually have to pay back

9 the unpaid principal and interest due under the

10 notes?

11 A. If they weren't monetized.

12 Q. Okay. Anything else?

13 A. Assets weren't monetized, yeah.

14 Q. Anything else?

15 A. That's – that's my recollection.

16 Q. If – if you – have the "conditions

17 subsequent" been met yet?

18 A. I believe the announcement of the

19 MGM sale will meet the conditions precedent

20 when it closes four or five months from now.

21 Q. Okay. But none of them have been

22 met – have the conditions subsequent been met

23 as of today?

24 A. Have the conditions subsequent been

25 met today. I don't have awareness of –

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2 Q. That's why I say "forgive the

3 question," sir.

4 Did you ever ask anybody to write

5 the agreement in paragraph 40 down on paper so

6 that it was memorialized somewhere?

7 A. No.

8 Q. Did you and Nancy –

9 (Simultaneous conversation.)

10 A. I'm sorry, go ahead.

11 BY MR. MORRIS:

12 Q. Do you and Nancy communicate by

13 email from time to time?

14 A. Almost entirely phone. I – from

15 time to time, but it's almost entirely phone.

16 Q. All right. Let's – let's move on.

17 A. Can I clarify something from before?

18 Q. Of course.

19 A. If the assets were never monetized

20 or the – the notes would stay in place and not

21 be forgiven.

22 If the assets were all monetized

23 below cost or what was considered a less

24 favorable scenario, then it would be – to

25 forgive it, something would have to be

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2 despite objecting vehemently, we don't have

3 awareness of what the debtor is doing with

4 Trussway or Cornerstone. So there's a

5 potential that those could have triggered, but

6 I don't – I don't have – I don't have

7 awareness.

8 Q. Okay. Do you know – and forgive

9 the question, sir, honestly. But do you

10 know –

11 A. Sure.

12 Q. – whether your estate would be

13 liable to pay all of the undue principal –

14 unpaid principal and interest if you passed

15 before the conditions subsequent were

16 satisfied?

17 MS. DEITSCH-PEREZ: Object to the

18 form.

19 A. I – I don't know that answer.

20 BY MR. MORRIS:

21 Q. That wasn't something that you and

22 your sister discussed in January or February of

23 2019; is that fair?

24 A. I wasn't contemplating that event at

25 that point in time.

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2 monetized above cost, you know; but if they

3 were all monetized below cost, that would make

4 the note payable.

5 Q. I appreciate that.

6 MR. MORRIS: Let's go to the next

7 document, document Number 11.

8 (Exhibit 11 introduced.)

9 MR. MORRIS: If we could just scroll

10 down, please.

11 (Scrolling.)

12 BY MR. MORRIS:

13 Q. All right. Now, these are your

14 objections and responses to the debtor's second

15 request for admissions. Do you see that?

16 A. Yes.

17 MR. MORRIS: And let's scroll down

18 to page 4, please.

19 (Scrolling.)

20 BY MR. MORRIS:

21 Q. Okay. Do you recall whether you saw

22 this document before it was served and filed on

23 your behalf?

24 A. Yes. Can we go all the way through,

25 just go all the way down?

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1 Dondero - 5-28-2021
 2 Was this notarized, also?
 3 Q. No, because these are responses to
 4 requests to admit. You only --
 5 A. Okay.
 6 Q. You only notarize responses to
 7 interrogatories, for whatever reason. So these
 8 were not. Yeah.
 9 But I'm just asking you if you have
 10 a memory of reviewing the requests for
 11 admission before they were served and filed on
 12 your behalf?
 13 A. Yes.
 14 Q. Okay. And did you authorize your
 15 lawyers to serve and file this document on your
 16 behalf?
 17 A. Yes.
 18 Q. Okay. Looking at Request For
 19 Admission Number 1, it asks you to admit that
 20 in December 2019, you made a payment to the
 21 debtor, a portion of which was applied to
 22 reduce principal and/or interest due under one
 23 or more of the notes.
 24 Have I read that correctly?
 25 A. Yes.

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1 Dondero - 5-28-2021
 2 increase another note later.
 3 So how many times or how often
 4 interest payments were made or if there was
 5 some small principal payment made at some
 6 point, I don't know the details; but I'm hoping
 7 that's accurate.
 8 Q. Okay. We looked at three notes that
 9 were signed by you in 2018, correct?
 10 A. Yes.
 11 Q. You signed other notes in favor of
 12 Highland prior to that time, correct?
 13 A. I believe -- yeah. I mean, I
 14 believe there were numerous notes beyond these.
 15 Q. Were -- were -- did you ever sign a
 16 note in favor of Highland that was forgiven?
 17 A. I don't -- I don't know.
 18 Q. Do you have any recollection of ever
 19 paying taxes in connection with a note that was
 20 subsequently forgiven by Highland?
 21 A. If there was -- if there was a
 22 forgiveness and it was taxable, I would have
 23 paid the taxes. We were compliant in that
 24 regard. I'm a hundred percent comfortable
 25 we're compliant, but I don't know.

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1 Dondero - 5-28-2021
 2 Q. And you've admitted that that
 3 statement is true and accurate as written,
 4 right?
 5 A. Yeah, I believe so. The -- yeah, I
 6 believe so. Let me let you ask the questions.
 7 Q. Okay. Do you have any reason to
 8 believe, as you sit here right now -- let me
 9 ask you a different question.
 10 Do you want to amend your response
 11 in any way right now?
 12 A. I -- I'm not aware of small amounts
 13 in terms of, like, interest or principal; and
 14 then sometimes the tax guys will say periodic
 15 interest payments are important to -- for the
 16 character of the notes, so sometimes periodic
 17 interest payments are made. Sometimes I think
 18 they peck on some of the notes.
 19 I don't -- I don't know or remember,
 20 but I hope that something like this is correct.
 21 Sometimes, if there was a need for cash into
 22 Highland, the easiest way to -- for me or a
 23 different entity to put cash into Highland was
 24 to reduce a principal amount of a note with the
 25 thought that we could create new notes or

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1 Dondero - 5-28-2021
 2 Q. Okay. And I appreciate -- I didn't
 3 mean to suggest that you weren't compliant,
 4 sir. I'm just asking you if you can identify
 5 any note that you made in favor of Highland
 6 that was ever forgiven.
 7 MS. DEITSCH-PEREZ: And I'm just
 8 going to object because, while he's not
 9 30(b)(6) witness, this is a deposition
 10 taken in a particular case and he may have
 11 not looked at the records going back to
 12 2000, or whatever, that's -- since when
 13 Highland was started.
 14 MR. MORRIS: I just can't tell you
 15 how inappropriate that is.
 16 BY MR. MORRIS:
 17 Q. Go ahead, Mr. Dondero.
 18 A. The same answer, I don't know.
 19 Q. Okay. You did, in fact, pay in full
 20 all principal and interest due on notes that
 21 you made in favor of Highland other than the
 22 three notes at issue in this case, correct?
 23 MS. DEITSCH-PEREZ: Object to the
 24 form.
 25 A. I -- I don't know. I would repeat

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1 Dondero - 5-28-2021
 2 the answer I gave a few minutes ago when I kind
 3 of rambled about cash management.
 4 BY MR. MORRIS:
 5 Q. Do you know how many notes you made
 6 in favor of Highland beyond the three that are
 7 the subject of this litigation?
 8 MS. DEITSCH-PEREZ: Object to the
 9 form.
 10 A. I – I do not, regarding myself
 11 personally.
 12 I am aware that the aggregate amount
 13 of affiliated notes is approximately 70 or
 14 \$80 million, including my notes; but that's it.
 15 I mean, that's all I know.
 16 BY MR. MORRIS:
 17 Q. All right. I'm just asking you
 18 about you, in your individual capacity.
 19 A. I don't know.
 20 Q. You don't know –
 21 (Audio distortion.)
 22 THE REPORTER: You broke up, sir.
 23 BY MR. MORRIS:
 24 Q. You don't know the number of
 25 notes – (audio distortion) – Highland beyond

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1 Dondero - 5-28-2021
 2 Q. Well, you've admitted to the fact.
 3 So, when did you learn that in December 2019 a
 4 payment made on your behalf, at least a portion
 5 of which was applied to reduce principal and/or
 6 interest due under one or more of the notes?
 7 When did you learn that?
 8 A. I don't know. It would have been as
 9 part of the process in preparing this document.
 10 Q. So it's your testimony that somebody
 11 used your money in December 2019 to reduce
 12 principal and/or interest due under one or more
 13 of the notes without your knowledge?
 14 A. Yeah, without my specific knowledge.
 15 There was a reason to put money in at that
 16 point in time, and then how they applied it was
 17 not my decision –
 18 Q. Making –
 19 A. -- not –
 20 Q. Making a payment – you would agree
 21 that making a payment of principle or interest
 22 under one or more of the notes conflicts with
 23 the agreement that you reached with Nancy,
 24 right?
 25 MS. DEITSCH-PEREZ: Object to the

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1 Dondero - 5-28-2021
 2 these three, correct?
 3 A. Correct.
 4 Q. And you can't recall whether any –
 5 any notes that you made in favor of Highland
 6 were ever forgiven, correct?
 7 A. I – I don't know.
 8 Q. Okay. So, did you ever object to
 9 the application of the payment referred to in
 10 Request For Admission Number 1 to principal
 11 and/or interest due under one or more of the
 12 notes?
 13 Did you ever object to the
 14 application of the payment in that way?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 A. I think the decision on how to
 18 handle cash needed at Highland was entirely
 19 made and the application to note principal or
 20 interest was – was entirely decided by the
 21 accounting group.
 22 BY MR. MORRIS:
 23 Q. But did you know that decision was
 24 made in or around December 2019?
 25 A. Not really, no. Not specifically.

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1 Dondero - 5-28-2021
 2 form.
 3 A. No, that's not true.
 4 BY MR. MORRIS:
 5 Q. Well, the conditions subsequent
 6 hadn't arisen yet; is that fair?
 7 A. The notes were in '18, correct?
 8 Q. Yes, sir.
 9 A. And then, yeah, the subsequent
 10 condition was in the first quarter of '19.
 11 Q. Right. And then, in December of
 12 '19, a payment of principal and/or interest was
 13 made against one or more of the notes, right?
 14 A. Yes.
 15 Q. And I'm just asking you, sir, if
 16 that's inconsistent with the agreement that you
 17 reached with Nancy.
 18 MS. DEITSCH-PEREZ: Object to the
 19 form.
 20 A. And I'm saying – I'm saying no. I
 21 mean, it's –
 22 BY MR. MORRIS:
 23 Q. Okay. Since learning of the
 24 payment, have you tried to identify the person
 25 who was responsible for applying your money in

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1 Dondero - 5-28-2021
 2 the way that's described in Request For
 3 Admission Number 1?
 4 A. No.
 5 MR. MORRIS: Can we go down to
 6 number 4, please?
 7 BY MR. MORRIS:
 8 Q. In your amended answer, I think you
 9 asserted that the – "each note is ambiguous."
 10 Do I have that right?
 11 We can go back, if you would like to
 12 look?
 13 A. Is this admission number 4? Is that
 14 where you're pointing to?
 15 Q. It is, and I'll just read it. It
 16 refers to paragraph 45 of the amended answer,
 17 and I'll read it. But I'm happy to go back and
 18 put it on the screen, if you'd would like.
 19 But it says simply: "Defendant
 20 further asserts that each note is ambiguous."
 21 So request for number 4 asks you to
 22 admit that before you served that amended
 23 answer, you had never informed the debtor of
 24 your belief that any provision of the notes was
 25 ambiguous.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: Object, no
 3 foundation.
 4 A. As – ask the question again,
 5 please.
 6 BY MR. MORRIS:
 7 Q. Did you ever inform the debtor of
 8 your belief that any provision of the notes was
 9 ambiguous?
 10 MS. DEITSCH-PEREZ: Object, no
 11 foundation.
 12 A. You know, I don't know what
 13 conversations were had between lawyers. I – I
 14 don't know.
 15 BY MR. MORRIS:
 16 Q. Okay. So I'm going to ask a
 17 slightly different question because of your
 18 answer: Can you tell me whether you or anybody
 19 acting on your behalf ever informed the debtor
 20 of your belief that any provision of any of the
 21 notes was ambiguous?
 22 MS. DEITSCH-PEREZ: Object, no
 23 foundation.
 24 A. I'm going to have to say, yes, I
 25 believe that statement is true; but I don't

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1 Dondero - 5-28-2021
 2 Do you see that?
 3 A. Yes.
 4 Q. And you've denied that request for
 5 admission.
 6 Do you see that?
 7 A. Yes.
 8 Q. So, who did you inform at the debtor
 9 of your belief that a provision of the notes
 10 was ambiguous?
 11 Who did you –
 12 MS. DEITSCH-PEREZ: Object.
 13 BY MR. MORRIS:
 14 Q. Who did you communicate that to?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form, no foundation.
 17 A. I – I – I don't – "I don't know"
 18 is my answer to pretty much any question you
 19 could ask there.
 20 BY MR. MORRIS:
 21 Q. This is – you're denying the
 22 request for admission, and that's your right.
 23 Did you ever inform the debtor of
 24 your belief that a provision of the notes was
 25 ambiguous?

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1 Dondero - 5-28-2021
 2 have specific knowledge.
 3 BY MR. MORRIS:
 4 Q. Do you have any knowledge, can you
 5 identify any person who informed the debtor of
 6 your belief?
 7 A. I don't have specific knowledge. I
 8 don't – I don't – I don't know.
 9 Q. Can you tell me when the debtor was
 10 informed of your belief that any provision of
 11 the notes was ambiguous?
 12 MS. DEITSCH-PEREZ: Object, no
 13 foundation.
 14 A. I don't know.
 15 BY MR. MORRIS:
 16 Q. Can you identify the person who was
 17 acting on behalf of the debtor who was informed
 18 by you or anyone acting on your behalf of your
 19 belief that any provision of the notes was
 20 ambiguous?
 21 MS. DEITSCH-PEREZ: Object, no
 22 foundation.
 23 A. I don't know.
 24 BY MR. MORRIS:
 25 Q. Okay.

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1 Dondero - 5-28-2021
 2 MR. MORRIS: Let's go to the next
 3 exhibit, please.
 4 THE WITNESS: Is this a good time
 5 for a lunch break?
 6 MR. MORRIS: Yeah. I'm happy to do
 7 it. I'm trying to move as quickly as I
 8 can, Mr. Dondero. This is a little bit
 9 longer than you and I usually sit for, and
 10 I apologize for that, but I'm happy to take
 11 as long a break as you -- as you need.
 12 MS. DEITSCH-PEREZ: How long do you
 13 think you have for the rest of the
 14 deposition? What's your guess?
 15 MR. MORRIS: I would say more than
 16 an hour, less than two.
 17 MS. DEITSCH-PEREZ: Do you want to
 18 take a really short --
 19 THE WITNESS: Can we take a half
 20 hour, like 12:30 our time, 1:30 East Coast
 21 time?
 22 MR. MORRIS: Of course.
 23 THE WITNESS: Yeah. So, we'll take
 24 35 minutes, and then we'll get back to it.
 25 You know --

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1 Dondero - 5-28-2021
 2 MR. MORRIS: Can we put up the next
 3 exhibit, which I believe is Number 12?
 4 (Exhibit 12 introduced.)
 5 BY MR. MORRIS:
 6 Q. Okay. So, Mr. Dondero, these are
 7 interrogatories, and so I direct you first to
 8 the last page of the document, the Verification
 9 page.
 10 And is that your signature, sir?
 11 A. Yes.
 12 Q. Now, this wasn't notarized. Is
 13 there a reason why you didn't get this
 14 notarized?
 15 A. No.
 16 Q. Okay.
 17 MR. MORRIS: If we could just scroll
 18 back up.
 19 BY MR. MORRIS:
 20 Q. But is the Verification true --
 21 MR. MORRIS: If we just go back to
 22 it.
 23 BY MR. MORRIS:
 24 Q. At the time you signed this
 25 document, had you read the Defendant's

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1 Dondero - 5-28-2021
 2 THE REPORTER: Are we still on the
 3 record, please?
 4 MR. MORRIS: Yes.
 5 COURT REPORTER: Okay.
 6 MS. DEITSCH-PEREZ: We'll --
 7 MR. MORRIS: If you have time
 8 constraints -- if you have time
 9 constraints, Mr. Dondero, I'm prepared to
 10 keep going. I'll take a shorter break. I
 11 don't want -- you know, I apologize for the
 12 burden, but these are relevant questions.
 13 THE WITNESS: Yeah, let's -- let's
 14 do 35 minutes, and we will try and wrap it
 15 up in -- like you're saying, like an hour
 16 or less than two.
 17 MR. MORRIS: Yeah.
 18 THE WITNESS: Yeah. I do need to be
 19 someplace in the early afternoon.
 20 MR. MORRIS: I assure you, I'll do
 21 my best to keep to that time frame.
 22 THE WITNESS: Okay. Thank you.
 23 THE REPORTER: And we're off the
 24 record.
 25 (Lunch recess held.)

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1 Dondero - 5-28-2021
 2 Objections and Answers to Highland Capital
 3 Management, L.P.'s Second Set of
 4 Interrogatories?
 5 A. Yes.
 6 Q. And did you believe that the facts
 7 stated therein were both within your personal
 8 knowledge and were true and correct?
 9 A. Yes.
 10 Q. Okay.
 11 MR. MORRIS: Can we go to the
 12 substance of the document on page 4 of 6?
 13 BY MR. MORRIS:
 14 Q. Okay. So, in the answer to
 15 Interrogatory No. 1, you identify the
 16 conditions subsequent that were the subject of
 17 the agreement that we've been talking about
 18 that you and Nancy entered into.
 19 Do I have that right?
 20 A. Yes.
 21 Q. And to the best of your knowledge,
 22 does the answer that's set forth in response to
 23 Interrogatory No. 1 fully and accurately set
 24 forth the conditions subsequent that were the
 25 subject of the agreement?

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. Repeat the question, please.
 5 BY MR. MORRIS:
 6 Q. Does this answer to Interrogatory
 7 No. 1 set forth, to the best of your knowledge
 8 and understanding, the conditions subsequent
 9 that were part of the agreement that you and
 10 Nancy entered into in January or February 2019?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. Yes, large – yes, largely –
 14 BY MR. MORRIS:
 15 Q. Okay.
 16 A. – or yes.
 17 Q. Is there any aspect of this that you
 18 believe right now is incorrect?
 19 A. No.
 20 Q. Is there any aspect of your
 21 agreement with Nancy on the conditions
 22 subsequent that's not described in this answer?
 23 MS. DEITSCH-PEREZ: Object to the
 24 form.
 25 A. My recollection is that that largely

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1 Dondero - 5-28-2021
 2 Q. Okay.
 3 A. Well, yeah. I think what the intent
 4 was – those three companies I just mentioned
 5 were always considered portfolio companies.
 6 There have been a few others over the years,
 7 but those are – those – I think they're
 8 trying to capture them that way, but I only
 9 remember talking to her about those three.
 10 Q. Are there any other portfolio
 11 company interests that are managed and/or owned
 12 directly or indirectly by Highland and/or its
 13 affiliates or managed funds? Are there any
 14 other assets?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 A. There were some lesser private
 18 equity investments or companies, yes.
 19 BY MR. MORRIS:
 20 Q. Can you identify them?
 21 A. CCS Medical. I think OmniMax was
 22 one. Kerri International. Yeah, those –
 23 those are ones that come to mind.
 24 Q. Okay. But notwithstanding the
 25 answer here, to the best of your recollection,

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1 Dondero - 5-28-2021
 2 captures it.
 3 BY MR. MORRIS:
 4 Q. Okay. There's a reference there to,
 5 quote, "the disposition of the portfolio
 6 company interests managed and/or owned directly
 7 or indirectly by Highland and/or its affiliates
 8 or managed funds."
 9 Do you see that?
 10 A. Yes.
 11 Q. What does that refer to?
 12 A. Just, you know, MGM is owned in a
 13 variety of places, Comerstone is owned in a
 14 variety of places, and then Trussway is owned
 15 in a subsidiary of Highland.
 16 So there – I believe it's to
 17 capture the fact of the different ownerships or
 18 controls of those three different investments.
 19 Q. Are those the only portfolio company
 20 interests managed and/or directly or indirectly
 21 by Highland or its affiliates – withdrawn.
 22 That was bad.
 23 This answer doesn't refer
 24 specifically to any particular assets, correct?
 25 A. It does not.

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1 Dondero - 5-28-2021
 2 the agreement that you had with Nancy pertained
 3 only to MGM, Comerstone, and Trussway. Do I
 4 have that right?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 A. The monetization of those three were
 8 the – were the conditions subsequent, yes.
 9 BY MR. MORRIS:
 10 Q. Okay. And there's a reference there
 11 to being disposed of, quote, on a favorable
 12 basis.
 13 Do you see that?
 14 A. Yes.
 15 Q. What does that mean?
 16 A. Above cost or book value.
 17 Q. How much above cost or book value
 18 would you have to dispose of MGM, Comerstone,
 19 and Trussway in order to trigger the conditions
 20 subsequent?
 21 A. There wasn't – there was just
 22 monetization on a favorable basis. There
 23 wasn't a specific amount on each individual
 24 one. It only took one to trigger it.
 25 Q. Oh. So the sale of any of those

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1 Dondero - 5-28-2021
 2 three assets would trigger the conditions
 3 subsequent?
 4 A. Correct.
 5 Q. Okay. And who decided whether the
 6 asset was sold on a favorable basis?
 7 Who made that decision, under your
 8 agreement with Nancy?
 9 A. It was just defined relative to
 10 cost, so it was just – it was just a
 11 factual – there's nothing to decide. It would
 12 just be a factual answer.
 13 Q. So, I just want to make sure I
 14 understand.
 15 Your agreement with Nancy was that
 16 –
 17 A. Yes.
 18 Q. – that – all right. Withdrawn.
 19 Your agreement with Nancy in January
 20 or February 2019, was that if any of MGM,
 21 Comerstone, or Trussway was sold at cost, the
 22 debtor would forgive your obligations under the
 23 three notes.
 24 Do I have that right?
 25 MS. DEITSCH-PEREZ: Object to the

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1 Dondero - 5-28-2021
 2 Q. Okay. So, again, I just want to
 3 really understand your agreement with Nancy.
 4 Did you and her specifically agree
 5 in January or February 2019 that if you sold
 6 either MGM or Comerstone or Trussway for at
 7 least \$1 more than cost, then your obligations
 8 under the three notes would be forgiven?
 9 MS. DEITSCH-PEREZ: Object to the
 10 form.
 11 A. Before I answer that, I just – can
 12 you repeat so I can get all the subjects and
 13 participants straight in my head from the
 14 beginning of that question?
 15 BY MR. MORRIS:
 16 Q. Sure. Did you and Nancy agree in
 17 January or February 2019 that if Highland sold
 18 either MGM or Comerstone or Trussway for an
 19 amount that was equal to at least \$1 more than
 20 cost, that – that Highland would forgive your
 21 obligations under the three notes?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. I believe that is correct.
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 form.
 3 A. If any of them were sold above cost,
 4 it would – monetization would trigger the –
 5 the three notes – forgiveness of the three
 6 notes, yes.
 7 BY MR. MORRIS:
 8 Q. Okay. And I just want to see if I
 9 can understand: Did you and Nancy discuss in
 10 January or February 2019 how much above cost
 11 the sale would have to be in order for the
 12 debtor to forgive your obligations under the
 13 three notes?
 14 MS. DEITSCH-PEREZ: Object to the
 15 form.
 16 A. No. It just had to be above cost,
 17 not a amount above cost.
 18 BY MR. MORRIS:
 19 Q. Okay.
 20 A. Because just monetizing it – just
 21 monetizing it and getting liquidity for an
 22 illiquid investment, even if it was at cost, is
 23 good. So something above cost is great. And
 24 those are all big assets, and the notes were
 25 small.

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1 Dondero - 5-28-2021
 2 Q. Thank you very much.
 3 Was Grant Scott the trustee of the
 4 Dugaboy trust in January or February 2019?
 5 A. He was at one point. I don't know
 6 if he was – I don't know when he was the
 7 trustee, but he got replaced at a – some point
 8 in time.
 9 Q. Do you know if it was before or
 10 after the petition date?
 11 A. Before or after the petition date.
 12 It was before the petition date.
 13 MR. MORRIS: Okay. I'd ask for the
 14 production of any documents that show that
 15 Nancy Dondero was the trustee of the
 16 Dugaboy trust in January or February 2019.
 17 MS. DEITSCH-PEREZ: I'll take your
 18 request under advisement.
 19 BY MR. MORRIS:
 20 Q. Now, the last portion of
 21 Interrogatory No. 1, the answer to it, refers
 22 to a, quote, "basis wholly outside Dondero's
 23 control."
 24 Do you see that?
 25 A. Uh-huh.

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1 Dondero - 5-28-2021

2 Q. Was that part of the agreement that

3 you entered into with Nancy in January or

4 February 2019?

5 A. Yeah. It was probably unnecessary

6 complexity, but yes.

7 Q. Was there anything that you

8 envisioned in January or February 2019 that

9 would have caused you to lose control of

10 Highland?

11 MS. DEITSCH-PEREZ: Object to the

12 form.

13 A. No, and I wasn't – that wasn't the

14 thought process.

15 BY MR. MORRIS:

16 Q. So what was the thought process?

17 Why was that phrase part of – why –

18 withdrawn.

19 Did you include that – that aspect

20 of the conditions subsequent – withdrawn.

21 Who decided that one of the

22 conditions subsequent would be the disposition

23 of the assets that you've described, quote,

24 "wholly outside of Dondero's control."

25 Whose idea was it to put that into

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1 Dondero - 5-28-2021

2 subject to the conditions subsequent referred

3 to here in Interrogatory No. 1?

4 A. I don't know if Frank knew the

5 specifics. I think Frank really was aware that

6 the loans could and would likely be forgiven

7 and – yes. That's all to that answer.

8 Q. Did you tell him that?

9 A. Yes, and – I mean, partly he knew

10 it from the history of Highland, and the

11 structure of the notes are structured in a way

12 that facilitates forgiveness.

13 MR. MORRIS: I move to strike.

14 BY MR. MORRIS:

15 Q. Did you ever tell Frank Waterhouse

16 about the agreement that you reached with

17 Nancy?

18 MS. DEITSCH-PEREZ: Object to the

19 form.

20 A. Not – not the specifics.

21 BY MR. MORRIS:

22 Q. Did you ever mention anything about

23 any aspect of your agreement to Nancy – with

24 Nancy to Frank Waterhouse?

25 MS. DEITSCH-PEREZ: Object to the

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1 Dondero - 5-28-2021

2 the agreement?

3 A. It was – it was mine. And, again,

4 it was probably unnecessary complexity, but...

5 Q. And why did you want that piece of

6 it into the agreement?

7 A. MGM ended up being a success story,

8 but the value of MGM and the prospects of MGM

9 have bounced around considerably over the last

10 decade. And we never owned more than 17 or

11 18 percent and there was a 32 percent holder,

12 and Carl Icahn was involved at different points

13 in time. There was definitely a chance that,

14 over our objections, it could have been sold at

15 a lower price without our support.

16 And as far as Cornerstone was

17 concerned, there was a half or a majority that

18 was in the Restoration Fund that had a whole

19 bunch of outside investors in it; and,

20 theoretically, that could have been sold

21 without our – or against our recommendations.

22 So it was really meant to capture

23 those two possibilities.

24 Q. Did you tell Frank Waterhouse at any

25 time about your agreement with Nancy that's

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2 form.

3 A. I – listen, I don't – I don't

4 remember talking to him about the specifics,

5 but, in general, I – he – he – he was deeply

6 involved in the thought process and the

7 conclusion that the notes were forgiven or

8 going to be for- --

9 MR. MORRIS: I'm going to move to

10 strike.

11 BY MR. MORRIS:

12 Q. And I'm not asking you to get into

13 his head to tell me what you think he knew.

14 I'm asking you about what you told him.

15 Did you ever tell Mr. Waterhouse

16 that you reached an agreement with Nancy

17 pursuant to which the debtor had agreed not to

18 collect on the notes subject to the conditions

19 subsequent set forth in your answer to

20 Interrogatory No. 1?

21 MS. DEITSCH-PEREZ: Object to the

22 form.

23 A. I don't remember. I – I don't

24 remember enough to say conclusively one way or

25 the other.

<p style="text-align: right;">Page 220</p> <p>1 Dondero - 5-28-2021</p> <p>2 BY MR. MORRIS:</p> <p>3 Q. Do you have any recollection of</p> <p>4 telling any employee at Highland at any time of</p> <p>5 your agreement with Nancy?</p> <p>6 MS. DEITSCH-PEREZ: Object to the</p> <p>7 form.</p> <p>8 A. I – I don't know.</p> <p>9 BY MR. MORRIS:</p> <p>10 Q. Okay. Did you tell anybody employed</p> <p>11 or representing the debtor at any time of your</p> <p>12 agreement with Nancy?</p> <p>13 MS. DEITSCH-PEREZ: Object to the</p> <p>14 form.</p> <p>15 A. Not that I – not that I recall.</p> <p>16 Again, I didn't think there was a reason to,</p> <p>17 initially.</p> <p>18 MR. MORRIS: Can we go to</p> <p>19 Exhibit 13, please?</p> <p>20 (Exhibit 13 introduced.)</p> <p>21 BY MR. MORRIS:</p> <p>22 Q. All right. When you were the CEO,</p> <p>23 did PricewaterhouseCoopers serve as Highland's</p> <p>24 auditors?</p> <p>25 MS. DEITSCH-PEREZ: Object to the</p>	<p style="text-align: right;">Page 221</p> <p>1 Dondero - 5-28-2021</p> <p>2 form.</p> <p>3 A. At different times they were, and</p> <p>4 then KPMG was. I don't remember who it was in</p> <p>5 '17.</p> <p>6 BY MR. MORRIS:</p> <p>7 Q. Okay. And it's a fact, is it not,</p> <p>8 that until at least year-end 2018, Highland had</p> <p>9 audited the financial statements prepared for</p> <p>10 itself, right?</p> <p>11 A. I don't know. I wasn't aware they</p> <p>12 stopped.</p> <p>13 Q. Okay. Okay.</p> <p>14 So, I'm putting up on the screen the</p> <p>15 "Consolidated Financial Statements and</p> <p>16 Supplemental Information" for the period</p> <p>17 December 31st, 2017.</p> <p>18 Do you see that?</p> <p>19 A. Uh-huh.</p> <p>20 MR. MORRIS: And if we can go first</p> <p>21 to the page marked 33470, which is, I</p> <p>22 think, the –</p> <p>23 And is this – does this refresh</p> <p>24 your recollection that PWC served as</p> <p>25 Highland's independent auditors for the</p>
<p style="text-align: right;">Page 222</p> <p>1 Dondero - 5-28-2021</p> <p>2 financial statements prepared for the year</p> <p>3 ending December 31st, 2017?</p> <p>4 MR. MORRIS: If you could scroll</p> <p>5 down to the bottom of the page so</p> <p>6 Mr. Dondero can see the date.</p> <p>7 A. Okay.</p> <p>8 BY MR. MORRIS:</p> <p>9 Q. Do you see that?</p> <p>10 A. If you're asking me to agree that it</p> <p>11 was Pricewaterhouse, yes, I agree.</p> <p>12 Q. And do you see that they signed</p> <p>13 their letter on May 18th, 2018? Do you see</p> <p>14 that?</p> <p>15 A. Yeah.</p> <p>16 Q. And do you see, towards the top of</p> <p>17 the page, there's a statement about</p> <p>18 "Management's Responsibility for the</p> <p>19 Consolidated Financial Statements"?</p> <p>20 A. Yes.</p> <p>21 Q. And that's a pretty standard clause</p> <p>22 that auditors include in audited financial</p> <p>23 statements, in your experience; isn't that</p> <p>24 right?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 223</p> <p>1 Dondero - 5-28-2021</p> <p>2 MR. MORRIS: Can we go to the</p> <p>3 page – the next page, 3471?</p> <p>4 BY MR. MORRIS:</p> <p>5 Q. This is the Consolidated Balance</p> <p>6 Sheet for the period December 31, 2017, and</p> <p>7 it's been redacted except to show "Notes and</p> <p>8 other amounts due from affiliates." Do you see</p> <p>9 that?</p> <p>10 A. Uh-huh.</p> <p>11 Q. When you were the CEO, did Highland</p> <p>12 carry the Notes and Other Amounts Due from</p> <p>13 Affiliates as assets on its balance sheet?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And that's what's reflected</p> <p>16 on this page; is that correct?</p> <p>17 A. I mean, that's what the heading</p> <p>18 says, yes.</p> <p>19 Q. Okay.</p> <p>20 MR. MORRIS: Can we go to Bates</p> <p>21 number 33499.</p> <p>22 (Scrolling.)</p> <p>23 BY MR. MORRIS:</p> <p>24 Q. And you're aware, are you not, that</p> <p>25 in the Notes to the financial statements, PWC</p>

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1 Dondero - 5-28-2021
 2 described all of the notes and other amounts
 3 that were due to affiliates – due from
 4 affiliates?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 A. Yes.
 8 BY MR. MORRIS:
 9 Q. And were you aware that in the
 10 financial statements prepared for Highland for
 11 the period ending December 31st, 2017, that PWC
 12 included in its notes amounts due from Highland
 13 Capital Management Fund Advisors, L.P.?
 14 A. The 0.2 million in the first
 15 sentence, is that your question?
 16 Q. Yes. You know, the whole – who at
 17 Highland was responsible for providing
 18 information to PWC relating to Notes and Other
 19 Amounts Due from Affiliates?
 20 A. The accounting department.
 21 Q. And who was the head of the
 22 accounting department as of the end of 2017?
 23 A. Frank Waterhouse.
 24 Q. And did Frank Waterhouse remain the
 25 head of the accounting department until at

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1 Dondero - 5-28-2021
 2 Q. And to the best of your
 3 recollection, was that accurate?
 4 A. Yes.
 5 Q. Okay. And to the best of your
 6 recollection, was it also accurate that as of
 7 the end of 2017, the total interest and
 8 principal due on an – on outstanding
 9 promissory notes was approximately 14 and a
 10 half million dollars and was payable in annual
 11 installments throughout the term of the note?
 12 A. Yes.
 13 Q. And prior to your execution of the
 14 demand notes, do you recall that you had made,
 15 in favor of Highland, certain term notes?
 16 A. I don't – I don't recall.
 17 Q. Do you remember having to make
 18 payments to Highland to satisfy the terms of
 19 any notes prior to 2018?
 20 A. I can't recall. I didn't refresh –
 21 I didn't refresh myself on anything else, on
 22 any other notes for this deposition.
 23 Q. Okay. But looking at this
 24 paragraph, is there anything about it that you
 25 currently believe is inaccurate or incorrect?

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1 Dondero - 5-28-2021
 2 least the end of 2020, to the best of your
 3 knowledge?
 4 A. Yes.
 5 Q. And when did Frank Waterhouse become
 6 the head of the accounting department?
 7 A. A few years earlier.
 8 Q. So, to the best of your
 9 recollection, Frank Waterhouse has been the
 10 head of the accounting department on a
 11 continuous basis from the period approximately
 12 2015 until the end of 2020; is that right?
 13 A. If not earlier, but yes. But I
 14 don't know the dates.
 15 Q. Okay.
 16 MR. MORRIS: Can we scroll down to
 17 the next to the last paragraph there, the
 18 one that refers to Mr. Dondero? There you
 19 go.
 20 BY MR. MORRIS:
 21 Q. Do you see that, according to this
 22 financial report, you "did not issue any new
 23 promissory notes to the Partnership" during the
 24 year 2017?
 25 A. Yeah.

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1 Dondero - 5-28-2021
 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. I – I don't know. I don't know.
 5 BY MR. MORRIS:
 6 Q. Okay. We can scroll through the
 7 entire page, if you would like, but I just –
 8 I'll ask the question first, and then you tell
 9 me what you need to read.
 10 Do you recall whether
 11 PricewaterhouseCoopers' audited financial
 12 statements ever disclosed the forgiveness of
 13 any loan ever made by Highland to you or any of
 14 its employees?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 A. I don't – I don't know.
 18 BY MR. MORRIS:
 19 Q. Do you have a recollection of any?
 20 A. I don't have a recollection –
 21 recollection of any. As a CPA, I'm not sure
 22 it's required until it's forgiven, but I'm not
 23 the expert. I can't remember seeing it or not
 24 seeing it.
 25 Q. Did the debtor make –

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1 Dondero - 5-28-2021
 2 MR. MORRIS: You know what? Let's
 3 look – let's look at each of these. We
 4 can start with the bottom of the page.
 5 BY MR. MORRIS:
 6 Q. Can you identify any of the makers
 7 of the notes that are referred to in this
 8 section that are not directly or indirectly
 9 owned or controlled by you, other than
 10 Mr. Okada?
 11 So, if we start at the top, is
 12 Highland Capital Management Fund Advisors,
 13 L.P., an entity that is either directly or
 14 indirectly owned or controlled by you?
 15 A. Yes.
 16 Q. NexPoint Advisors, L.P., the next
 17 paragraph, is that an entity that is directly
 18 or indirectly owned or controlled by you?
 19 A. Yes.
 20 Q. HCRE Partners, LLC, is that an
 21 entity that is directly or indirectly owned or
 22 controlled by you?
 23 A. Yes.
 24 Q. Highland Capital Management
 25 Services, Inc., is that an entity that is

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1 Dondero - 5-28-2021
 2 Q. Do you recall anybody at any time
 3 serving as the trustee of The Dugaboy
 4 Investment Trust other than Nancy or Mr. Scott?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 A. I – I don't remember.
 8 BY MR. MORRIS:
 9 Q. Are you the lifetime beneficiary of
 10 The Dugaboy Investment Trust?
 11 A. Yes.
 12 Q. And have you been – withdrawn.
 13 Are you the sole lifetime
 14 beneficiary of The Dugaboy Investment Trust?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 A. I believe so.
 18 BY MR. MORRIS:
 19 Q. Okay. And has that been true since
 20 the time The Dugaboy Investment Trust was
 21 created?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. I don't know for sure.
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 directly or indirectly owned or controlled by
 3 you?
 4 A. Yes.
 5 Q. All right. And you're the subject
 6 of the next paragraph, right?
 7 The next paragraph relates to Mark
 8 Okada. Are you aware of any loan that was ever
 9 made by Highland to Mr. Okada that was
 10 forgiven?
 11 A. I don't know.
 12 Q. Okay.
 13 MR. MORRIS: Can we go to the next
 14 paragraph, please?
 15 BY MR. MORRIS:
 16 Q. There's a reference to The Dugaboy
 17 Investment Trust. Do you see that?
 18 A. Yes.
 19 Q. Either your sister or Mr. Scott have
 20 served as the sole trustee of Dugaboy since the
 21 time it was created; is that correct?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. I – I don't know.
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 Q. Okay. The next paragraph refers to
 3 a Contribution Agreement. Do you see that?
 4 A. Yes.
 5 Q. Are you familiar who the affiliated
 6 trust is that entered into the Contribution
 7 Agreement?
 8 A. No. I'm willing to be refreshed,
 9 but I don't remember.
 10 Q. Is it the Hunter Mountain Investment
 11 Trust?
 12 A. It could be.
 13 Q. Can you think of any other
 14 affiliated trust other than Hunter Mountain who
 15 carried a note receivable in the amount of
 16 \$63 million due to the partnership?
 17 A. No.
 18 Q. Do you directly or indirectly own or
 19 control the Hunter Mountain Trust?
 20 A. No.
 21 Q. Let's go – do you have any interest
 22 in the Hunter Mountain Trust?
 23 A. No.
 24 Q. Directly or indirectly?
 25 A. No.

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1 Dondero - 5-28-2021
 2 MR. MORRIS: Can we go to 33510,
 3 please?
 4 (Scrolling.)
 5 BY MR. MORRIS:
 6 Q. Just to refresh your recollection,
 7 PricewaterhouseCoopers's letter is dated
 8 May 18th, 2018.
 9 And you see there, note 16 refers to
 10 "Subsequent Events." Do you see that?
 11 A. Yep.
 12 Q. So, sometime between January 1st and
 13 May 18, 2018, which is the report date,
 14 PricewaterhouseCoopers is disclosing that you
 15 issued promissory notes in the amount of
 16 \$11.7 million. Do you see that?
 17 A. Yes.
 18 Q. Do you believe that was true and
 19 accurate at the time? Is that your
 20 recollection?
 21 A. Yes.
 22 Q. Now, of the three notes that we
 23 looked at, only one of them was issued before
 24 May 18, 2018. That was the 2 and a half
 25 million-dollar note.

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1 Dondero - 5-28-2021
 2 And I refuse to go in that direction just
 3 because I don't know the details.
 4 BY MR. MORRIS:
 5 Q. I appreciate that, sir, and I didn't
 6 mean to take you into that direction. I'm just
 7 asking you if you know what accounts for the
 8 difference between the \$11.7 million stated and
 9 the 3.825 million-dollar note that we looked at
 10 as Exhibit Number 1 that was tendered by you on
 11 February 2nd, 2018. That's all.
 12 A. I – I don't know. I have no – I
 13 have no idea.
 14 Q. Okay. In the course of the audit,
 15 you personally sign management representation
 16 letters, right?
 17 A. Usually at the end.
 18 Q. Yeah.
 19 MR. MORRIS: So can we call the next
 20 exhibit up, please?
 21 (Exhibit 14 introduced.)
 22 BY MR. MORRIS:
 23 Q. And happy to take a look at it. I'm
 24 going to point you to a couple of things.
 25 MR. MORRIS: But if we could go to

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1 Dondero - 5-28-2021
 2 Do you remember that?
 3 I apologize. Withdrawn.
 4 That was the 3.825 million-dollar
 5 note.
 6 Do you remember that?
 7 A. Okay. Yes.
 8 Q. Okay. So, if that note was 3. –
 9 let's just call it roughly \$3.9 million, does
 10 that mean that there were \$7.8 million of other
 11 notes that you made in favor of Highland during
 12 the first five months of 2018?
 13 MS. DEITSCH-PEREZ: Object to the
 14 form.
 15 A. Yeah, I think you got the wrong –
 16 well, you're – I'm not the accounting
 17 department. I'm not the auditor. My comment
 18 would be our financial statements have always
 19 been – our audited financial statements have
 20 always been extremely accurate and
 21 Pricewaterhouse and KPMG literally do a hundred
 22 percent sampling of all transactions.
 23 Everything is reflected accurately in the
 24 financials, and there's no missing note or
 25 misstated note or unequal amount, or whatever.

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1 Dondero - 5-28-2021
 2 the document, it's page 9 of the document,
 3 Bates number 33408. All right.
 4 And scroll up to the prior page,
 5 please. Just looking for the signatures.
 6 BY MR. MORRIS:
 7 Q. All right. Is that your signature
 8 there, sir?
 9 A. Yeah.
 10 Q. And did you sign this management
 11 representation letter on behalf of Highland in
 12 your capacity as the Strand Advisors, Inc.,
 13 general partner on or about May 18th, 2018?
 14 A. Yeah.
 15 Q. And Frank Waterhouse, is that – do
 16 you know that to be his signature below?
 17 A. It resembles it, yes.
 18 Q. Okay. Do you have an understanding
 19 of why you signed this document?
 20 A. Despite all their auditing and
 21 double-checking of all source information,
 22 they – they want a validation from management,
 23 also.
 24 Q. And is that standard and customary,
 25 to the best of your experience?

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1 Dondero - 5-28-2021
 2 A. Yes.
 3 Q. Okay.
 4 MR. MORRIS: Can we go back to the
 5 first page, please?
 6 (Scrolling.)
 7 BY MR. MORRIS:
 8 Q. Do you see in the second paragraph,
 9 the last sentence, there's a reference to
 10 "materiality"?
 11 MR. MORRIS: If you can just scroll
 12 down a bit.
 13 BY MR. MORRIS:
 14 Q. And it says, quote, "Materiality
 15 used for purposes of these representations is
 16 \$2,000,000."
 17 Am I reading that correctly?
 18 A. Yes.
 19 Q. And did you understand that Highland
 20 was to provide to PWC, so that it could prepare
 21 the audited financial statements with
 22 information relating to issues and transactions
 23 that were material, using that definition?
 24 A. Yes.
 25 MR. MORRIS: Let's go to the next

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1 Dondero - 5-28-2021
 2 page, please?
 3 BY MR. MORRIS:
 4 Q. Again, you'll see that this is the
 5 Consolidated Balance Sheet for the period
 6 ending December 31st, 2018. Do you see that?
 7 A. Yes.
 8 Q. And is it accurate that Highland
 9 continued to carry on its balance sheet as an
 10 asset all "Notes and Other Amounts Due from
 11 Affiliates"?
 12 A. Yes.
 13 MS. DEITSCH-PEREZ: Object to the
 14 form.
 15 BY MR. MORRIS:
 16 Q. And you knew -- you knew at the time
 17 that the audited financials were finalized that
 18 Highland was carrying on its balance sheet
 19 "Notes and Other Amounts Due from Affiliates,"
 20 correct?
 21 A. Yup.
 22 Q. Did you personally tell anybody at
 23 PWC in connection with the preparation of the
 24 audited financial statements for 2018 that you
 25 had entered into the agreement with your sister

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1 Dondero - 5-28-2021
 2 document.
 3 (Exhibit 15 introduced.)
 4 BY MR. MORRIS:
 5 Q. These are the audited financials for
 6 the period ending December 31st, 2018.
 7 MR. MORRIS: And if you could go to
 8 the third page, the one ending in 33424.
 9 No, above. Yeah, right there.
 10 Do you see PricewaterhouseCoopers
 11 signed the audit letter on June 3rd, 2019?
 12 A. Yep.
 13 MR. MORRIS: And if we can scroll up
 14 to the top of the page, it has the same
 15 statement concerning "Management's
 16 Responsibility for the Consolidated
 17 Financial Statements" that we looked at
 18 earlier in the 2017 audit, correct?
 19 A. Yes.
 20 BY MR. MORRIS:
 21 Q. Okay. And that's -- looking at it,
 22 that's customary language that auditors include
 23 in audited financial statements, correct?
 24 A. Yep.
 25 MR. MORRIS: Can we go to the next

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1 Dondero - 5-28-2021
 2 Nancy in January or February of 2019?
 3 MS. DEITSCH-PEREZ: Object to the
 4 form.
 5 A. Not that I recall.
 6 BY MR. MORRIS:
 7 Q. Do you know if anybody told PWC,
 8 prior to the completion of the audited
 9 financial statements for the period ending
 10 December 31st, 2018, of your agreement with
 11 Nancy?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. Not that I know of.
 15 BY MR. MORRIS:
 16 Q. Did you ever instruct anybody to
 17 inform PWC about the agreement you reached with
 18 Nancy in --
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 BY MR. MORRIS:
 22 Q. -- January --
 23 MR. MORRIS: Please let me finish
 24 the question.
 25 MS. DEITSCH-PEREZ: You took a

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1 Dondero - 5-28-2021
 2 breath. Sorry.
 3 MR. MORRIS: Are you finished?
 4 MS. DEITSCH-PEREZ: Yes. As I
 5 explained, you took a breath, and I thought
 6 you were done. Sorry.
 7 BY MR. MORRIS:
 8 Q. Did you ever instruct anybody to
 9 inform PWC of your agreement that you reached
 10 with Nancy in January or February 2019?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. No.
 14 MR. MORRIS: Can you please go to
 15 page 33451?
 16 (Scrolling.)
 17 BY MR. MORRIS:
 18 Q. And we've got the "Notes and Other
 19 Amounts Due from Affiliates." We had gone
 20 through all of this before and I'm not going to
 21 do it again, but I do want to ask you, sir:
 22 Did you personally approve and authorize each
 23 of the notes that are reflected in the PWC
 24 disclosure concerning Notes and Other Amounts
 25 Due from Affiliates?

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1 Dondero - 5-28-2021
 2 Q. That would include the three notes
 3 at issue in this lawsuit, is that right?
 4 MS. DEITSCH-PEREZ: Object to the
 5 form.
 6 A. (No response.)
 7 BY MR. MORRIS:
 8 Q. Let me ask a different question.
 9 The three – the three notes at
 10 issue in this lawsuit were all issued in 2018,
 11 correct?
 12 A. Yes.
 13 Q. Okay. Do you have a recollection as
 14 to what notes account for the difference
 15 between the \$8.8 million or so that's at issue
 16 in this lawsuit and the \$14.9 million
 17 referenced in this disclosure?
 18 A. I don't, other than that – I
 19 believe the audit is accurate and, you know,
 20 there could have been principle or interest
 21 paydowns. I don't know the reason for the
 22 difference.
 23 Q. This disclosure, as it pertains to
 24 you, doesn't mention any oral agreement, does
 25 it?

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 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. Repeat the question.
 5 Did I personally approve? Was that
 6 the question or –
 7 BY MR. MORRIS:
 8 Q. Yes. Withdrawn.
 9 I'll ask a different question.
 10 And I'm happy to give you the time
 11 needed to look at the full disclosure, but are
 12 you aware of any note or other amount due from
 13 affiliate that you didn't approve and
 14 authorize?
 15 A. I'm not aware.
 16 MR. MORRIS: Okay. If we could just
 17 focus in on that bottom paragraph relating
 18 to Mr. Dondero.
 19 BY MR. MORRIS:
 20 Q. So there's a reference there to your
 21 having "issued promissory notes to the
 22 Partnership in the aggregate amount of
 23 \$14.9 million" during 2018.
 24 Do you see that?
 25 A. Yes.

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1 Dondero - 5-28-2021
 2 A. No.
 3 Q. And it doesn't mention any amendment
 4 to any of the notes, correct?
 5 A. No.
 6 Q. It doesn't describe any conditions
 7 that have been placed on the collectability of
 8 the notes from you, correct?
 9 A. No.
 10 Q. It doesn't state that the notes
 11 might be forgiven upon some conditions
 12 subsequent, correct?
 13 A. No, it does not.
 14 MR. MORRIS: Can we turn to
 15 page 33461, please?
 16 (Scrolling.)
 17 BY MR. MORRIS:
 18 Q. And these are "Subsequent Events,"
 19 and I just want to look through them –
 20 withdrawn.
 21 You understand that these financial
 22 statements are for the period ending
 23 December 31st, 2018, correct?
 24 A. Yes.
 25 Q. And the agreement that you reached

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1 Dondero - 5-28-2021
 2 with Nancy, to the best of your recollection,
 3 occurred in January or February 2019, correct?
 4 (Simultaneous conversation.)
 5 A. Yes –
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 THE REPORTER: I didn't hear an
 9 answer.
 10 A. Repeat the question again, just in
 11 case.
 12 BY MR. MORRIS:
 13 Q. Sure. The agreement that you – the
 14 agreement that you reached with Nancy on behalf
 15 of Highland was an agreement that was reached
 16 in January or February 2019, correct?
 17 A. Was in – the last was in January or
 18 February of '19, yes. Yes.
 19 Q. Okay. So I just want to show you
 20 the entirety of the "Subsequent Events" because
 21 they cover the period from December 31st, 2018,
 22 until the report date of June 3, 2019.
 23 MR. MORRIS: If we could just look
 24 at that.
 25 BY MR. MORRIS:

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1 Dondero - 5-28-2021
 2 not there's any other aspect of the
 3 financial statements that –
 4 MS. DEITSCH-PEREZ: That's fine.
 5 MR. MORRIS: – pertain to the
 6 notes.
 7 Give me a break. Stop.
 8 MS. DEITSCH-PEREZ: I know.
 9 Litigation isn't a one-way – one-way
 10 disco.
 11 MR. MORRIS: Okay. All right.
 12 The next document, please.
 13 THE WITNESS: How are we doing on
 14 time?
 15 MR. MORRIS: We're doing pretty
 16 well. I think we're going to fit within –
 17 we're not quite an hour back on, but I'm
 18 confident that we'll fit within the one- to
 19 two-hour – we'll be done within an hour.
 20 That's my point.
 21 THE WITNESS: Okay. I'm going to
 22 give a hard stop at 2:00. Okay?
 23 MR. MORRIS: You can do whatever you
 24 want. If we're not finished, we'll just
 25 have to figure out a time to come back. So

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 2 Q. Is there any reference made to the
 3 agreement that you reached with Nancy in
 4 January or February 2019?
 5 A. No.
 6 MS. DEITSCH-PEREZ: And I just want
 7 to object for the record that we asked the
 8 debtor for all of the Highland financial –
 9 audited financial statements. We got
 10 highly redacted ones where the debtor has
 11 clearly left unredacted only those things
 12 it wanted to use while denying Mr. Dondero
 13 the unredacted copies. So we do not have
 14 here, for him to look at, the unredacted
 15 Highland audited financial statements.
 16 MR. MORRIS: But this is the only
 17 portion of the document – well, I'm not
 18 going to argue.
 19 MS. DEITSCH-PEREZ: Yes. You showed
 20 us what you wanted to show him in an
 21 unredacted (audio distortion) gave him
 22 fully redacted copies. I understand that.
 23 MR. MORRIS: Yeah, and I'll be happy
 24 to submit a unredacted copy to the Judge
 25 under seal so that she can see whether or

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 2 let's get through as much as we can, and
 3 we'll see where we are.
 4 BY MR. MORRIS:
 5 Q. The next document is the management
 6 representation letter.
 7 (Exhibit 16 introduced.)
 8 BY MR. MORRIS:
 9 Q. And I would just ask you to look at,
 10 I guess, page 33419 and just confirm for me
 11 that that's your signature.
 12 A. Yes.
 13 Q. Okay. And this contains the same
 14 representations that you made to PWC that we
 15 looked at in the earlier management rep letter,
 16 right?
 17 A. Yes.
 18 Q. Okay. Let's look at the next
 19 document, please.
 20 (Exhibit 17 introduced.)
 21 BY MR. MORRIS:
 22 Q. So PWC issues the audited financials
 23 in June of 2019, and then Highland files for
 24 bankruptcy in October.
 25 Do I have that right?

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 2 A. Yes.
 3 Q. And at the time Highland filed for
 4 bankruptcy, you were the president and CEO of
 5 Highland, correct?
 6 A. Yes.
 7 Q. And you personally authorized
 8 Highland's bankruptcy filing, correct?
 9 A. On Pachulski's recommendation.
 10 Q. But you're the only person who
 11 authorized the filing; is that correct?
 12 A. Yes.
 13 Q. And did you understand -- you have
 14 familiarity with bankruptcy proceedings, right?
 15 MS. DEITSCH-PEREZ: Object to the
 16 form.
 17 A. Not this kind of bankruptcy, but,
 18 yes, we have experience in bankruptcies.
 19 BY MR. MORRIS:
 20 Q. And you had experience in the Acis
 21 bankruptcy, for example, correct?
 22 A. Yes.
 23 MS. DEITSCH-PEREZ: Object to the
 24 form.
 25 BY MR. MORRIS:

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 2 A. I'm sure they filed many schedules.
 3 Q. And did you -- did you review the
 4 debtor's schedules before they were filed?
 5 A. No.
 6 Q. All right. So, here is a summary of
 7 the debtor's assets and liabilities that was
 8 filed in December -- on December 12th, 2019.
 9 Do you see the timeline at the top?
 10 A. Yes.
 11 Q. And you were still in control of the
 12 debtor at that time, correct?
 13 A. Yep.
 14 Q. And was Mr. Waterhouse responsible
 15 for preparing the debtor's Summary of Assets
 16 and Liabilities on behalf of Highland at that
 17 time?
 18 A. I -- I don't know whether DSI was in
 19 control at that point. I don't know.
 20 Q. Did DSI rely on Mr. Waterhouse and
 21 the accounting team for the information that
 22 was used to create the debtor's disclosures?
 23 MS. DEITSCH-PEREZ: Object to the
 24 form.
 25 BY MR. MORRIS:

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 2 Q. And you understand that debtors in
 3 bankruptcy have to make certain disclosures; is
 4 that right?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 BY MR. MORRIS:
 8 Q. You can answer.
 9 A. Yes.
 10 Q. And you understand that the purpose
 11 of the disclosures is to give interested
 12 parties an opportunity to review the financial
 13 information relating to the debtors, right?
 14 MS. DEITSCH-PEREZ: Object to the
 15 form.
 16 A. Generally.
 17 BY MR. MORRIS:
 18 Q. The debtor is supposed to be
 19 transparent. Is that a statement you would
 20 agree with?
 21 A. I'd agree the debtor is supposed to
 22 be.
 23 Q. So, are you aware that the debtor
 24 filed certain schedules in connection with the
 25 bankruptcy case?

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 2 Q. Withdrawn.
 3 To the best of your knowledge, did
 4 DSI rely on Mr. Waterhouse and the accounting
 5 team at Highland in order to prepare the
 6 debtor's schedules and financial disclosures?
 7 MS. DEITSCH-PEREZ: Object to the
 8 form.
 9 A. I don't know.
 10 BY MR. MORRIS:
 11 Q. Did you ever discuss with
 12 Mr. Waterhouse the debtor's financial
 13 disclosures during the bankruptcy case?
 14 A. Nope.
 15 Q. Did you ever look at the Summary of
 16 Assets and Liabilities that was filed with the
 17 Court in December 2019?
 18 A. Nope.
 19 MR. MORRIS: Turn to the second
 20 page, please. Let's just go down right --
 21 right there.
 22 BY MR. MORRIS:
 23 Q. Do you see in part 11 -- part 11
 24 pertains to all other assets and in Item
 25 Number 71, there's a reference to "Notes

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 2 Receivable."
 3 A. Yep.
 4 Q. And do you see that the Notes
 5 Receivable are for an aggregate amount of
 6 approximately \$150 million?
 7 A. Yep.
 8 Q. And it refers to Exhibit D. Do you
 9 see that?
 10 A. Yes.
 11 Q. All right.
 12 MR. MORRIS: Can we turn – go to
 13 the next page?
 14 BY MR. MORRIS:
 15 Q. And exhibit – this page is Exhibit
 16 D.
 17 Do you see that?
 18 A. Yes.
 19 Q. And this shows an aggregate amount
 20 of – the face amount of notes to be the same
 21 \$150.3 million that we just saw, correct?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 BY MR. MORRIS:
 25 Q. We can go back and look, if you

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 2 Q. Do you know if the debtor's
 3 schedules were ever amended after
 4 December 13th, 2019, to reflect "Doubtful or
 5 Uncollectible" Notes Receivable?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. Yeah. I believe the Hunter Mountain
 9 56 was written off.
 10 BY MR. MORRIS:
 11 Q. Okay. Anything else?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. I – I don't know.
 15 BY MR. MORRIS:
 16 Q. Okay. Did you ever ask anyone to
 17 amend the debtor's schedules to reflect any
 18 Doubtful or Uncollectible receivable that's set
 19 forth on this page?
 20 A. I did not.
 21 Q. Okay.
 22 MR. MORRIS: La Asia, I'm actually
 23 going to just skip the next exhibit. And
 24 if we could go to the one that you and I
 25 had marked as 19. We'll just mark it as 18

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 2 want.
 3 A. It seems to tie.
 4 Q. Okay. And it was disclosed on the
 5 docket in the bankruptcy case that you
 6 personally had made Notes Receivable
 7 outstanding in the approximate amount of
 8 \$9.3 million. Do you see that?
 9 A. Yes.
 10 Q. Okay.
 11 MR. MORRIS: Can we just go to the
 12 top? I want to just show the date.
 13 BY MR. MORRIS:
 14 Q. It's December 13. That's the date
 15 that this disclosure is made. Do you see that?
 16 A. Yes.
 17 Q. And there's a footnote there, number
 18 [1], that says "Doubtful or Uncollectible
 19 accounts are evaluated at year end." Do you
 20 see that?
 21 A. Yes.
 22 Q. Now, nothing on this document shows
 23 any of the notes as being doubtful or
 24 uncollectible, correct?
 25 A. Correct.

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 2 for purposes of the deposition.
 3 MS. DEITSCH-PEREZ: I think that's
 4 confusing. I don't mind if you just mark
 5 18 as "omitted." I would want a sheet with
 6 "18 omitted." That way, your numbering can
 7 stay the same.
 8 MR. MORRIS: Okay. That's fine.
 9 Thank you. So we'll mark 18 as "omitted",
 10 and this will be 19.
 11 (Exhibit 19 introduced.)
 12 BY MR. MORRIS:
 13 Q. Are you aware of – that the debtor
 14 filed disclosures called Statements of
 15 Financial Affairs, often referred to as SoFAs?
 16 A. I've heard of the form before, yes.
 17 Q. Did you ever review the debtor's
 18 SoFAs?
 19 A. No.
 20 Q. So, do you know who was responsible
 21 at Highland for preparing the debtor's SoFAs?
 22 A. No.
 23 Q. Would it have been – would –
 24 whoever it was, would that person have either
 25 been or reported to Frank Waterhouse, as the

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 2 CFO?
 3 A. I'm sorry. Can you repeat that one
 4 more time?
 5 Q. I appreciate the fact that you
 6 don't – you can't identify the person who
 7 prepared the SoFAs; but within the
 8 organizational structure of Highland during the
 9 time that you were the CEO, would the person
 10 have been either Frank Waterhouse or somebody
 11 who reported to Frank Waterhouse?
 12 A. Or DSI.
 13 Q. Okay.
 14 MR. MORRIS: Can we go to page 2,
 15 please.
 16 (Scrolling.)
 17 BY MR. MORRIS:
 18 Q. Do you see at number 4 here, there's
 19 a reference to payments made to insiders within
 20 a year of the bankruptcy case?
 21 A. Yup.
 22 Q. Are you aware – withdrawn.
 23 Were you aware in December 2019 that
 24 Highland was going to disclose all payments
 25 made to insiders within a year of the

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 2 with that since he's only prepared for
 3 his – his – for this proceeding and has
 4 not refreshed himself on anything else.
 5 So, this is outside of what the scope of
 6 this deposition ought to be.
 7 MR. MORRIS: Okay. So you have two
 8 choices, Deborah: You can either state
 9 your objection, "beyond the scope," or you
 10 can direct the witness not to answer.
 11 Which would you like to do?
 12 MS. DEITSCH-PEREZ: I am going to
 13 state my objection that it's beyond the
 14 scope, but I'm asking you because – as a
 15 matter of fairness, that you restrain
 16 yourself and limit your deposition to this
 17 adversary proceeding –
 18 MR. MORRIS: Okay. I appreciate –
 19 MS. DEITSCH-PEREZ: – and not –
 20 (Simultaneous conversation.)
 21 MS. DEITSCH-PEREZ: And if the
 22 witness isn't prepared to answer these
 23 questions, it's not fair that you proceed
 24 on them.
 25 MR. MORRIS: Okay. So I'll just say

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 2 bankruptcy case?
 3 A. No.
 4 MR. MORRIS: Let's go to page 19 of
 5 34, please.
 6 (Scrolling.)
 7 MR. MORRIS: If we could, scroll
 8 down near the bottom.
 9 BY MR. MORRIS:
 10 Q. You'll see that there's two entries
 11 for Highland Capital Management Fund Advisors.
 12 Do you see that?
 13 A. Yup.
 14 Q. And in May 2019, the debtor paid
 15 Highland Capital Management Fund Advisors the
 16 aggregate amount of \$7.4 million. Am I reading
 17 that correctly?
 18 A. Yes.
 19 Q. Okay. And those payments were – in
 20 exchange for those payments, Highland received
 21 two promissory notes, correct?
 22 MS. DEITSCH-PEREZ: John, I'm going
 23 to object. You're straying from the
 24 subject of this adversary and going into
 25 another, and I'm really not comfortable

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 2 that for a couple of questions to ask the
 3 former CEO about a 7.4 million-dollar
 4 payment made to an affiliate that he owns
 5 or controls, I'm going to ask you to give
 6 me a little latitude.
 7 BY MR. MORRIS:
 8 Q. Mr. Dondero, were those two payments
 9 backed up by promissory notes in favor of the
 10 debtor, to the best of your knowledge?
 11 A. I don't know.
 12 Q. Okay.
 13 MR. MORRIS: Let's go to the next
 14 page, please.
 15 Can we go towards the middle of the
 16 page. Right there. That's fine.
 17 BY MR. MORRIS:
 18 Q. Do you see your name, James Dondero,
 19 there?
 20 A. Yes.
 21 Q. And you were paid \$3.75 million
 22 within a year of the bankruptcy, correct?
 23 A. Yes.
 24 Q. Who determined that you should –
 25 who made the decision for Highland to pay you

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 2 that amount?
 3 A. Me? I don't know.
 4 Q. Is there anybody else who had the
 5 authority to determine your compensation prior
 6 to the petition date, other than yourself?
 7 A. Especially – besides myself –
 8 okay. Let me answer that question first.
 9 The Class A – majority Class A
 10 holders can, and then I can.
 11 Q. Anybody else?
 12 A. Not that – not that I know.
 13 Q. In practice, did anybody other than
 14 you set your compensation?
 15 A. In practice, yes, sometimes majority
 16 Class A did.
 17 Q. And at any time prior to the
 18 petition date, can you think of an instance
 19 where the majority of the Class A refused to
 20 compensate you in the manner in which you
 21 wanted?
 22 A. There was – no, because there was
 23 no reason to because there was plenty of head
 24 room in all the agreements and compared to
 25 market levels.

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 2 the electronic signature of Mr. Waterhouse. Do
 3 you see?
 4 A. Yes.
 5 Q. Okay. Were – to the best of your
 6 knowledge as the CEO at the time, were
 7 Mr. Sharp and Mr. Waterhouse authorized to sign
 8 and file Monthly Operating Reports with the
 9 Court?
 10 A. Again, it's not my sphere of
 11 knowledge. It looks like – individually or
 12 jointly, I – I don't have a comment.
 13 Q. I'm just asking you, as the CEO, did
 14 you expect Mr. Waterhouse and Mr. Sharp to take
 15 care of all financial disclosures required
 16 under the bankruptcy code?
 17 A. Yes.
 18 Q. And did you expect them to do that
 19 completely, transparently and accurately?
 20 A. Yes.
 21 Q. Do you have any reason to believe
 22 that they failed to do so?
 23 A. Not that I'm aware.
 24 MR. MORRIS: Can we go to page 6 of
 25 11?

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 2 MR. MORRIS: Let's go to the next
 3 document, please.
 4 (Exhibit 20 introduced.)
 5 BY MR. MORRIS:
 6 Q. Are you aware that, during the
 7 course of the bankruptcy proceeding, the
 8 debtor, in addition to the schedules and SoFAs,
 9 also filed every month a document called the
 10 "Monthly Operating Report"?
 11 A. I'm not aware, specifically.
 12 Q. Did you ever review any of the
 13 debtor's Monthly Operating Reports?
 14 A. Not that I can recall.
 15 Q. Okay.
 16 MR. MORRIS: We can scroll down a
 17 bit.
 18 BY MR. MORRIS:
 19 Q. You see there's – there's two
 20 signatures here: One electronic, one
 21 handwritten, both dated December 2nd. Do you
 22 see that Brad Sharp has signed as an authorized
 23 individual as the Chief Restructuring Officer?
 24 A. Yup.
 25 Q. Okay. And then below that, there's

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 2 (Scrolling.)
 3 BY MR. MORRIS:
 4 Q. You haven't seen this document
 5 before; is that right?
 6 A. I do not believe so.
 7 Q. Okay. But you see that it was filed
 8 in late January 2020, but it was signed in
 9 December, right?
 10 A. Yeah.
 11 Q. Okay. And do you see that among the
 12 assets listed are amounts "Due from
 13 affiliates"?
 14 A. Yep.
 15 Q. And do you have any reason to
 16 believe that the amounts due from affiliates
 17 are anything other than the same notes and
 18 amounts due that we saw in the audited
 19 financial statements?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form.
 22 A. I don't know.
 23 BY MR. MORRIS:
 24 Q. Okay.
 25 THE WITNESS: I do look at this and

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 2 get wistful. You guys should be ashamed of
 3 yourselves, what you've done to this
 4 company.
 5 MR. MORRIS: I move to strike.
 6 Can we take a look at footnote (1),
 7 please?
 8 BY MR. MORRIS:
 9 Q. Do you see that it "Includes various
 10 notes receivable at carrying value"?
 11 Do you have any understanding of
 12 what that --
 13 MS. DEITSCH-PEREZ: You didn't state
 14 the whole sentence, John. Please, if
 15 you're going to point him to things, read
 16 him the whole sentence.
 17 BY MR. MORRIS:
 18 Q. Sir, do you have any understanding
 19 as to what footnote (1) refers to or means?
 20 A. It says what it says.
 21 Q. Okay.
 22 MR. MORRIS: Let's look at the next
 23 document, please.
 24 (Exhibit 21 introduced.)
 25 MR. MORRIS: All right. So if you

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 2 Mr. Sharp, as the responsible party, that there
 3 was anything inaccurate in any monthly --
 4 Monthly Operating Report filed by the debtor?
 5 A. No.
 6 MR. MORRIS: Can we go to the next
 7 page, please?
 8 (Scrolling.)
 9 THE WITNESS: I'm going to give the
 10 12-minute warning here. I can be back at
 11 4:00, but I'm going to need a couple hours.
 12 MR. MORRIS: I'm trying to finish
 13 up, okay?
 14 THE WITNESS: Okay.
 15 MR. MORRIS: I'd rather not come
 16 back, to be honest with you.
 17 Can we go to the next page, please?
 18 BY MR. MORRIS:
 19 Q. Again, the debtor reported that the
 20 amounts due from affiliates were assets of the
 21 debtor's estate, correct?
 22 A. Yep.
 23 Q. Do you -- do you have any issue with
 24 the fact that the debtor reported the notes,
 25 including your own notes, as assets of the

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 2 could just stop right there.
 3 BY MR. MORRIS:
 4 Q. This is the Monthly Operating Report
 5 for the period ending November 2019. Do you
 6 see that?
 7 A. Yes.
 8 MR. MORRIS: Can we scroll down a
 9 bit?
 10 BY MR. MORRIS:
 11 Q. And that's Mr. Sharp's and
 12 Mr. Waterhouse's signatures, correct?
 13 A. Yes.
 14 Q. Do you see on this version,
 15 Mr. Sharp is identified as the "Responsible
 16 Party," but Mr. Waterhouse is identified as the
 17 "Preparer"?
 18 A. Yes.
 19 Q. Do you recall ever telling Mr.
 20 Waterhouse, in his capacity as the preparer of
 21 Monthly Operating Reports, that there was
 22 anything inaccurate in any Monthly Operating
 23 Report filed by the debtor?
 24 A. No.
 25 Q. Do you recall ever telling

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 2 estate?
 3 MS. DEITSCH-PEREZ: Object to the
 4 form.
 5 A. Until they're forgiven, they're bona
 6 fide notes.
 7 BY MR. MORRIS:
 8 Q. And you don't think the "conditions
 9 subsequent" agreement that you entered into
 10 with Nancy calls into question whether the
 11 debtor would ever recover on their notes that
 12 you issued to them?
 13 MS. DEITSCH-PEREZ: Object to the
 14 form.
 15 A. Again, I don't believe it's material
 16 or GAAP, is my understanding.
 17 BY MR. MORRIS:
 18 Q. Well, almost a third of the debtor's
 19 assets are notes "Due from affiliates," right?
 20 A. You have to back out Hunter
 21 Mountain, and you have to back out -- you have
 22 to back out about 80 million to get to the 70
 23 million of affiliated notes; and then, from
 24 there, you have to back out 60 of them to get
 25 to the 9 million.

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 2 MS. DEITSCH-PEREZ: Mr. Morris,
 3 please don't make faces at Mr. Dondero.
 4 BY MR. MORRIS:
 5 Q. Why – why are we backing out Hunter
 6 Mountain?
 7 A. I think the Hunter Mountain – there
 8 were notes going both ways, but I think the
 9 Hunter Mountain is out of the estate, I
 10 believe.
 11 Q. But Hunter Mountain – the debtor
 12 held notes that were made by Hunter Mountain in
 13 the approximate amount of \$60 million, right?
 14 A. But subsequent to these dates, I
 15 think -- I think they realized it was just a
 16 cross-transaction. There were dues and
 17 payables that were essentially equal from
 18 Hunter Mountain, so I think Hunter Mountain
 19 came out of that.
 20 Q. Isn't it – isn't it a fact that
 21 they wrote them off because they didn't believe
 22 they were collectible?
 23 A. Yeah, because the payment on those
 24 notes depended upon Highland honoring its
 25 agreements to Hunter Mountain, which Highland

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 2 (Exhibit 22 introduced.)
 3 MR. MORRIS: Yeah, that's it.
 4 Go to page 5, please. Thank you.
 5 BY MR. MORRIS:
 6 Q. Do you see that box there? It says
 7 "Non-Operating Receipts - Other."
 8 A. Yes.
 9 Q. Okay. And do you understand that
 10 that shows that, in December 2019, while you
 11 were still personally in control of the debtor,
 12 that certain payments of "principle or
 13 interest" were made with respect to notes made
 14 in favor of the debtor?
 15 A. Yes.
 16 Q. Okay. And do you understand that
 17 the one dated December 23rd in the approximate
 18 amount of \$783,000, that was a payment that was
 19 made by you?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form.
 22 A. If you say so. I don't have a basis
 23 for denying it or confirming it.
 24 BY MR. MORRIS:
 25 Q. Okay. But it's true, you do recall

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 2 had no intention of doing. So, there's no
 3 ability for Hunter Mountain to pay Highland.
 4 Q. Does Highland – does Hunter
 5 Mountain today have the ability to pay back any
 6 of the \$60 million that it – that was
 7 reflected in the notes?
 8 MS. DEITSCH-PEREZ: Object.
 9 A. No, not that I know of but –
 10 BY MR. MORRIS:
 11 Q. Okay.
 12 MS. DEITSCH-PEREZ: And, Mr. Morris,
 13 once again, I think we're straying from
 14 this adversary.
 15 MR. MORRIS: Can we go to page 5 of
 16 9, please?
 17 (Scrolling.)
 18 MR. MORRIS: Above that, I think.
 19 Next page, 5 of 9. We must be looking at
 20 the wrong exhibit.
 21 Is the one that was marked 22? No,
 22 it's the next – I believe it's the next
 23 document.
 24 Let's pull up the next document,
 25 please.

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 2 that in December 2019, after the petition date,
 3 while you were still in control of the debtor,
 4 that certain payments of principal and interest
 5 were made on notes that were made in favor of
 6 the debtor, correct?
 7 MS. DEITSCH-PEREZ: Asked -- asked
 8 and answered about an hour ago.
 9 BY MR. MORRIS:
 10 Q. You can answer, sir.
 11 A. I believe – I believe so.
 12 Q. Thank you. Do you recall that in
 13 connection with its Plan and Disclosure
 14 Statement, that the debtor prepared a
 15 Liquidation Analysis?
 16 A. Yes.
 17 MR. MORRIS: Can we call the next
 18 document up on the screen, please?
 19 (Exhibit 23 introduced.)
 20 MR. MORRIS: And if we can go to the
 21 next page.
 22 BY MR. MORRIS:
 23 Q. Your lawyers and lawyers acting on
 24 behalf of entities you own and control or
 25 otherwise have an interest spent considerable

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 2 time on the debtor's Liquidation Analysis and
 3 confirmation.
 4 Do you remember that?
 5 A. I can't – I can't agree or disagree
 6 with that.
 7 BY MR. MORRIS:
 8 Q. Okay. Did you personally review the
 9 debtor's Liquidation Analysis?
 10 A. Briefly.
 11 Q. Okay.
 12 MR. MORRIS: Can we go to the next
 13 page, please?
 14 BY MR. MORRIS:
 15 Q. Do you see that this page contains a
 16 list of "Assumptions"?
 17 A. Yes.
 18 MR. MORRIS: And can we scroll up a
 19 little further so we can see the date?
 20 BY MR. MORRIS:
 21 Q. You'll see that on November 24th,
 22 2020, the debtor filed a Liquidation Analysis
 23 that contained, as among the Assumptions,
 24 quote, "All demand notes are collected in the
 25 year 2021." Do you see that?

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 2 Q. Do you recall that there came a time
 3 just prior to the confirmation hearing that the
 4 debtor amended its Liquidation Analysis?
 5 A. No. Okay. Yes.
 6 MR. MORRIS: Okay. And if we could
 7 go to the next page.
 8 BY MR. MORRIS:
 9 Q. You'll see at the bottom right-hand
 10 corner it's dated January 28th, 2021.
 11 MR. MORRIS: We wanted page up but
 12 just – yeah, page up, the assumptions.
 13 Yeah, right there.
 14 BY MR. MORRIS:
 15 Q. You see it's dated January 28, 2021?
 16 A. Yes.
 17 Q. Okay. And let's look at Assumption
 18 C. It's been amended somewhat.
 19 And it now says, quote: "All demand
 20 notes are collected in the year 2021; 3 term
 21 notes defaulted and have been demanded based on
 22 default provisions; payment estimated in 2021."
 23 Do you see that?
 24 A. Yes.
 25 Q. Did you or anybody on your behalf

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 2 A. Yes.
 3 Q. Did you or anybody acting on your
 4 behalf ever inform the Court that you believed
 5 that assumption was unreasonable?
 6 A. I – I don't know, but I know we've
 7 been fighting the notes consistently through
 8 various mechanisms.
 9 Q. Okay. Did you or anybody acting on
 10 your behalf ever inform the Court of your
 11 agreement with Nancy?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. Not – not that I know of.
 15 BY MR. MORRIS:
 16 Q. Did you ever instruct anybody to
 17 inform the Court that you had an agreement with
 18 Nancy that rendered Assumption C unreasonable?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. I did not.
 22 MR. MORRIS: Let's look at the last
 23 document, please.
 24 (Exhibit 24 introduced.)
 25 BY MR. MORRIS:

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 2 ever inform the Court that this assumption was
 3 unreasonable?
 4 MS. DEITSCH-PEREZ: Object to the
 5 form.
 6 A. Yes. Well, Lynn wrote a letter to
 7 all the counsels, which I think ended up being
 8 put in the Court record, that the notes were
 9 all subject to defenses and could not be
 10 considered unencumbered, I think, if they're
 11 sold, or whatever. He was – he was – he –
 12 he realized the attitude towards the notes had
 13 shifted, and he penned something to everybody
 14 and to make the notes so that they couldn't be
 15 sold without notifying people that there were
 16 good defenses to them.
 17 BY MR. MORRIS:
 18 Q. Did you or anybody acting on your
 19 behalf ever challenge this assumption in
 20 connection with the debtor's confirmation
 21 hearing?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form, asked and answered.
 24 A. Yeah. I think Lynn's letter
 25 objected to that vehemently. It was just

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EXHIBIT 14

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Proposed Counsel for the Debtor and Debtor-in-Possession

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

.....	§	
In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	Related to Docket No. 281
.....		

STIPULATION IN SUPPORT OF 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

This Stipulation (the “Stipulation”) is being entered into by and among Highland Capital Management, L.P., as the above-captioned debtor and debtor-in-possession (the “Debtor”), the

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

Official Committee of Unsecured Creditors appointed in the above captioned case (the “Committee”), Strand Advisors, Inc. (“Strand”), and James Dondero (“Mr. Dondero” and together with the Debtor, the Committee, and Strand, the “Parties”), with reference to the following facts:

Recitals

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

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

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].² The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

4. On December 27, 2019, the Debtor filed the *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”).³

5. The Settlement Motion seeks approval of a proposed settlement embodied in the

² All docket numbers refer to the docket maintained by this Court.

³ All capitalized terms used but not defined herein have the meaning given to them in the Settlement Motion.

Term Sheet (as amended). The Term Sheet, among other things, contemplated the creation of a new independent board of directors of Strand.

6. Strand is the Debtor's general partner and the ultimate party in control of the Debtor.

7. Mr. Dondero is the sole shareholder of Strand.

8. The Term Sheet provides that James Seery, John Dubel, and Russell Nelms (collectively, the "Independent Directors") will be appointed to Strand's board of directors (the "Board") pursuant to the terms of the Term Sheet and the Governing Documents.

9. The Governing Documents provide, among other things, that the Parties will enter into this Stipulation and seek this Court's approval of the Stipulation.

Stipulation

10. In consideration for the Committee entering into the Term Sheet, Mr. Dondero, being the sole shareholder of Strand, agrees as follows:

- a. not to transfer or assign his shares in Strand or exercise the voting power of such shares to remove any of the Independent Directors from Strand's Board or further change the authorized number of directors on the Board from three directors;
- b. to exercise the voting power of his shares so as to cause each of the Independent Directors to be re-elected upon the expiration of each such person's term;
- c. upon the death, disability, or resignation of any member of the Board, to exercise the voting power of his shares so as to cause the resulting vacancy to be filled by a successor that is both independent and (i) acceptable to Mr. Dondero and the Committee or (ii) selected by the remaining members of the Board; and
- d. not take any action or exercise the voting power of his shares in Strand in any way that is inconsistent with the Term Sheet or any order of this Court approving the Term Sheet.

11. The Parties stipulate and agree that this Stipulation will no longer be effective or bind Strand or Mr. Dondero following the termination of the Debtor's bankruptcy case and that the Parties will take such steps as may be reasonably necessary to cause this Stipulation to terminate at such time.

12. The Parties further stipulate and agree that the Court shall have exclusive jurisdiction over (a) all matters arising from or related to the interpretation and implementation of this Stipulation and (b) the adjudication of any Party's breach of this Stipulation.

[Remainder of page intentionally left blank]

Dated: January 9, 2020

Submitted and Agreed to by,

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Jeffrey N. Pomerantz

Jeffrey N. Pomerantz (CA Bar No.143717)

(admitted pro hac vice)

Ira D. Kharasch (CA Bar No. 109084)

(admitted pro hac vice)

Maxim B. Litvak (SBN: 24002482)

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-and-

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Dallas, Texas 75231

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*Counsel and Proposed Counsel for the Debtor and
Debtor-in-Possession*

Dated: January 9, 2020

AGREED AS TO FORM AND SUBSTANCE:

SIDLEY AUSTIN LLP

/s/ Matthew A. Clemente

Bojan Guzina, Esq. (*admitted pro hac vice*)
Matthew A. Clemente, Esq. (*admitted pro hac vice*)
Dennis M. Twomey, Esq. (*pro hac vice pending*)
Alyssa Russell, Esq. (*admitted pro hac vice*)
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Telephone: (312) 853-7000
Facsimile: (312) 853-7036

*Proposed Counsel for the Official Committee of
Unsecured Creditors*

Dated: January 9, 2020

AGREED AS TO FORM AND SUBSTANCE:

STRAND ADVISORS, INC.



Scott Ellington
Secretary

Dated: January 9, 2020

AGREED AS TO FORM AND SUBSTANCE:

**JAMES DONDERO, SOLELY IN HIS CAPACITY
AS THE SOLE SHAREHOLDER OF STRAND
ADVISORS, INC.**



EXHIBIT 15



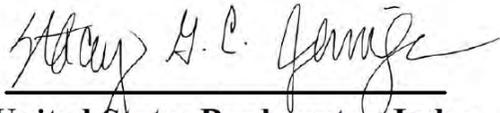
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 9, 2020


United States Bankruptcy Judge

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	Related to Docket Nos. 7 & 259

**ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF
UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR
AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE**

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the "Motion"),² filed by the above-captioned debtor and debtor in possession

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

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

(the “Debtor”); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee’s objection to the Motion is OVERRULED.

2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) \$60,000 for each of the first three months, (ii) \$50,000 for each of the next three months, and (iii) \$30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor’s expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

EXHIBIT 16

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084) (admitted pro hac vice)
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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:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	_____
JAMES DONDERO,	§	
Defendant.	§	

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



**COMPLAINT FOR (I) BREACH OF CONTRACT
AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant, Mr. James Dondero ("Mr. Dondero" or "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Mr. Dondero as a result of Mr. Dondero's defaults under three promissory notes executed by Mr. Dondero in favor of the Debtor in the aggregate original principal amount of \$8,825,000 and payable upon the Debtor's demand. Despite due demand, Mr. Dondero has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. Through this Complaint, the Debtor seeks (a) damages from Mr. Dondero in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the notes) for Mr. Dondero's breach of his obligations under the Notes, and (b) turnover by Mr. Dondero to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor's President and Chief Executive Officer until his resignation on January 9, 2020.

CASE BACKGROUND

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

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a)

Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The Dondero Notes

13. Mr. Dondero, in his personal capacity, is the maker under a series of promissory notes in favor of the Debtor.

14. Specifically, on February 2, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$3,825,000 (“Dondero’s First Note”). A true and correct copy of Dondero’s First Note is attached hereto as **Exhibit 1**.

15. On August 1, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Second Note”). A true and correct copy of Dondero’s Second Note is attached hereto as **Exhibit 2**.

16. On August 13, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Third Note” and collectively, with Dondero’s First Note and Dondero’s Second Note, the “Notes”). A true and correct copy of Dondero’s Third Note is attached hereto as **Exhibit 3**.

17. Section 2 of each Note provides: “**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

18. Section 4 of each Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

19. Section 6 of each Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. Mr. Dondero Defaults under Each Note

20. By letter dated December 3, 2020, the Debtor made demand on Mr. Dondero for payment under the Notes by December 11, 2020 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 4**. The Demand Letter provided:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$9,004,013.07, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

21. Despite the Debtor's demand, Mr. Dondero did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020, or at any time thereafter.

22. As of December 11, 2020, there was an outstanding principal amount of \$3,687,269.71 on Dondero's First Note and accrued but unpaid interest in the amount of \$21,003.70, resulting in a total outstanding amount as of that date of \$3,708,273.41.

23. As of December 11, 2020, there was an outstanding principal balance of \$2,619,929.42 on Dondero's Second Note and accrued but unpaid interest in the amount of \$27,950.70, resulting in a total outstanding amount as of that date of \$2,647,880.12.

24. As of December 11, 2020, there was an outstanding principal balance of \$2,622,425.61 on Dondero's Third Note and accrued but unpaid interest in the amount of \$25,433.94, resulting in a total outstanding amount as of that date of \$2,647,859.55.

25. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Notes was \$9,004,013.07.

26. Pursuant to Section 4 of each Note, each Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

27. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

28. Each Note is a binding and enforceable contract.

29. Mr. Dondero breached each Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

30. Pursuant to each Note, the Debtor is entitled to damages from Mr. Dondero in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for Mr. Dondero's breach of his obligations under each of the Notes.

31. As a direct and proximate cause of Mr. Dondero's breach of each Note, the Debtor has suffered damages in the total amount of at least \$9,004,013.07 as of December 11,

2020, plus an amount equal to all accrued but unpaid interest from that date plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by Mr. Dondero Pursuant to 11 U.S.C. § 542(b))

32. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

33. Mr. Dondero owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for Mr. Dondero's breach of his obligations under each of the Notes.

34. Each Note is property of the Debtor's estate, and the amounts due under each Note are matured and payable upon demand.

35. Mr. Dondero has not paid the amounts due under each Note to the Debtor.

36. The Debtor has made demand for the turnover of the amounts due under each Note.

37. As of the date of filing of this Complaint, Mr. Dondero has not turned over to the Debtor all or any of the amounts due under each of the Notes.

38. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of

payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by Mr. Dondero to the Debtor of an amount equal to (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses); and

(iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

\$3,825,000

February 2, 2018

FOR VALUE RECEIVED, JAMES DONDERO ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of THREE MILLION, EIGHT HUNDRED AND TWENTY-FIVE THOUSAND and 00/100 Dollars (\$3,825,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term "*applicable federal rate*" (2.66%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Tax Loan. This Note is paid to the Maker to help satisfy any current tax obligations of a former partner or current partner.

5. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

6. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

7. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other

amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

8. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

9. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

EXHIBIT 2

PROMISSORY NOTE

\$2,500,000

August 1, 2018

FOR VALUE RECEIVED, JAMES DONDERO ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term "*applicable federal rate*" (2.95%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

EXHIBIT 3

PROMISSORY NOTE

\$2,500,000

August 13, 2018

FOR VALUE RECEIVED, JAMES DONDERO ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term "*applicable federal rate*" (2.95%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any; and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

EXHIBIT 4

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

James Dondero
 c/o Highland Capital Management, L.P.
 300 Crescent Court, Suite 700
 Dallas, Texas 75201

Re: Demand on Promissory Notes:

Dear Mr. Dondero,

You entered into the following promissory notes (collectively, the “Notes”) in favor of Highland Capital Management, L.P. (“Payee”):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
2/2/18	\$3,825,000	\$3,687,269.71	\$21,003.70	\$3,708,273.41
8/1/18	\$2,500,000	\$2,619,929.42	\$27,950.70	\$2,647,880.12
8/13/18	\$2,500,000	\$2,622,425.61	\$25,433.94	\$2,647,859.55
TOTALS	\$16,725,000	\$8,929,624.74	\$74,388.33	\$9,004,013.07

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$9,004,013.07, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain your obligation.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
 Highland Capital Management, L.P.
 Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
D. Michael Lynn

Case 21-03003-sgj Doc 1-4 Filed 01/22/21 Entered 01/22/21 17:50:01 Page 4 of 4

Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.	DEFENDANTS James Dondero	
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100	ATTORNEYS (If Known) Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Fort Worth, Texas 76102 Tel.: (817) 405-6900	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input checked="" type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Count 1: Breach of contract; Count 2: Turnover of estate property pursuant to 11 U.S.C. 542		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <p style="text-align: center;">(continued next column)</p>	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input checked="" type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ 9,004,013.07 plus interest, fees, and expenses	
Other Relief Sought		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE January 22, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 17

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084) (admitted pro hac vice)
John A. Morris (NY Bar No. 2405397) (admitted pro hac vice)
Gregory V. Demo (NY Bar No. 5371992) (admitted pro hac vice)
Hayley R. Winograd (NY Bar No. 5612569) (admitted pro hac vice)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
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HAYWARD PLLC
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Zachery Z. Annable
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT FUND
ADVISORS, L.P.,

Defendant.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§
§
§ Adversary Proceeding No.
§
§
§
§
§
§
§

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

**COMPLAINT FOR (I) BREACH OF CONTRACT
AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant, Highland Capital Management Fund Advisors, L.P. ("HCMFA" or "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against HCMFA as a result of HCMFA's defaults under two promissory notes executed by HCMFA in favor of the Debtor in the aggregate original principal amount of \$7,400,000 and payable upon the Debtor's demand. Despite due demand, HCMFA has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. Through this Complaint, the Debtor seeks (a) damages from HCMFA in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the Notes), and (b) turnover by HCMFA to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, HCMFA is a limited partnership with offices located in Dallas, Texas and is organized under the laws of the state of Delaware.

CASE BACKGROUND

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

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The HCMFA Notes

13. HCMFA is the maker under a series of promissory notes in favor of the Debtor.

14. Specifically, on May 2, 2019, HCMFA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$2,400,000 (“HCMFA’s First Note”). A true and correct copy of HCMFA’s First Note is attached hereto as **Exhibit 1**.

15. On May 3, 2019, HCMFA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$5,000,000 (“HCMFA’s Second Note,” and together with HCMFA’s First Note, the “Notes”). A true and correct copy of HCMFA’s Second Note is attached hereto as **Exhibit 2**.

16. Section 2 of each Note provides: “**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

17. Section 4 of each Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

18. Section 6 of each Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. HCMFA's Default under Each Note

19. By letter dated December 3, 2020, the Debtor made demand on HCMFA for payment under the Notes by December 11, 2020 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 3**. The Demand Letter provided:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$7,687,653.07, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

20. Despite the Debtor's demand, HCMFA did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020 or at any time thereafter.

21. As of December 11, 2020, there was an outstanding principal amount of \$2,457,517.15 on HCMFA's First Note and accrued but unpaid interest in the amount of \$35,884.46, resulting in a total outstanding amount as of that date of \$2,493,401.61.

22. As of December 11, 2020, there was an outstanding principal balance of \$5,119,827.40 on HCMFA's Second Note and accrued but unpaid interest in the amount of \$74,424.05, resulting in a total outstanding amount as of that date of \$5,194,251.45.

23. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Notes was \$7,687,653.07

24. Pursuant to Section 4 of each Note, each Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

26. Each Note is a binding and enforceable contract.

27. HCMFA breached each Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

28. Pursuant to each Note, the Debtor is entitled to damages from HCMFA in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCMFA's breach of its obligations under each of the Notes.

29. As a direct and proximate cause of HCMFA's breach of each Note, the Debtor has suffered damages in the total amount of at least \$7,687,653.07 as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

31. HCMFA owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs

and reasonable attorneys' fees and expenses) for HCMFA's breach of its obligations under each of the Notes.

32. Each Note is property of the Debtor's estate, and the amounts due under each Note are matured and payable upon demand.

33. HCMFA has not paid the amounts due under each Note to the Debtor.

34. The Debtor has made demand for the turnover of the amounts due under each Note.

35. As of the date of filing of this Complaint, HCMFA has not turned over to the Debtor all or any of the amounts due under each of the Notes.

36. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);
- (ii) On its Second Claim for Relief, ordering turnover by HCMFA to the Debtor of an amount equal to (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses); and
- (iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

\$2,400,000.00

May 2, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, LP. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION FOUR HUNDRED THOUSAND and 00/100 Dollars (\$2,400,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term “*applicable federal rate*” (2.39%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



FRANK WATERHOUSE

EXHIBIT 2

PROMISSORY NOTE

\$5,000,000.00

May 3, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, LP. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of FIVE MILLION and 00/100 Dollars (\$5,000,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term “*applicable federal rate*” (2.39%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



FRANK WATERHOUSE

EXHIBIT 3

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

Highland Capital Management Fund Advisors, LP
 c/o Highland Capital Management, L.P.
 300 Crescent Court, Suite 700
 Dallas, Texas 75201
 Attention: Frank Waterhouse, CFO

Re: Demand on Promissory Notes:

Dear Mr. Waterhouse,

Highland Capital Management Fund Advisors, LP (“Maker”) entered into the following promissory notes (collectively, the “Notes”), among others,¹ in favor of Highland Capital Management, L.P. (“Payee”):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
5/2/2019	\$2,400,000	\$2,457,517.15	\$35,884.46	\$2,493,401.61
5/3/2019	\$5,000,000	\$5,119,827.40	\$74,424.05	\$5,194,251.45
TOTALS	\$7,400,000	\$7,577,344.55	\$110,308.52	\$7,687,653.07

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$7,687,653.07, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are

¹ Maker is also obligated to pay amounts due under promissory notes issued in favor of Payee prior to April 15, 2019. Pursuant to that certain *Acknowledgment from HCMLP*, dated as of April 15, 2019, Payee agreed not to demand payment on such amounts until May 31, 2021. Payee reserves all rights with respect to such amounts.

expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

Case 21-03004-sgj Doc 1-3 Filed 01/22/21 Entered 01/22/21 17:54:38 Page 4 of 4

Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)	
PLAINTIFFS Highland Capital Management, L.P.		DEFENDANTS Highland Capital Management Fund Advisors, L.P.	
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward LLP 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100		ATTORNEYS (If Known) Munsch Hardt Kopf & Harr, P.C. 500 N. Akard Street, Suite 3800 Dallas, Texas 75201 Tel.: (214) 855-7500	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee		PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Count 1: Breach of contract; Count 2: Turnover pursuant to 11 U.S.C. 542			
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)			
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)		FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law		<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint		Demand \$7,687,653.07 plus interest, fees, and expenses	
Other Relief Sought			

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE January 22, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 18

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084) (admitted pro hac vice)
John A. Morris (NY Bar No. 2405397) (admitted pro hac vice)
Gregory V. Demo (NY Bar No. 5371992) (admitted pro hac vice)
Hayley R. Winograd (NY Bar No. 5612569) (admitted pro hac vice)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC

Melissa S. Hayward
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Zachery Z. Annable
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10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re: §
§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,¹ §
§ Case No. 19-34054-sgj11
Debtor. §
§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff, § Adversary Proceeding No.
vs. §
§
NEXPOINT ADVISORS, L.P. §
§
Defendant. §

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



**COMPLAINT FOR (I) BREACH OF CONTRACT
AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), by its undersigned counsel, as and for its complaint (the “Complaint”) against defendant NexPoint Advisors, L.P. (“NPA” or “Defendant”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against NPA arising from NPA’s default under a promissory note executed by NPA in favor of the Debtor in the original principal amount of \$30,746,812.33 and payable in annual installments. NPA has failed to pay amounts when due under the note, the note is in default, and the amounts due under the note have been accelerated pursuant to the terms of the note.

2. Through this Complaint, the Debtor seeks (a) damages from NPA in an amount equal to (i) the outstanding principal due under the Note (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor’s costs of collection (including all court costs and reasonable attorneys’ fees and expenses, as provided for in the Note) for NPA’s breach of its obligations under the Note, and (b) turnover by the NPA to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor’s case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Court”) under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas and organized under the laws of the state of Delaware.

CASE BACKGROUND

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

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The NPA Note

13. NPA is the maker under a promissory note in favor of the Debtor.

14. Specifically, on May 31, 2017, NPA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$30,746,812.33 (the “Note”). A true and correct copy of the Note is attached hereto as **Exhibit 1**.

15. Section 2 of the Note provides: “**Payment of Principal and Interest**. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the “**Annual Installment**”) until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the “**Maturity Date**”).

16. Section 3 of the Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

² All docket numbers refer to the main docket for the Debtor’s Case maintained by this Court.

17. Section 4 of the Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

18. Section 6 of the Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. NPA's Default under the Note

19. NPA failed to make the payment due under the Note on December 31, 2020 in the amount of \$1,406,111.92.

20. By letter dated January 7, 2021, the Debtor made demand on NPA for immediate payment under the Note (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 2**. The Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Demand Letter (emphasis in the original).

21. On January 14, 2021, in an apparent attempt to cure its default, NPA paid the Debtor the \$1,406,111.92 that was due on December 31, 2020 (the "Partial Payment").

22. The Note does not contain a cure provision. Therefore, the Partial Payment did not cure NPA's default. Accordingly, on January 15, 2021, the Debtor sent NPA a follow-up letter to its Demand Letter (the "Second Demand Letter"), a true and correct copy of which is attached hereto as **Exhibit 3**, stating:

[T]he Partial Payment will be applied as payment against the amounts due under the Note in accordance with Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note).

Second Demand Letter (emphasis in original).

23. Despite the Debtor's demands, NPA did not pay the amount demanded by the Debtor on January 7, 2021, or at any time thereafter.

24. As of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03

25. Pursuant to Section 4 of the Note, the Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

26. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

27. The Note is a binding and enforceable contract.

28. NPA breached the Note by failing to pay all amounts due to the Debtor upon NPA's default and acceleration.

29. Pursuant to the Note, the Debtor is entitled to damages from NPA in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and

unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for NPA's breach of its obligations under the Note.

30. As a direct and proximate cause of NPA's breach of the Note, the Debtor has suffered damages in the amount of at least \$23,071,195.03 as of January 15, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by NPA Pursuant to 11 U.S.C. § 542(b))

31. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

32. NPA owes the Debtor an amount equal to (i) the aggregate outstanding principal due under the Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for NPA's breach of its obligations under the Note.

33. The Note is property of the Debtor's estate that is matured and payable upon default and acceleration.

34. NPA has not paid the amount due under the Note to the Debtor.

35. The Debtor has made demand for the turnover of the amount due under the Note.

36. As of the date of filing of this Complaint, NPA has not turned over the amount due under the Note.

37. The Debtor is entitled to the amount due under the Note.

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);
- (ii) On its Second Claim for Relief, ordering turnover by NPA to the Debtor of an amount equal to (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses); and
- (iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 2405397)
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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By: 

Name:

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

EXHIBIT 2

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P, entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the "Note") in favor of Highland Capital Management, L.P. ("Payee").

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee's wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

EXHIBIT 3

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 15, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Partial Payment on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P. (“Maker”), entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”). A copy of the Note is attached hereto as **Appendix A**.

On January 7, 2021, Payee notified you that because of Maker’s failure to make the payment due on December 31, 2020 (the “Default”), the Note was in default and that all principal, interest, and any other amounts due on the Note were immediately due and payable. The amount due and payable on the Note as of January 8, 2021, was \$24,471,804.98; however, interest continues to accrue under the Note.

On January 14, 2021, Payee received a wire from Maker in the amount of \$1,406,111.92 (the “Partial Payment”). To reiterate, the amount due under the Note as of January 8, 2021, was \$24,471,804.98. The Partial Payment will be applied as payment against the amounts due under the Note pursuant to Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note). Payment of such amount is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix B**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved, including the right to recover Payee’s expenses incurred in collecting the Note. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter
A. Lee Hogewood III

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Appendix A

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By: 

Name:

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

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Appendix B

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.	DEFENDANTS NexPoint Advisors, L.P.	
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100	ATTORNEYS (If Known) Munsch Hardt Kopf & Harr, P.C. 500 N. Akard Street, Suite 3800 Dallas, Texas 75201 Tel.: (214) 855-7500	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Count 1: Breach of contract; Count 2: Turnover pursuant to 11 U.S.C. 542		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <p style="text-align: center;">(continued next column)</p>	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ 23,071,195.03 plus interest, fees, and expenses	
Other Relief Sought		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE January 22, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 19

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084) (admitted pro hac vice)
John A. Morris (NY Bar No. 2405397) (admitted pro hac vice)
Gregory V. Demo (NY Bar No. 5371992) (admitted pro hac vice)
Hayley R. Winograd (NY Bar No. 5612569) (admitted pro hac vice)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC,

Defendant.

§ Chapter 11
§ Case No. 19-34054-sgj11
§
§
§ Adversary Proceeding No.
§
§
§
§
§

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

**COMPLAINT FOR (I) BREACH OF CONTRACT
AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant, Highland Capital Management Services, Inc. ("HCMS" or "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against HCMS as a result of HCMS's defaults under (i) four demand notes in the aggregate principal amount of \$900,000 and payable upon the Debtor's demand, and (ii) one term note in the aggregate principal amount of \$20,247,628.02 and payable in the event of default, all executed by HCMS in favor of the Debtor. HCMS has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. Through this Complaint, the Debtor seeks (a) damages from HCMS in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the notes) for HCMS's breach of its obligations under the Notes, and (b) turnover by HCMS to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, HCMS is a company with offices located in Dallas, Texas, and is incorporated in the state of Delaware.

CASE BACKGROUND

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

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The HCMS Demand Notes

13. HCMS is the maker under a series of demand notes in favor of the Debtor.

14. Specifically, on March 28, 2018, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$150,000 (“HCMS’s First Demand Note”). A true and correct copy of HCMS’s First Demand Note is attached hereto as **Exhibit 1**.

15. On June 25, 2018, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$200,000 (“HCMS’s Second Demand Note”). A true and correct copy of HCMS’s Second Demand Note is attached hereto as **Exhibit 2**.

16. On May 29, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$400,000 (“HCMS’s Third Demand Note”). A true and correct copy of HCMS’s Third Demand Note is attached hereto as **Exhibit 3**.

17. On June 26, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$150,000 (“HCMS’s Fourth Demand Note,” and collectively, with HCMS’s First Demand Note, HCMS’s Second Demand Note, and HCMS’s Third Demand Note, the “Demand Notes”). A true and correct copy of HCMS’s Fourth Demand Note is attached hereto as **Exhibit 4**.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

18. Section 2 of the Demand Notes provide: “**Payment of Principal and Interest.**

The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

19. Section 4 of the Demand Notes provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

20. Section 6 of the Demand Notes provides:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

B. HCMS’s Defaults under Each Demand Note

21. By letter dated December 3, 2020, the Debtor made demand on HCMS for payment under the Demand Notes by December 11, 2020 (the “Demand Letter”). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 5**. The Demand Letter provided:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$947,519.43, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

22. Despite the Debtor’s demand, HCMS did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020.

23. As of December 11, 2020, there was an outstanding principal amount of \$158,776.59 on HCMS's First Demand Note and accrued but unpaid interest in the amount of \$3,257.32, resulting in a total outstanding amount as of that date of \$162,033.91.

24. As of December 11, 2020, there was an outstanding principal balance of \$212,403.37 on HCMS's Second Demand Note and accrued but unpaid interest in the amount of \$2,999.54, resulting in a total outstanding amount as of that date of \$215,402.81.

25. As of December 11, 2020, there was an outstanding principal balance of \$409,586.19 on HCMS's Third Demand Note and accrued but unpaid interest in the amount of \$5,256.62, resulting in a total outstanding amount as of that date of \$414,842.81.

26. As of December 11, 2020, there was an outstanding principal balance of \$153,564.74 on HCMS's Fourth Demand Note and accrued but unpaid interest in the amount of \$1,675.16, resulting in a total outstanding amount as of that date of \$155,239.90.

27. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Demand Notes was \$947,519.43. Pursuant to Section 4 of each Demand Note, each Note is in default and is currently due and payable.

C. The HCMS Term Note

28. HCMS is the maker under a term note in favor of the Debtor.

29. Specifically, on May 31, 2017, HCMS executed a term note in favor of the Debtor, as payee, in the original principal amount of \$20,247,628.02 (the "Term Note," and together with the Demand Notes, the "Notes"). A true and correct copy of the Term Note is attached hereto as **Exhibit 6**.

30. Section 2 of the Term Note provides: "**Payment of Principal and Interest**. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

31. Section 3 of the Term Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

32. Section 4 of the Term Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

33. Section 6 of the Term Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

D. HCMS's Default under the Term Note

34. HCMS failed to make the payment due under the Term Note on December 31, 2020.

35. By letter dated January 7, 2021, the Debtor made demand on HCMS for immediate payment under the Term Note (the “Second Demand Letter”). A true and correct copy of the Second Demand Letter is attached hereto as Exhibit 7. The Second Demand Letter provides:

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,757,248.95; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Second Demand Letter (emphasis in the original).

36. As of January 8, 2021, the total outstanding principal and accrued but unpaid interest under the Term Note was \$6,757,248.95.

37. Pursuant to Section 4 of the Term Note, the Term Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

38. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

39. The Notes are binding and enforceable contracts.

40. HCMS breached each Demand Note by failing to pay all amounts due to the Debtor upon the Debtor’s demand.

41. HCMS breached the Term Note by failing to pay all amounts due to the Debtor upon HCMS’s default and acceleration.

42. Pursuant to each Note, the Debtor is entitled to damages from HCMS in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued

and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCMS's breach of its obligations under each of the Notes.

43. As a direct and proximate cause of HCMS's breach of each Demand Note, the Debtor has suffered damages in the amount of at least \$947,519.43 as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

44. As a direct and proximate cause of HCMS's breach of the Term Note, the Debtor has suffered damages in the amount of at least \$6,757,248.95 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by HCMS Pursuant to 11 U.S.C. § 542(b))

45. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

46. HCMS owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each of the Notes, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCMS's breach of its obligations under each of the Notes.

47. Each Demand Note is property of the Debtor's estate and the amounts due under each Demand Note are matured and payable upon demand.

48. The Term Note is property of the Debtor's estate and the amounts due under the Term Note are matured and payable upon default and acceleration.

49. The Debtor has made demand for turnover of the amounts due under each of the Notes.

50. As of the date of filing this Complaint, HCMS has not turned over to the Debtor all or any of the amounts due under each of the Notes.

51. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

WHEREFORE, the Debtor prays for judgment as follows:

(i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by HCMS to the Debtor of an amount equal to (a) the aggregate principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses); and

(iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

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/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 20

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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:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HCRE PARTNERS, LLC (N/K/A/ NEXPOINT
REAL ESTATE PARTNERS, LLC,

Defendant.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§
§
§ Adversary Proceeding No.
§
§
§
§
§
§
§
§

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

**COMPLAINT FOR (I) BREACH OF CONTRACT
AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case and the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) ("HCRE" or "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against HCRE as a result of HCRE's defaults under (i) four demand notes in the aggregate principal amount of \$4,250,000 and payable upon the Debtor's demand, and (ii) one term note in the aggregate principal amount of \$6,059,831.51 payable in the event of default, all executed by HCRE in favor of the Debtor. HCRE has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. Through this Complaint, the Debtor seeks (a) damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the notes) for HCRE's breach of its obligations under the Notes, and (b) turnover by HCRE to the Debtor of the foregoing amounts.

JURISDICTION AND VENUE

3. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

7. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

8. Upon information and belief, HCRE is a limited liability company with offices located in Dallas, Texas and is organized under the laws of the state of Delaware.

CASE BACKGROUND

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

10. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis LP and Acis GP.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

12. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The HCRE Demand Notes

13. HCRE is the maker under a series of demand notes in favor of the Debtor.

14. Specifically, on November 27, 2013, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$100,000 (“HCRE’s First Demand Note”). A true and correct copy of HCRE’s First Demand Note is attached hereto as **Exhibit 1**.

15. On October 12, 2017, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“HCRE’s Second Demand Note”). A true and correct copy of HCRE’s Second Demand Note is attached hereto as **Exhibit 2**.

16. On October 15, 2018, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$750,000 (“HCRE’s Third Demand Note”). A true and correct copy of HCRE’s Third Demand Note is attached hereto as **Exhibit 3**

17. On September 25, 2019, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$900,000 (“HCRE’s Fourth Demand Note,” and collectively, with HCRE’s First Demand Note, HCRE’s Second Demand Note, and HCRE’s Third Demand Note, the “Demand Notes”). A true and correct copy of HCRE’s Fourth Demand Note is attached hereto as **Exhibit 4**.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

18. Section 2 of the Demand Notes provide: “**Payment of Principal and Interest.** The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

19. Section 4 of the Demand Notes provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

20. Section 6 of the Demand Notes provides:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

B. HCRE’s Defaults under Each Demand Note

21. By letter dated December 3, 2020, the Debtor made demand on HCRE for payment of the Demand Notes by December 11, 2020 (the “Demand Letter”). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 5**. The Demand Letter provides:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$5,012,260.96, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

22. Despite the Debtor’s demand, HCRE did not pay all or any portion of the amount demanded by the Debtor on December 11, 2020 or at any time thereafter.

23. As of December 11, 2020, there was an outstanding principal amount of \$171,542 on HCRE's First Demand Note and accrued but unpaid interest in the amount of \$526.10, resulting in a total outstanding amount as of that date of \$172,068.10.

24. As of December 11, 2020, there was an outstanding principal balance of \$3,149,919.12 on HCRE's Second Demand Note and accrued but unpaid interest in the amount of \$41,423.60, resulting in a total outstanding amount as of that date of \$3,191,342.72.

25. As of December 11, 2020, there was an outstanding principal balance of \$874,977.53 on HCRE's Third Demand Note and accrued but unpaid interest in the amount of \$10,931.23, resulting in a total outstanding amount as of that date of \$885,908.76.

26. As of December 11, 2020, there was an outstanding principal balance of \$750,279.14 on HCRE's Fourth Demand Note and accrued but unpaid interest in the amount of \$12,662.24, resulting in a total outstanding amount as of that date of \$762,941.38.

27. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Demand Notes was \$5,012,260.96.

28. Pursuant to Section 4 of each Note, each Note is in default and is currently due and payable.

C. The HCRE Term Note

29. HCRE is the maker under a term note in favor of the Debtor.

30. Specifically, on May 31, 2017, HCRE executed a term note in favor of the Debtor, as payee, in the original principal amount of \$6,059,831 (the "Term Note," and together with the Demand Notes, the "Notes"). A true and correct copy of the Term Note is attached hereto as **Exhibit 6**.

31. Section 2 of the Term Note provides: "**Payment of Principal and Interest**. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

32. Section 3 of the Term Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

33. Section 4 of the Term Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

34. Section 6 of the Term Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

D. HCRE's Default under the Term Note

35. HCRE failed to make the payment due under the Term Note on December 31, 2020.

36. By letter dated January 7, 2021, the Debtor made demand on HCRE for immediate payment under the Term Note (the “Second Demand Letter”). A true and correct copy of the Second Demand Letter is attached hereto as Exhibit 7. The Demand Letter provides:

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84; however, interest continues to accrue under the Note.

The Term Note is in default, and payment is due immediately.

Second Demand Letter (emphasis in the original).

37. Despite the Debtor’s demands, HCRE did not pay the amount demanded by the Debtor on January 7, 2021 or at any time thereafter.

38. As of January 8, 2021, the total outstanding principal and accrued but unpaid interest under the Term Note was \$6,145,466.84.

39. Pursuant to Section 4 of the Term Note, the Note is in default and is currently due and payable.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

40. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

41. Each Note is a binding and enforceable contract.

42. HCRE breached each Demand Note by failing to pay all amounts due to the Debtor upon the Debtor’s demand.

43. HCRE breached the Term Note by failing to pay all amounts due to the Debtor upon HCRE’s default and acceleration.

44. Pursuant to each Note, the Debtor is entitled to damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCRE's breach of its obligations under each of the Notes.

45. As a direct and proximate cause of HCRE's breach of each Demand Note, the Debtor has suffered damages in the amount of at least \$5,012,260.96 as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

46. As a direct and proximate cause of HCRE's breach of the Term Note, the Debtor has suffered damages in the amount of at least \$6,145,466.84 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Turnover by HCRE Pursuant to 11 U.S.C. § 542(b))

47. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

48. HCRE owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each of the Notes, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses) for HCRE's breach of its obligations under each of the Notes.

49. Each Demand Note is property of the Debtor's estate and the amounts due under each Demand Note are matured and payable upon demand.

50. The Term Note is property of the Debtor's estate and the amounts due under the Term Note are matured and payable upon default and acceleration.

51. The Debtor has made demand for turnover of the amounts due under each of the Notes.

52. As of the date of filing this Complaint, HCRE has not turned over to the Debtor all or any of the amounts due under each of the Notes.

53. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

WHEREFORE, the Debtor prays for judgment as follows:

(i) On its First Claim for Relief, damages in an amount to be determined at trial, including, among other things, (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by HCRE to the Debtor of an amount equal to (a) the aggregate principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses); and

(iii) Such other and further relief as this Court deems just and proper.

Dated: January 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

\$100,000

November 27, 2013

FOR VALUE RECEIVED, HCRE PARTNERS, LLC ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of ONE HUNDRED THOUSAND and 00/100 Dollars (\$100,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

EXHIBIT 2

PROMISSORY NOTE

\$2,500,000

October 12, 2017

FOR VALUE RECEIVED, HCRE PARTNERS, LLC ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

EXHIBIT 3

PROMISSORY NOTE

\$750,000

October 15, 2018

FOR VALUE RECEIVED, HCRE PARTNERS, LLC (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of SEVEN HUNDRED FIFTY THOUSAND and 00/100 Dollars (\$750,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

EXHIBIT 4

PROMISSORY NOTE

\$900,000

September 25, 2019

FOR VALUE RECEIVED, HCRE PARTNERS, LLC ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of NINE HUNDRED THOUSAND and 00/100 Dollars (\$900,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

EXHIBIT 5

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)
 c/o NexPoint Advisors, LP
 300 Crescent Court, Suite 700
 Dallas, Texas 75201
 Attention: James Dondero

Re: Demand on Promissory Notes:

Dear Mr. Dondero,

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) ("Maker") entered into the following promissory notes (collectively, the "Notes") in favor of Highland Capital Management, L.P. ("Payee"):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
11/27/13	\$100,000	\$171,542.00	\$526.10	\$172,068.10
10/12/17	\$2,500,000	\$3,149,919.12	\$41,423.60	\$3,191,342.72
10/15/18	\$750,000	\$874,977.53	\$10,931.23	\$885,908.76
9/25/19	\$900,000	\$750,279.14	\$12,662.24	\$762,941.38
TOTALS	\$4,250,000	\$4,946,717.79	\$65,543.17	\$5,012,260.96

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$5,012,260.96, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee's wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

EXHIBIT 6

PROMISSORY NOTE

\$6,059,831.51

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from HCRE Partners, LLC, as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, HCREA PARTNERS, LLC ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of SIX MILLION, FIFTY NINE THOUSAND, EIGHT HUNDRED THIRTY ONE AND 51/100 DOLLARS (\$6,059,831.51), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of eight percent (8.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

HCRE PARTNERS, LLC

By: 

Name: James Dondero

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
1/9/14	\$100,000.00	8.00%	\$108,000.00
1/29/14	\$600,000.00	8.00%	\$648,000.00
3/10/14	\$2,000,000.00	8.00%	\$2,009,643.84
3/28/14	\$50,000.00	8.00%	\$54,000.00
1/26/15	\$1,500,000.00	8.00%	\$1,545,356.16
4/2/15	\$1,500,000.00	8.00%	\$1,545,356
	\$5,750,000.00		\$6,059,831.51

EXHIBIT 7

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)
c/o NexPoint Advisors, LP
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“Maker”) entered into that certain promissory note in the original principal amount of \$6,059,831.51 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.	DEFENDANTS HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)	
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100	ATTORNEYS (If Known)	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Count 1: Breach of contract; Count 2: Turnover pursuant to 11 U.S.C. 542		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ 11,157,727.80 plus interest, fees, and expenses	
Other Relief Sought		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas		DIVISION OFFICE Dallas
		NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING		DIVISION OFFICE
		NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE January 22, 2021		PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 21

D. Michael Lynn – State Bar ID 12736500
John Y. Bonds, III – State Bar ID 02589100
John T. Wilson, IV – State Bar ID 24033344
Bryan C. Assink – State Bar ID 24089009
BONDS ELLIS EPPICH SCHAFFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 – Telephone
(817) 405-6902 – Facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. §
§ **Adversary No.: 21-03003**
§
JAMES D. DONDERO, §
§
Defendant. §

DEFENDANT JAMES DONDERO’S ORIGINAL ANSWER

Defendant James Dondero (“Dondero” or “Defendant”), the defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Original Answer (the “Answer”) responding to the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate* [Adv. Dkt. 1] (the “Complaint”). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Complaint sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in paragraph 5 not expressly admitted are denied.

6. The Defendant admits paragraph 6 of the Complaint.

THE PARTIES

7. The Defendant admits paragraph 7 of the Complaint.

8. The Defendant admits paragraph 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits paragraph 9 of the Complaint.

10. The Defendant admits paragraph 10 of the Complaint.

11. The Defendant admits paragraph 11 of the Complaint.

12. The Defendant admits paragraph 12 of the Complaint.

STATEMENT OF FACTS

13. The Defendant admits that he has executed promissory notes under which the Debtor is the payee. Any allegations in paragraph 13 not expressly admitted are denied.

14. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 14 of the Complaint. Defendant admits that the attached document appears to be a copy of the referenced note.

15. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 15 of the Complaint. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in the second sentence of paragraph 15 of the Complaint and therefore denies same.

16. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 16 of the Complaint. Defendant admits that the attached document appears to be a copy of the referenced note.

17. The Defendant admits that section 2 of each note attached to the Complaint contains the provision quoted in paragraph 17 of the Complaint.

18. The Defendant denies the allegations in paragraph 18 of the Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

19. The Defendant denies the allegations in paragraph 19 of the Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

20. In response to paragraph 20 of the Complaint, the Defendant admits that Exhibit 4 to the Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 20 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 20 of the Complaint is denied.

21. To the extent paragraph 21 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 21 of the Complaint.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 22 of the Complaint and therefore denies same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 23 of the Complaint and therefore denies same.

24. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 24 of the Complaint and therefore denies same.

25. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 25 of the Complaint and therefore denies same.

26. The Defendant denies the allegations in paragraph 26 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

27. Paragraph 27 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 28 of the Complaint and therefore denies same.

29. Paragraph 29 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 29 of the Complaint and therefore denies same.

30. Paragraph 30 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30 of the Complaint and therefore denies same.

31. The Defendant denies paragraph 31 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by Mr. Dondero Pursuant to 11 U.S.C. § 542(b))

32. Paragraph 32 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

33. Paragraph 33 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 33 of the Complaint and therefore denies same.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 34 of the Complaint and therefore denies the same.

35. The Defendant denies paragraph 35 of the Complaint.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter, and that document speaks for itself. To the extent paragraph 36 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 36 of the Complaint and therefore denies the same.

37. The Defendant denies paragraph 37 of the Complaint.

38. Paragraph 38 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 38 of the Complaint and therefore denies the same.

39. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

40. Defendant asserts that Plaintiff's claims should be barred because it was previously agreed by Plaintiff that Plaintiff would not collect on the Notes.

41. Defendant further asserts that Plaintiff's claims are barred, in whole or in part, due to waiver.

42. Defendant further asserts that Plaintiff's claims are barred, in whole or in part, due

to estoppel.

43. Defendant further asserts that Plaintiff's claims may be barred, in whole or in part, due to failure of consideration.

JURY DEMAND

44. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

45. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Complaint and provide the Defendant such other relief to which he is entitled.

Dated: March 16, 2021

Respectfully submitted,

/s/ Bryan C. Assink

D. Michael Lynn – State Bar ID 12736500
John Y. Bonds, III – State Bar ID 02589100
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**ATTORNEYS FOR DEFENDANT
JAMES DONDERO**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 16, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Bryan C. Assink _____

Bryan C. Assink

EXHIBIT 22

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*Counsel for Highland Capital Management Fund
Advisors, L.P.*

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

In re

HIGHLAND CAPITAL MANAGEMENT,
L.P.,

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

HIGHLAND CAPITAL MANAGEMENT,
L.P.,

Plaintiff,

v.

HIGHLAND CAPITAL MANAGEMENT
FUND ADVISORS, L.P.

Defendant.

§
§
§
§
§
§
§
§
§
§

Adv. No. 21-03004

DEFENDANT’S ORIGINAL ANSWER

COMES NOW Highland Capital Management Fund Advisors, L.P. (the “Defendant”), the defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), and files this its *Defendant’s Original Answer* (the “Answer”), responding to the *Complaint for (I) Breach of Contract and (II)*

Turnover of Property of the Debtor's Estate (the "Complaint"). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMFA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant admits ¶ 14 of the Complaint.

15. The Defendant admits ¶ 15 of the Complaint.

16. The Defendant denies ¶ 16 of the Complaint. The document speaks for itself and the quote set forth in ¶ 16 is not verbatim.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. HCMFA's Default under Each Note

19. The Defendant admits that Exhibit 3 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 19 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 19 of the Complaint is denied.

20. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 20 of the Complaint.

21. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 21 of the Complaint and therefore denies the same.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 22 of the Complaint and therefore denies the same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 23 of the Complaint and therefore denies the same.

24. The Defendant denies ¶ 24 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. Paragraph 25 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

26. Paragraph 26 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 26 of the Complaint and therefore denies the same.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 27 of the Complaint and therefore denies the same.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient

to form a belief about the truth of the allegations in ¶ 28 of the Complaint and therefore denies the same.

29. The Defendant denies ¶ 29 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. Paragraph 30 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

31. Paragraph 31 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 31 of the Complaint and therefore denies the same.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 32 of the Complaint and therefore denies the same.

33. The Defendant denies ¶ 33 of the Complaint.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter. To the extent ¶ 34 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 34 of the Complaint and therefore denies the same.

35. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient

to form a belief about the truth of the allegations in ¶ 36 of the Complaint and therefore denies the same.

37. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

JURY DEMAND

38. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

39. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of March, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 1st day of March, 2021, a true and correct copy of this document was electronically served by the Court's ECF system on parties entitled to notice thereof, including counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina, Esq.

EXHIBIT 23

of the Debtor's Estate (the "Complaint"). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.
8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.
10. The Defendant admits ¶ 10 of the Complaint.
11. The Defendant admits ¶ 11 of the Complaint.
12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The NPA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant admits ¶ 14 of the Complaint.

15. The Defendant denies ¶ 15 of the Complaint. The document speaks for itself and the quote set forth in ¶ 15 is not verbatim.

16. The Defendant admits ¶ 16 of the Complaint.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. NPA's Default under the Note

19. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 19 of the Complaint and therefore denies the same.

20. The Defendant admits that Exhibit 2 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the

extent ¶ 20 of the Complaint asserts a legal conclusion, no response is required, and it is denied.

To the extent not expressly admitted, ¶ 20 of the Complaint is denied.

21. The Defendant admits that it paid the Debtor \$1,406,111.92 on January 14, 2021.

To the extent not expressly admitted, paragraph 21 of the Complaint is denied.

22. The Defendant admits that Exhibit 3 to the Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself.

To the extent ¶ 22 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 22 of the Complaint is denied.

23. To the extent ¶ 23 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 23 of the Complaint.

24. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 24 of the Complaint and therefore denies the same.

25. The Defendant denies ¶ 25 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

26. Paragraph 26 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 27 of the Complaint and therefore denies the same.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient

to form a belief about the truth of the allegations in ¶ 28 of the Complaint and therefore denies the same.

29. Paragraph 29 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 29 of the Complaint and therefore denies the same.

30. The Defendant denies ¶ 30 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

31. Paragraph 31 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 32 of the Complaint and therefore denies the same.

33. Paragraph 33 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 33 of the Complaint and therefore denies the same.

34. The Defendant denies ¶ 34 of the Complaint.

35. Paragraph 35 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves. To the extent ¶ 35 alleges other facts,

the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. The Defendant denies ¶ 36 of the Complaint.

37. Paragraph 37 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 37 of the Complaint and therefore denies the same.

38. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

39. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

40. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

41. Furthermore, the Plaintiff waived the right to accelerate the note and/or the Plaintiff is estopped to enforce the alleged acceleration.

JURY DEMAND

42. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

43. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of March, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**COUNSEL FOR NEXPOINT
ADVISORS, L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 1st day of March, 2021, a true and correct copy of this document was electronically served by the Court's ECF system on parties entitled to notice thereof, including counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina, Esq.

EXHIBIT 24

PRELIMINARY STATEMENT¹

1. The first sentence of Paragraph 1 sets forth Plaintiff's objective in bringing the Complaint and does not require a response. To the extent a response is required, Defendant denies the allegations in the first sentence of Paragraph 1. The second sentence contains a legal conclusion that does not require a response. To the extent a response is required, Defendant denies the allegations in the second sentence of Paragraph 1.

2. Paragraph 2 contains a summary of the relief Plaintiff seeks and does not require a response. To the extent a response is required, Defendant denies the allegations in Paragraph 2.

JURISDICTION AND VENUE

3. Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers constitutional authority on the Bankruptcy Court to adjudicate this dispute. Defendant denies any allegations in Paragraph 3 that are not expressly admitted.

4. Paragraph 4 states a legal conclusion that does not require a response. To the extent a response is required, Defendant admits the Bankruptcy Court has statutory jurisdiction over this Adversary Proceeding but denies that the Court has constitutional authority over this Adversary Proceeding. Defendant denies any allegations in Paragraph 4 that are not expressly admitted.

5. Defendant denies that Plaintiff's breach of contract claim is a core proceeding. Defendant further denies that a turnover proceeding under 11 U.S.C. § 542(b) is the appropriate mechanism to collect a contested debt. Defendant admits that a turnover proceeding under 11 U.S.C. § 542(b) is a statutorily core proceeding but denies that it is constitutionally core under *Stern v. Marshall*. Defendant does not consent to the Bankruptcy Court entering final orders or

¹ The headings herein are from Plaintiff's Complaint and are solely included for the Court's convenience.

judgment in this Adversary Proceeding. Defendant denies any allegations in Paragraph 5 that are not expressly admitted.

6. Paragraph 6 states a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that venue is proper in this District.

THE PARTIES

7. Defendant admits the allegations in Paragraph 7 of the Complaint.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

CASE BACKGROUND

9. Defendant admits the allegations in Paragraph 9 of the Complaint.

10. Defendant admits the allegations in Paragraph 10 of the Complaint.

11. Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Defendant admits the allegations in Paragraph 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMS Demand Notes

13. Defendant admits it has executed at least one promissory note under which the Debtor is the payee. Defendant denies any allegations in Paragraph 13 that are not expressly admitted.

14. Defendant admits that it signed the document attached to the Complaint as Exhibit 1. Defendant denies any allegations in Paragraph 14 that are not expressly admitted.

15. Defendant admits that it signed the document attached to the Complaint as Exhibit 2. Defendant denies any allegations in Paragraph 15 that are not expressly admitted.

16. Defendant admits that it signed the document attached to the Complaint as Exhibit 3. Defendant denies any allegations in Paragraph 16 that are not expressly admitted.

17. Defendant admits that it signed the document attached to the Complaint as Exhibit 4. Defendant denies any allegations in Paragraph 17 that are not expressly admitted.

18. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Complaint in Paragraph 18.

19. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Complaint in Paragraph 19.

20. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 of the Complaint in Paragraph 20.

B. Allegations regarding the Demand Notes

21. Defendant admits that Plaintiff sent it a copy of Exhibit 5. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of Paragraph 21. Defendant denies any allegations in Paragraph 21 that are not expressly admitted.

22. To the extent Paragraph 22 asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits the allegations in Paragraph 22.

23. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 23 and, therefore, denies them.

24. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 24 and, therefore, denies them.

25. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 25 and, therefore, denies them.

26. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 26 and, therefore, denies them.

27. Defendant lacks sufficient information or knowledge to admit or deny the allegations in the first sentence of Paragraph 27 and, therefore, denies them. Defendant denies the allegations in the second sentence of Paragraph 27 of the Complaint.

C. The HCMS Term Note

28. Defendant admits that it has executed at least one promissory note under which Debtor is the payee. Defendant denies any allegations in Paragraph 28 that are not expressly admitted.

29. Defendant admits it signed the document attached to the Complaint as Exhibit 6. Defendant denies any allegations in Paragraph 29 that are not expressly admitted.

30. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Complaint in Paragraph 30. Defendant denies any allegations in Paragraph 30 that are not expressly admitted.

31. Defendant admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Complaint in Paragraph 31. Defendant denies any allegations in Paragraph 31 that are not expressly admitted.

32. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Complaint in Paragraph 32. Defendant denies any allegations in Paragraph 32 that are not expressly admitted.

33. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Complaint in Paragraph 33. Defendant denies any allegations in Paragraph 33 that are not expressly admitted.

D. Allegations regarding the Term Note.

34. To the extent Paragraph 34 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits Paragraph 34 of the Complaint.

35. Defendant admits that Plaintiff sent it a copy of Exhibit 7. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of Paragraph 35 of the Complaint. Defendant denies any allegations in Paragraph 35 that are not expressly admitted.

36. Defendant is without sufficient information or knowledge to admit or deny the allegations in Paragraph 36 of the Complaint and, therefore, denies them.

37. Defendant denies Paragraph 37 of the Complaint.

**FIRST CLAIM FOR RELIEF
(For Breach of Contract)**

38. Paragraph 38 of the Complaint seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

39. Paragraph 39 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

40. Paragraph 40 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

41. Paragraph 41 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

42. Paragraph 42 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

43. Defendant denies Paragraph 43 of the Complaint.

44. Defendant denies Paragraph 44 of the Complaint.

**SECOND CLAIM FOR RELIEF
(Turnover by HCMS Pursuant to 11 U.S.C. § 549(b))**

45. Paragraph 45 seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

46. Paragraph 46 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

47. Paragraph 47 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

48. Paragraph 48 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

49. Defendant admits that Plaintiff transmitted Exhibits 5 and 7 to the Complaint. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 49 of the Complaint and, therefore, denies them.

50. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 50 of the Complaint and, therefore, denies them.

51. Defendant denies Paragraph 51 of the Complaint.

52. Defendant denies that Plaintiff is entitled to the relief requested in the prayer of the Complaint, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

53. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

54. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

55. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

56. Plaintiff's claims are barred in whole or in part by the doctrines of offset and/or setoff.

JURY DEMAND

57. HCMS demands a trial by jury of all issues so triable under Federal Rule of Civil Procedure 38 and Federal Rule of Bankruptcy Procedure 9015.

58. HCMS does not consent to the Bankruptcy Court conducting a jury trial and therefore demands such jury trial in the District Court.

PRAYER

For these reasons, HCMS respectfully requests that, following a trial on the merits, the Court deny the relief Plaintiffs seeks through its Complaint, enter a judgment that the Plaintiff take nothing on the Complaint, and grant HCMS such other relief at law or in equity to which it may be entitled.

Respectfully submitted,

/s/ Lauren K. Drawhorn

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**COUNSEL FOR HIGHLAND MANAGEMENT
SERVICES, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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Fax: (972) 755-7110

/s/ Lauren K. Drawhorn

Lauren K. Drawhorn

EXHIBIT 25

Estate (the “Complaint”) in the above-referend adversary proceeding (the “Adversary Proceeding”) and respectfully states as follows:

PRELIMINARY STATEMENT¹

1. The first sentence of Paragraph 1 sets forth Plaintiff’s objective in bringing the Complaint and does not require a response. To the extent a response is required, Defendant denies the allegations in the first sentence of Paragraph 1. The second sentence contains a legal conclusion that does not require a response. To the extent a response is required, Defendant denies the allegations in the second sentence of Paragraph 1.

2. Paragraph 2 contains a summary of the relief Plaintiff seeks and does not require a response. To the extent a response is required, Defendant denies the allegations in Paragraph 2.

JURISDICTION AND VENUE

3. Defendant admits that this Adversary Proceeding relates to the Plaintiff’s bankruptcy case but denies any implication that this fact confers constitutional authority on the Bankruptcy Court to adjudicate this dispute. Defendant denies any allegations in Paragraph 3 that are not expressly admitted.

4. Paragraph 4 states a legal conclusion that does not require a response. To the extent a response is required, Defendant admits the Bankruptcy Court has statutory jurisdiction over this Adversary Proceeding but denies that the Court has constitutional authority over this Adversary Proceeding. Defendant denies any allegations in Paragraph 4 that are not expressly admitted.

5. Defendant denies that Plaintiff’s breach of contract claim is a core proceeding. Defendant further denies that a turnover proceeding under 11 U.S.C. § 542(b) is the appropriate mechanism to collect a contested debt. Defendant admits that a turnover proceeding under 11

¹ The headings herein are from Plaintiff’s Complaint and are solely included for the Court’s convenience.

U.S.C. § 542(b) is a statutorily core proceeding but denies that it is constitutionally core under *Stern v. Marshall*. Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Defendant denies any allegations in Paragraph 5 that are not expressly admitted.

6. Paragraph 6 states a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that venue is proper in this District.

THE PARTIES

7. Defendant admits the allegations in Paragraph 7 of the Complaint.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

CASE BACKGROUND

9. Defendant admits the allegations in Paragraph 9 of the Complaint.

10. Defendant admits the allegations in Paragraph 10 of the Complaint.

11. Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Defendant admits the allegations in Paragraph 12 of the Complaint.

STATEMENT OF FACTS

A. The HCRE Demand Notes

13. Defendant admits it has executed at least one promissory note under which the Debtor is the payee. Defendant denies any allegations in Paragraph 13 that are not expressly admitted.

14. Defendant admits that it signed the document attached to the Complaint as Exhibit 1. Defendant denies any allegations in Paragraph 14 that are not expressly admitted.

15. Defendant admits that it signed the document attached to the Complaint as Exhibit 2. Defendant denies any allegations in Paragraph 15 that are not expressly admitted.

16. Defendant admits that it signed the document attached to the Complaint as Exhibit 3. Defendant denies any allegations in Paragraph 16 that are not expressly admitted.

17. Defendant admits that it signed the document attached to the Complaint as Exhibit 4. Defendant denies any allegations in Paragraph 17 that are not expressly admitted.

18. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Complaint in Paragraph 18.

19. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Complaint in Paragraph 19.

20. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 of the Complaint in Paragraph 20.

B. Allegations regarding the Demand Notes

21. Defendant admits that Plaintiff sent it a copy of Exhibit 5. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of Paragraph 21. Defendant denies any allegations in Paragraph 21 that are not expressly admitted.

22. To the extent Paragraph 22 asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits the allegations in Paragraph 22.

23. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 23 and, therefore, denies them.

24. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 24 and, therefore, denies them.

25. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 25 and, therefore, denies them.

26. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 26 and, therefore, denies them.

27. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 27 and, therefore, denies them.

28. Defendant denies the allegations in Paragraph 28 of the Complaint.

C. The HCRE Term Note

29. Defendant admits that it has executed at least one promissory note under which Debtor is the payee. Defendant denies any allegations in Paragraph 29 that are not expressly admitted.

30. Defendant admits it signed the document attached to the Complaint as Exhibit 6. Defendant denies any allegations in Paragraph 30 that are not expressly admitted.

31. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Complaint in Paragraph 31. Defendant denies any allegations in Paragraph 31 that are not expressly admitted.

32. Defendant admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Complaint in Paragraph 32. Defendant denies any allegations in Paragraph 32 that are not expressly admitted.

33. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Complaint in Paragraph 33. Defendant denies any allegations in Paragraph 33 that are not expressly admitted.

34. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Complaint in Paragraph 34. Defendant denies any allegations in Paragraph 34 that are not expressly admitted.

D. Allegations regarding the Term Note.

35. To the extent Paragraph 35 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits Paragraph 35 of the Complaint.

36. Defendant admits that Plaintiff sent it a copy of Exhibit 7. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of Paragraph 36 of the Complaint. Defendant denies any allegations in Paragraph 36 that are not expressly admitted.

37. To the extent Paragraph 37 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits Paragraph 37 of the Complaint.

38. Defendant is without sufficient information or knowledge to admit or deny the allegations in Paragraph 38 of the Complaint and, therefore, denies them.

39. Defendant denies Paragraph 39 of the Complaint.

**FIRST CLAIM FOR RELIEF
(For Breach of Contract)**

40. Paragraph 40 of the Complaint seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

41. Paragraph 41 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

42. Paragraph 42 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

43. Paragraph 43 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

44. Paragraph 44 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

45. Defendant denies Paragraph 45 of the Complaint.

46. Defendant denies Paragraph 46 of the Complaint.

**SECOND CLAIM FOR RELIEF
(Turnover by HCRE Pursuant to 11 U.S.C. § 549(b))**

47. Paragraph 47 seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

48. Paragraph 48 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

49. Paragraph 49 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

50. Paragraph 50 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

51. Defendant admits that Plaintiff transmitted Exhibits 5 and 7 to the Complaint. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 51 of the Complaint and, therefore, denies them.

52. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 52 of the Complaint and, therefore, denies them.

53. Defendant denies Paragraph 53 of the Complaint.

54. Defendant denies that Plaintiff is entitled to the relief requested in the prayer of the Complaint, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

55. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

56. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

57. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

58. Plaintiff's claims are barred in whole or in part by the doctrines of offset and/or setoff.

JURY DEMAND

59. HCRE demands a trial by jury of all issues so triable under Federal Rule of Civil Procedure 38 and Federal Rule of Bankruptcy Procedure 9015.

60. HCRE does not consent to the Bankruptcy Court conducting a jury trial and therefore demands such jury trial in the District Court.

PRAYER

For these reasons, HCRE respectfully requests that, following a trial on the merits, the Court deny the relief Plaintiffs seeks through its Complaint, enter a judgment that the Plaintiff take nothing on the Complaint, and grant HCRE such other relief at law or in equity to which it may be entitled.

Respectfully submitted,

/s/ Lauren K. Drawhorn

Jason M. Rudd

Texas Bar No. 24028786

Lauren K. Drawhorn

Texas Bar No. 24074528

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**COUNSEL FOR HCRE PARTNERS, LLC (N/K/A
NEXPOINT REAL ESTATE PARTNERS, LLC)**

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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/s/ Lauren K. Drawhorn

Lauren K. Drawhorn

EXHIBIT 26

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Clay Taylor
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Bryan C. Assink
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re: § **Case No. 19-34054**
§
HIGHLAND CAPITAL MANAGEMENT, L.P. § **Chapter 11**
§
Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
Plaintiff. §
v. § **Adversary No. 21-03003-sgj**
§
JAMES D. DONDERO, §
Defendant. §

**DEFENDANT JAMES DONDERO’S OBJECTIONS AND RESPONSES
TO HIGHLAND CAPITAL MANAGEMENT, L.P.’S
FIRST REQUEST FOR ADMISSIONS**

TO: Highland Capital Management, L.P., by and through its attorneys of record, Zachery Z. Annable, Hayward PLLC, 10501 N. Central Expy., Ste. 106, Dallas, Texas 75231.

Defendant James Dondero (“Defendant” or “Dondero”) serves his Objections and Responses to Debtor Highland Capital Management, L.P.’s (“Debtor” or “Highland”) First Request for Admissions (“Requests”), as follows:

Dated: April 28, 2021

Respectfully submitted,

/s/ Bryan C. Assink

John Y. Bonds, III
State Bar I.D. No. 02589100
Clay Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
State Bar I.D. No. 24089009
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-and-

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on April 28, 2021, a true and correct copy of the foregoing document was served via email on counsel for the Debtor.

/s/ Bryan C. Assink

Bryan C. Assink

OBJECTIONS AND RESPONSES

REQUEST FOR ADMISSION NO. 1: Admit that attached as Exhibit A is a true and correct copy of a Promissory Note (a) executed by James Dondero, as maker, in favor of the Debtor, as payee, (b) dated February 2, 2018, (c) in the original face amount of \$3,825,000 (the "February 2 Note").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 2: Admit that on or about February 2, 2018, the Debtor paid \$3,825,000 to James Dondero (or for his benefit) in exchange for the February 2 Note (the "February 2 Consideration").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 3: Admit that on or about February 2, 2018, the Debtor transferred \$3,825,000 to an account for James Dondero's benefit.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 4: Admit that neither James Dondero nor any entity he owns and/or controls paid any federal or state income taxes on account of the February 2 Consideration.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 5: Admit that attached as Exhibit B is a true and correct copy of a Promissory Note (a) executed by James Dondero, as maker, in favor of the Debtor, as payee, (b) dated August 1, 2018, (c) in the original face amount of \$2,500,000 (the "August 1 Note").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 6: Admit that on or about August 1, 2018, the Debtor paid \$2,500,000 to James Dondero (or for his benefit) in exchange for the August 1 Note (the "August 1 Consideration").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 7: Admit that on or about August 1, 2018, the Debtor transferred \$2,500,000 to an account for James Dondero's benefit.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 8: Admit that neither James Dondero nor any entity he owns and/or controls paid any federal state income taxes on account of the August 1 Consideration.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 9: Admit that attached as Exhibit C is a true and correct copy of a Promissory Note (a) executed by James Dondero, as maker, in favor of the Debtor, as payee, (b) dated August 13, 2018, (c) in the original face amount of \$2,500,000 (the "August 13 Note").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 10: Admit that on or about August 13, 2018, the Debtor paid \$2,500,000 to James Dondero (or for his benefit) in exchange for the August 13 Note (the "August 13 Consideration").

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 11: Admit that on or about August 13, 2018, the Debtor transferred \$2,500,000 to an account for James Dondero's benefit.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 12: Admit that neither James Dondero nor any entity he owns and/or controls paid any federal or state income taxes on account of the August 13 Consideration.

RESPONSE:

ADMIT.

REQUEST FOR ADMISSION NO. 13: Admit that attached as Exhibit D is the Debtor's December 3, 2020 demand letter (the "Demand Letter") to James Dondero demanding payment of the accrued interest and principal due and payable on the Promissory Notes in the aggregate amount of \$9,004,013.07 (the "Outstanding Amount").

RESPONSE:

Admit only that the letter attached as Exhibit D is a letter sent from the Debtor to Dondero making demand on the notes. The remainder of the request is denied.

REQUEST FOR ADMISSION NO. 14: Admit that, as of January 22, 2021, James Dondero has not paid the Debtor the Outstanding Amount.

RESPONSE:

Admit only that Dondero has not paid the Debtor the amount the Debtor asserts is due on the notes in the amount of \$9,004,013.07. The remainder of the request is denied.

EXHIBIT 27

D. Michael Lynn – State Bar ID 12736500
John Y. Bonds, III – State Bar ID 02589100
John T. Wilson, IV – State Bar ID 24033344
Bryan C. Assink – State Bar ID 24089009
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03003
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

DEFENDANT JAMES DONDERO’S AMENDED ANSWER

Defendant James Dondero (“Dondero” or “Defendant”), the defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Amended Answer (the “Answer”) responding to the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate* [Adv. Dkt. 1] (the “Complaint”). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Complaint sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in paragraph 5 not expressly admitted are denied.

6. The Defendant admits paragraph 6 of the Complaint.

THE PARTIES

7. The Defendant admits paragraph 7 of the Complaint.
8. The Defendant admits paragraph 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits paragraph 9 of the Complaint.
10. The Defendant admits paragraph 10 of the Complaint.
11. The Defendant admits paragraph 11 of the Complaint.
12. The Defendant admits paragraph 12 of the Complaint.

STATEMENT OF FACTS

13. The Defendant admits that he has executed promissory notes under which the Debtor is the payee. Any allegations in paragraph 13 not expressly admitted are denied.

14. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 14 of the Complaint. Defendant admits that the attached document appears to be a copy of the referenced note.

15. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 15 of the Complaint. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in the second sentence of paragraph 15 of the Complaint and therefore denies same.

16. The Defendant admits that he executed a note as alleged in the first sentence of paragraph 16 of the Complaint. Defendant admits that the attached document appears to be a copy of the referenced note.

17. The Defendant admits that section 2 of each note attached to the Complaint contains the provision quoted in paragraph 17 of the Complaint.

18. The Defendant denies the allegations in paragraph 18 of the Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

19. The Defendant denies the allegations in paragraph 19 of the Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

20. In response to paragraph 20 of the Complaint, the Defendant admits that Exhibit 4 to the Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 20 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 20 of the Complaint is denied.

21. To the extent paragraph 21 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 21 of the Complaint.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 22 of the Complaint and therefore denies same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 23 of the Complaint and therefore denies same.

24. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 24 of the Complaint and therefore denies same.

25. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 25 of the Complaint and therefore denies same.

26. The Defendant denies the allegations in paragraph 26 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

27. Paragraph 27 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 28 of the Complaint and therefore denies same.

29. Paragraph 29 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 29 of the Complaint and therefore denies same.

30. Paragraph 30 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30 of the Complaint and therefore denies same.

31. The Defendant denies paragraph 31 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by Mr. Dondero Pursuant to 11 U.S.C. § 542(b))

32. Paragraph 32 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

33. Paragraph 33 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 33 of the Complaint and therefore denies same.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 34 of the Complaint and therefore denies the same.

35. The Defendant denies paragraph 35 of the Complaint.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter, and that document speaks for itself. To the extent paragraph 36 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 36 of the Complaint and therefore denies the same.

37. The Defendant denies paragraph 37 of the Complaint.

38. Paragraph 38 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 38 of the Complaint and therefore denies the same.

39. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

40. Defendant asserts that Plaintiff's claims should be barred because prior to the demands for payment Plaintiff agreed that it would not collect on the Notes upon fulfillment of conditions subsequent.

41. Defendant further asserts that Plaintiff's claim should be barred, or reduced, in whole or in part, pursuant to Defendant's right to set off a mutual obligation owed to Defendant

by Plaintiff under state and/or federal law, including pursuant to 11 U.S.C. § 553. Plaintiff owes Defendant a debt that should set off or reduce any amounts that Defendant is found to owe Plaintiff on the Notes.

42. Defendant further asserts that Plaintiff's claims are barred, in whole or in part, due to waiver.

43. Defendant further asserts that Plaintiff's claims are barred, in whole or in part, due to estoppel.

44. Defendant further asserts that Plaintiff's claims are barred, in whole or in part, due to failure of consideration.

45. Defendant further asserts that each Note is ambiguous.

JURY DEMAND

46. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

47. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Complaint and provide the Defendant such other relief to which he is entitled.

Dated: April 6, 2021

Respectfully submitted,

/s/ Bryan C. Assink

D. Michael Lynn – State Bar ID 12736500
John Y. Bonds, III – State Bar ID 02589100
John T. Wilson, IV – State Bar ID 24033344
Bryan C. Assink – State Bar ID 24089009
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john.wilson@bondsellis.com
bryan.assink@bondsellis.com

**ATTORNEYS FOR DEFENDANT
JAMES DONDERO**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 6, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Bryan C. Assink

Bryan C. Assink

EXHIBIT 28

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Clay M. Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

DEFENDANT JAMES DONDERO’S RULE 26 INITIAL DISCLOSURES

TO: Plaintiff Highland Capital Management, L.P., by and through its attorneys of record, John Morris, Pachulski Stang Ziehl & Jones LLP, 10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA 90067.

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, made applicable to this proceeding through Rule 7026 of the Federal Rules of Bankruptcy Procedure, Defendant James

Dondero (“Dondero” or “Defendant”) makes the following initial disclosures to Plaintiff Highland Capital Management, L.P. (“Plaintiff” or “Debtor”).¹

- 1. The names, and, if known, the addresses, and telephone numbers of individuals likely to have discoverable information, along with the subjects of that information are listed below. Defendant reserves the right to amend and/or supplement these disclosures.**

ANSWER:

James D. Dondero
c/o D. Michael Lynn
Clay M. Taylor
Bryan C. Assink
BONDS ELLIS EPPICH SCHAFFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
Attorneys for Defendant

Dondero may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor’s complaint and this adversary proceeding, including, without limitation, the terms of the promissory notes, the drafting and execution of the notes, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the purpose and intent of the notes, the Debtor’s prior use of forgivable loans, and Dondero’s compensation from the Debtor during his employment.

Highland Capital Management, L.P. and certain of its current employees

c/o John Morris
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Attorneys for Plaintiff

Debtor and certain of its current employees, including potentially Thomas Surgent, David Klos, and Kristen Hendrix, may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor’s complaint and Dondero’s defenses to the allegations in the complaint, including the circumstances surrounding the execution of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions

¹ Defendant makes these disclosures subject in all respects to his Motion for Withdrawal of the Reference [Adv. Dkt. No. 21] and the Motion to Stay Pending the Motion to Withdraw the Reference of Plaintiff’s Complaint [Adv. Dkt. No. 22] filed on April 15, 2021. Defendant does not waive, but instead hereby preserves, his right to a jury trial and all rights and requests for relief asserted in the motions. Defendant does not consent to the Bankruptcy Court determining this proceeding or entering final orders or judgments in this proceeding. Instead, Defendant requests that the reference be withdrawn and that the District Court adjudicate this proceeding.

subsequent, the Debtor's prior use of forgivable loans, and Dondero's compensation from the Debtor during his employment.

Brian Collins, former employee of the Debtor

Tel: 213-550-4538

As a former employee, he may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor's complaint and this adversary proceeding, including, without limitation, the promissory notes, the circumstances surrounding the preparation and/or execution of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the Debtor's prior use of forgivable loans, compensation of Debtor employees, and Dondero's compensation from the Debtor during his employment.

Amy Theriot, former employee of the Debtor

Tel: 214-893-5352

As a former employee, she may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor's complaint and this adversary proceeding, including, without limitation, the promissory notes, the circumstances surrounding the preparation and/or execution of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the Debtor's prior use of forgivable loans, compensation of Debtor employees, and Dondero's compensation from the Debtor during his employment.

Mark Okada, former employee of the Debtor

Tel: 975-989-1000

As a former employee, he may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor's complaint and this adversary proceeding, including, without limitation, the promissory notes, the circumstances surrounding the preparation and/or execution of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the Debtor's prior use of forgivable loans, compensation of Debtor employees, and Dondero's compensation from the Debtor during his employment.

Scott Ellington, former employee of the Debtor

c/o Frances Smith

Ross & Smith PC

700 N. Pearl Street, Suite 1610

Dallas, TX 75201

As a former employee, he may have knowledge regarding the claims, defenses, and factual circumstances at issue in the Debtor's complaint and this adversary proceeding, including, without limitation, the promissory notes, the circumstances surrounding the preparation and/or execution

of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the Debtor's prior use of forgivable loans, compensation of Debtor employees, and Dondero's compensation from the Debtor during his employment.

Frank Waterhouse, former employee of the Debtor

c/o Frances Smith
Ross & Smith PC
700 N. Pearl Street, Suite 1610
Dallas, TX 75201

As a former employee, he may have knowledge regarding the promissory notes, the circumstances surrounding the execution of the notes and related transfers, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the Debtor's prior use of forgivable loans, compensation of Debtor employees, and Dondero's compensation from the Debtor during his employment.

John Honis, employee of Rand Advisors

Tel: 214-335-7969

As an employee of Rand Advisors, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Jack Yang, former employee of the Debtor

Tel: 646-387-2351

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Paul Adkins, former employee of the Debtor

Tel: +65 9728 0599

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Pat Daugherty, former employee of the Debtor

c/o Jason Kathman
Spencer Fane LLP
2200 Ross Avenue, Suite 4800
Dallas, TX 75201

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Tim Lawler, former employee of the Debtor

Tel: 847-305-3013

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Appu Mundassery, former employee of the Debtor

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Mike Hurley, former employee of the Debtor

Tel: 775-750-8921

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

Gibran Mahmud, former employee of the Debtor

Tel: 972-740-0018

As a former employee, he may have knowledge regarding the Debtor's prior use of forgivable loans.

2. A copy or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

ANSWER: Defendant may have documents and communications related to the following matters in his possession, custody, or control that he may use to support his claims or defenses. The inclusion of a general category of documents below does not mean that specific documents necessarily exist or that Defendant has such documents in his possession, custody, or control.

1. Documents and communications related to the allegations in the complaint and Dondero's defenses to the allegations in the complaint, including, without limitation, documents related to the terms of the promissory notes, the drafting and execution of the notes, the agreement of the Debtor to not collect on the notes upon fulfillment of conditions subsequent, the purpose and intent of the notes, the Debtor's prior use of forgivable loans, and Dondero's compensation from the Debtor during his employment.
2. Documents related to Dondero's personal tax returns.
3. Documents related to tax loan(s) made by the Debtor to Dondero and such tax amounts incurred related to federal partnership tax.
4. Documents and/or communications related to Dondero's compensation during his employment at Highland.
5. Any and all pleadings filed in this matter and the main bankruptcy case.

3. A computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

ANSWER:

Defendant is not seeking actual damages at this time.

4. For inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

ANSWER:

No such insurance agreements known.

Reservation of Rights

Defendant makes these disclosures subject in all respects to his Motion for Withdrawal of the Reference [Adv. Dkt. No. 21] and Motion to Stay Pending the Motion to Withdraw the Reference of Plaintiff's Complaint [Adv. Dkt. No. 22] filed on April 15, 2021. Defendant does not waive, but hereby preserves, his right to a jury trial and all additional rights and relief available as asserted in the motions.

The Defendant's investigation is ongoing, and he reserves the right to further amend, modify and/or supplement these initial disclosures as provided in Federal Rule of Civil Procedure 26(e) if warranted and to the extent additional disclosures are not mooted or made redundant by information made known during the discovery process or in writing. In addition, the Defendant makes these initial disclosures without waiving but expressly preserving: (a) his right to a jury trial; (b) his right to have this proceeding determined by the District Court; (c) his right to object to the entry of any final orders or final judgments by the Bankruptcy Court in this proceeding; (d) the right to object to any discovery requests or to the admissibility of evidence on the grounds of privilege, work product, relevance, materiality, or any other proper ground; and (e) the right to object to the use of any information provided in or derived from these initial disclosures for any purpose in this action.

Dated: April 15, 2021

Respectfully submitted,

/s/ Bryan C. Assink

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Clay M. Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
State Bar I.D. No. 24089009
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Email: john@bondsellis.com
Email: clay.taylor@bondsellis.com
Email: bryan.assink@bondsellis.com

ATTORNEYS FOR DEFENDANT JAMES
DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on April 15, 2021, a true and correct copy of the foregoing Rule 26 initial disclosure was served via email on counsel for the Plaintiff as listed below.

Jeff Pomerantz
Ira Kharasch
John Morris
Greg Demo
Hayley Winograd
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Email: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

/s/ Bryan C. Assink

Bryan C. Assink

EXHIBIT 29

John Y. Bonds, III
State Bar I.D. No. 02589100
Clay Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
State Bar I.D. No. 24089009
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Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
State Bar No. 24012196
STINSON LLP
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219
(214) 560-2201 telephone
(214) 560-2203 facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

**DEFENDANT JAMES DONDERO’S OBJECTIONS AND ANSWERS
TO HIGHLAND CAPITAL MANAGEMENT, L.P.’S
FIRST SET OF INTERROGATORIES**

TO: Highland Capital Management, L.P., by and through its attorneys of record, Zachery Z. Annable, Hayward PLLC, 10501 N. Central Expy., Ste. 106, Dallas, Texas 75231.

Defendant James Dondero (“Defendant” or “Dondero”) serves his Objections and Answers to Debtor Highland Capital Management, L.P.’s (“Debtor” or “Highland”) First Set of Interrogatories (“Requests”), as follows:

Dated: 4/26/2021

Respectfully submitted,

/s/ Bryan C. Assink

John Y. Bonds, III
State Bar I.D. No. 02589100
Clay Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFFER JONES LLP
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Email: john@bondsellis.com
Email: joshua@bondsellis.com
Email: bryan.assink@bondsellis.com

-and-

Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
State Bar No. 24012196
STINSON LLP
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(214) 560-2201 telephone
(214) 560-2203 facsimile
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on 4/26/2021, a true and correct copy of the foregoing document was served via email on counsel for the Debtor.

/s/ Bryan C. Assink
Bryan C. Assink

OBJECTIONS AND ANSWERS

INTERROGATORY NO. 1: With respect to each Note, identify:

- (a) the person who entered into each Purported Agreement on behalf of the Debtor;
- (b) the date each Purported Agreement was entered into; and
- (c) all documents that reflect or memorialize each Purported Agreement.

ANSWER:

The Agreements were entered into on behalf of the Debtor by James Dondero, subsequent to the time each Note was executed. Documents reflecting or memorializing the Agreements, if any, will be produced at a mutually agreeable time and location.

INTERROGATORY NO. 2: Identify every person who James Dondero believes has actual knowledge of each Purported Agreement.

ANSWER:

Dondero objects to this interrogatory (1) to the extent it seeks privileged information, (2) because it requires Dondero to speculate as to what other people know and believe, and (3) because the phrase “actual knowledge” is not defined. Subject to these objections, Dondero believes the following individuals may have actual knowledge of each Purported Agreement:

James Dondero

Frank Waterhouse

Mark Okada

John Honis

Scott Ellington

INTERROGATORY NO. 3: Identify (a) anything of value that was received by James Dondero (or for his benefit) in exchange for each Note, and (b) the date anything of value that was received by James Dondero (or for his benefit) in exchange for each Note.

ANSWER:

Dondero received the funds evidenced in each Note on or about the date that each Note was entered into by the parties to the Notes.

INTERROGATORY NO. 4: Identify each witness James Dondero intends to call at trial in this Adversary Proceeding.

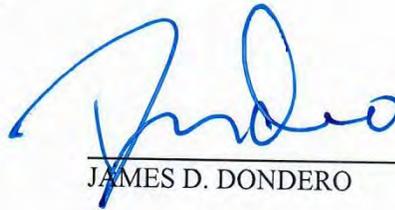
ANSWER:

Dondero will identify witnesses in accordance with the scheduling order governing this proceeding.

VERIFICATION

STATE OF TEXAS)
)
COUNTY OF DALLAS)

On this day, James D. Dondero appeared before me, the undersigned notary public, and upon his oath, certified that he had read Defendant's Objections and Answers to Highland Capital Management, L.P.'s First Set of Interrogatories and that the facts stated therein are within his personal knowledge and are true and correct.



JAMES D. DONDERO

SWORN TO and SUBSCRIBED before me by James D. Dondero on the 26th day of April, 2021.





Notary Public in and for the State of Texas

EXHIBIT 30

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The NPA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant admits ¶ 14 of the Complaint.

15. The Defendant denies ¶ 15 of the Complaint. The document speaks for itself and the quote set forth in ¶ 15 is not verbatim.

16. The Defendant admits ¶ 16 of the Complaint.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. NPA's Default under the Note

19. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 19 of the Complaint and therefore denies the same.

20. The Defendant admits that Exhibit 2 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 20 of the Complaint is denied.

21. The Defendant admits that it paid the Debtor \$1,406,111.92 on January 14, 2021.

To the extent not expressly admitted, paragraph 21 of the Complaint is denied.

22. The Defendant admits that Exhibit 3 to the Complaint (the “Second Demand

Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself.

To the extent ¶ 22 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 22 of the Complaint is denied.

23. To the extent ¶ 23 of the Complaint asserts a legal conclusion, no response is

necessary, and it is denied. The Defendant otherwise admits ¶ 23 of the Complaint.

24. The Defendant lacks knowledge or information sufficient to form a belief about the

truth of the allegations in ¶ 24 of the Complaint and therefore denies the same.

25. The Defendant denies ¶ 25 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

26. Paragraph 26 of the Complaint is a sentence of incorporation that does not require

a response. All prior denials are incorporated herein by reference.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a

response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 27 of the Complaint and therefore denies the same.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a

response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 28 of the Complaint and therefore denies the same.

29. Paragraph 29 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 29 of the Complaint and therefore denies the same.

30. The Defendant denies ¶ 30 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

31. Paragraph 31 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 32 of the Complaint and therefore denies the same.

33. Paragraph 33 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 33 of the Complaint and therefore denies the same.

34. The Defendant denies ¶ 34 of the Complaint.

35. Paragraph 35 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves. To the extent ¶ 35 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. The Defendant denies ¶ 36 of the Complaint.

37. Paragraph 37 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 37 of the Complaint and therefore denies the same.

38. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

39. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

40. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

41. Furthermore, the Plaintiff waived the right to accelerate the note and/or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

42. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed with Mr. James Dondero, acting for Defendant, that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Mr. Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant believes there may be testimony or email correspondence that

discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

JURY DEMAND

43. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

44. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 9th day of August, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

Davor Rukavina, Esq.
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Julian P. Vasek, Esq.
Texas Bar No. 24070790
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drukavina@munsch.com
jvasek@munsch.com

**COUNSEL FOR NEXPOINT
ADVISORS, L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 9th day of August, 2021, a true and correct copy of this document was served electronically via the Court's CM/ECF system on the following recipients:

Zachery Z. Annable

Hayward PLLC
10501 N. Central Expressway
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Melissa S. Hayward

Hayward PLLC
10501 N. Central Expry, Ste. 106
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Juliana Hoffman

Sidley Austin LLP
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Dallas, TX 75201
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Paige Holden Montgomery

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/s/ Davor Rukavina

Davor Rukavina, Esq.

EXHIBIT 31

Jason M. Rudd
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Lauren K. Drawhorn
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WICK PHILLIPS GOULD & MARTIN, LLP
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Telephone: (214) 692-6200
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**COUNSEL FOR HIGHLAND CAPITAL
MANAGEMENT SERVICES, INC.**

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	Case No.: 19-34054-sgj11
	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Adv. Pro. No. 21-03006-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.,	§	
	§	
Defendant.	§	

**HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.’S
FIRST AMENDED ANSWER TO PLAINTIFF’S COMPLAINT**

Defendant Highland Capital Management Services, Inc. (“HCMS” or “Defendant”) files this First Amended Answer in response to Highland Capital Management L.P.’s (“Plaintiff” or “Debtor”) Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate (the “Complaint”) and respectfully states as follows:

PRELIMINARY STATEMENT¹

1. The first sentence of Paragraph 1 sets forth Plaintiff's objective in bringing the Complaint and does not require a response. To the extent a response is required, Defendant denies the allegations in the first sentence of Paragraph 1. The second sentence contains a legal conclusion that does not require a response. To the extent a response is required, Defendant denies the allegations in the second sentence of Paragraph 1.

2. Paragraph 2 contains a summary of the relief Plaintiff seeks and does not require a response. To the extent a response is required, Defendant denies the allegations in Paragraph 2.

JURISDICTION AND VENUE

3. Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers constitutional authority on the Bankruptcy Court to adjudicate this dispute. Defendant denies any allegations in Paragraph 3 that are not expressly admitted.

4. Paragraph 4 states a legal conclusion that does not require a response. To the extent a response is required, Defendant admits the Bankruptcy Court has statutory jurisdiction over this Adversary Proceeding but denies that the Court has constitutional authority over this Adversary Proceeding. Defendant denies any allegations in Paragraph 4 that are not expressly admitted.

5. Defendant denies that Plaintiff's breach of contract claim is a core proceeding. Defendant further denies that a turnover proceeding under 11 U.S.C. § 542(b) is the appropriate mechanism to collect a contested debt. Defendant admits that a turnover proceeding under 11 U.S.C. § 542(b) is a statutorily core proceeding but denies that it is constitutionally core under *Stern v. Marshall*. Defendant does not consent to the Bankruptcy Court entering final orders or

¹ The headings herein are from Plaintiff's Complaint and are solely included for the Court's convenience.

judgment in this Adversary Proceeding. Defendant denies any allegations in Paragraph 5 that are not expressly admitted.

6. Paragraph 6 states a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that venue is proper in this District.

THE PARTIES

7. Defendant admits the allegations in Paragraph 7 of the Complaint.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

CASE BACKGROUND

9. Defendant admits the allegations in Paragraph 9 of the Complaint.

10. Defendant admits the allegations in Paragraph 10 of the Complaint.

11. Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Defendant admits the allegations in Paragraph 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMS Demand Notes

13. Defendant admits it has executed at least one promissory note under which the Debtor is the payee. Defendant denies any allegations in Paragraph 13 that are not expressly admitted.

14. Defendant admits that it signed the document attached to the Complaint as Exhibit 1. Defendant denies any allegations in Paragraph 14 that are not expressly admitted.

15. Defendant admits that it signed the document attached to the Complaint as Exhibit 2. Defendant denies any allegations in Paragraph 15 that are not expressly admitted.

16. Defendant denies that it signed the document attached to the Complaint as Exhibit 3. Defendant denies any allegations in Paragraph 16 that are not expressly admitted.

17. Defendant denies that it signed the document attached to the Complaint as Exhibit 4. Defendant denies any allegations in Paragraph 17 that are not expressly admitted.

18. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Complaint in Paragraph 18.

19. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Complaint in Paragraph 19.

20. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 of the Complaint in Paragraph 20.

B. Allegations regarding the Demand Notes

21. Defendant admits that Plaintiff sent it a copy of Exhibit 5. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of Paragraph 21. Defendant denies any allegations in Paragraph 21 that are not expressly admitted.

22. To the extent Paragraph 22 asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits the allegations in Paragraph 22.

23. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 23 and, therefore, denies them.

24. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 24 and, therefore, denies them.

25. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 25 and, therefore, denies them.

26. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 26 and, therefore, denies them.

27. Defendant lacks sufficient information or knowledge to admit or deny the allegations in the first sentence of Paragraph 27 and, therefore, denies them. Defendant denies the allegations in the second sentence of Paragraph 27 of the Complaint.

C. The HCMS Term Note

28. Defendant admits that it has executed at least one promissory note under which Debtor is the payee. Defendant denies any allegations in Paragraph 28 that are not expressly admitted.

29. Defendant admits it signed the document attached to the Complaint as Exhibit 6. Defendant denies any allegations in Paragraph 29 that are not expressly admitted.

30. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Complaint in Paragraph 30. Defendant denies any allegations in Paragraph 30 that are not expressly admitted.

31. Defendant admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Complaint in Paragraph 31. Defendant denies any allegations in Paragraph 31 that are not expressly admitted.

32. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Complaint in Paragraph 32. Defendant denies any allegations in Paragraph 32 that are not expressly admitted.

33. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Complaint in Paragraph 33. Defendant denies any allegations in Paragraph 33 that are not expressly admitted.

D. Allegations regarding the Term Note.

34. To the extent Paragraph 34 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise denies Paragraph 34 of the Complaint.

35. Defendant admits that Plaintiff sent it a copy of Exhibit 7. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of Paragraph 35 of the Complaint. Defendant denies any allegations in Paragraph 35 that are not expressly admitted.

36. Defendant is without sufficient information or knowledge to admit or deny the allegations in Paragraph 36 of the Complaint and, therefore, denies them.

37. Defendant denies Paragraph 37 of the Complaint.

**FIRST CLAIM FOR RELIEF
(For Breach of Contract)**

38. Paragraph 38 of the Complaint seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

39. Paragraph 39 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

40. Paragraph 40 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

41. Paragraph 41 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

42. Paragraph 42 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

43. Defendant denies Paragraph 43 of the Complaint.

44. Defendant denies Paragraph 44 of the Complaint.

**SECOND CLAIM FOR RELIEF
(Turnover by HCMS Pursuant to 11 U.S.C. § 549(b))**

45. Paragraph 45 seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

46. Paragraph 46 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

47. Paragraph 47 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

48. Paragraph 48 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

49. Defendant admits that Plaintiff transmitted Exhibits 5 and 7 to the Complaint. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 49 of the Complaint and, therefore, denies them.

50. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 50 of the Complaint and, therefore, denies them.

51. Defendant denies Paragraph 51 of the Complaint.

52. Defendant denies that Plaintiff is entitled to the relief requested in the prayer of the Complaint, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

53. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

54. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

55. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

56. Plaintiff's claims are barred in whole or in part because prior to the demands for payment Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed with Mr. James Dondero, acting for Defendant, that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Mr. Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

57. HCMS further asserts that each Note is ambiguous as a whole based on the signatory and/or references to unspecified related agreements.

JURY DEMAND

58. HCMS demands a trial by jury of all issues so triable under Federal Rule of Civil Procedure 38 and Federal Rule of Bankruptcy Procedure 9015.

59. HCMS does not consent to the Bankruptcy Court conducting a jury trial and therefore demands such jury trial in the District Court.

PRAYER

For these reasons, HCMS respectfully requests that, following a trial on the merits, the Court deny the relief Plaintiffs seeks through its Complaint, enter a judgment that the Plaintiff take nothing on the Complaint, and grant HCMS such other relief at law or in equity to which it may be entitled.

Respectfully submitted,

/s/ Lauren K. Drawhorn _____

Jason M. Rudd

Texas Bar No. 24028786

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**COUNSEL FOR HIGHLAND MANAGEMENT
SERVICES, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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/s/ Lauren K. Drawhorn

Lauren K. Drawhorn

EXHIBIT 32

Debtor's Estate (the "Complaint") in the above-referend adversary proceeding (the "Adversary Proceeding") and respectfully states as follows:

PRELIMINARY STATEMENT¹

1. The first sentence of Paragraph 1 sets forth Plaintiff's objective in bringing the Complaint and does not require a response. To the extent a response is required, Defendant denies the allegations in the first sentence of Paragraph 1. The second sentence contains a legal conclusion that does not require a response. To the extent a response is required, Defendant denies the allegations in the second sentence of Paragraph 1.

2. Paragraph 2 contains a summary of the relief Plaintiff seeks and does not require a response. To the extent a response is required, Defendant denies the allegations in Paragraph 2.

JURISDICTION AND VENUE

3. Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers constitutional authority on the Bankruptcy Court to adjudicate this dispute. Defendant denies any allegations in Paragraph 3 that are not expressly admitted.

4. Paragraph 4 states a legal conclusion that does not require a response. To the extent a response is required, Defendant admits the Bankruptcy Court has statutory jurisdiction over this Adversary Proceeding but denies that the Court has constitutional authority over this Adversary Proceeding. Defendant denies any allegations in Paragraph 4 that are not expressly admitted.

5. Defendant denies that Plaintiff's breach of contract claim is a core proceeding. Defendant further denies that a turnover proceeding under 11 U.S.C. § 542(b) is the appropriate mechanism to collect a contested debt. Defendant admits that a turnover proceeding under 11

¹ The headings herein are from Plaintiff's Complaint and are solely included for the Court's convenience.

U.S.C. § 542(b) is a statutorily core proceeding but denies that it is constitutionally core under *Stern v. Marshall*. Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Defendant denies any allegations in Paragraph 5 that are not expressly admitted.

6. Paragraph 6 states a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that venue is proper in this District.

THE PARTIES

7. Defendant admits the allegations in Paragraph 7 of the Complaint.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

CASE BACKGROUND

9. Defendant admits the allegations in Paragraph 9 of the Complaint.

10. Defendant admits the allegations in Paragraph 10 of the Complaint.

11. Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Defendant admits the allegations in Paragraph 12 of the Complaint.

STATEMENT OF FACTS

A. The Demand Notes

13. Defendant admits it has executed at least one promissory note under which the Debtor is the payee. Defendant denies any allegations in Paragraph 13 that are not expressly admitted.

14. Defendant admits that it signed the document attached to the Complaint as Exhibit 1. Defendant denies any allegations in Paragraph 14 that are not expressly admitted.

15. Defendant admits that it signed the document attached to the Complaint as Exhibit 2. Defendant denies any allegations in Paragraph 15 that are not expressly admitted.

16. Defendant admits that it signed the document attached to the Complaint as Exhibit 3. Defendant denies any allegations in Paragraph 16 that are not expressly admitted.

17. Defendant admits that it signed the document attached to the Complaint as Exhibit 4. Defendant denies any allegations in Paragraph 17 that are not expressly admitted.

18. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Complaint in Paragraph 18.

19. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Complaint in Paragraph 19.

20. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 of the Complaint in Paragraph 20.

B. Allegations regarding the Demand Notes

21. Defendant admits that Plaintiff sent it a copy of Exhibit 5. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of Paragraph 21. Defendant denies any allegations in Paragraph 21 that are not expressly admitted.

22. To the extent Paragraph 22 asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits the allegations in Paragraph 22.

23. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 23 and, therefore, denies them.

24. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 24 and, therefore, denies them.

25. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 25 and, therefore, denies them.

26. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 26 and, therefore, denies them.

27. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 27 and, therefore, denies them.

28. Defendant denies the allegations in Paragraph 28 of the Complaint.

C. The Term Note

29. Defendant admits that it has executed at least one promissory note under which Debtor is the payee. Defendant denies any allegations in Paragraph 29 that are not expressly admitted.

30. Defendant admits it signed the document attached to the Complaint as Exhibit 6. Defendant denies any allegations in Paragraph 30 that are not expressly admitted.

31. Defendant admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Complaint in Paragraph 31. Defendant denies any allegations in Paragraph 31 that are not expressly admitted.

32. Defendant admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Complaint in Paragraph 32. Defendant denies any allegations in Paragraph 32 that are not expressly admitted.

33. Defendant admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Complaint in Paragraph 33. Defendant denies any allegations in Paragraph 33 that are not expressly admitted.

34. Defendant admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Complaint in Paragraph 34. Defendant denies any allegations in Paragraph 34 that are not expressly admitted.

D. Allegations regarding the Term Note.

35. To the extent Paragraph 35 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise denies Paragraph 35 of the Complaint.

36. Defendant admits that Plaintiff sent it a copy of Exhibit 7. Defendant admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of Paragraph 36 of the Complaint. Defendant denies any allegations in Paragraph 36 that are not expressly admitted.

37. To the extent Paragraph 37 of the Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits Paragraph 37 of the Complaint.

38. Defendant is without sufficient information or knowledge to admit or deny the allegations in Paragraph 38 of the Complaint and, therefore, denies them.

39. Defendant denies Paragraph 39 of the Complaint.

**FIRST CLAIM FOR RELIEF
(For Breach of Contract)**

40. Paragraph 40 of the Complaint seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

41. Paragraph 41 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

42. Paragraph 42 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

43. Paragraph 43 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

44. Paragraph 44 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

45. Defendant denies Paragraph 45 of the Complaint.

46. Defendant denies Paragraph 46 of the Complaint.

**SECOND CLAIM FOR RELIEF
(Turnover Pursuant to 11 U.S.C. § 549(b))**

47. Paragraph 47 seeks to incorporate the allegations in the preceding paragraphs and does not require a response. Defendant incorporates all prior denials herein by reference.

48. Paragraph 48 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

49. Paragraph 49 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

50. Paragraph 50 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, Defendant lacks sufficient information or knowledge to admit or deny the allegations and, therefore, denies them.

51. Defendant admits that Plaintiff transmitted Exhibits 5 and 7 to the Complaint. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 51 of the Complaint and, therefore, denies them.

52. Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 52 of the Complaint and, therefore, denies them.

53. Defendant denies Paragraph 53 of the Complaint.

54. Defendant denies that Plaintiff is entitled to the relief requested in the prayer of the Complaint, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

55. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

56. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

57. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

58. Plaintiff's claims are barred in whole or in part because prior to the demands for payment, Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed with Mr. James Dondero, acting for Defendant, that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Mr. Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

59. Defendant further asserts that each Note is ambiguous as a whole based on references to unspecified related agreements.

JURY DEMAND

60. Defendant demands a trial by jury of all issues so triable under Federal Rule of Civil Procedure 38 and Federal Rule of Bankruptcy Procedure 9015.

61. Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands such jury trial in the District Court.

PRAYER

For these reasons, Defendant respectfully requests that, following a trial on the merits, the Court deny the relief Plaintiffs seeks through its Complaint, enter a judgment that the Plaintiff take nothing on the Complaint, and grant Defendant such other relief at law or in equity to which it may be entitled.

Respectfully submitted,

/s/ Lauren K. Drawhorn

Jason M. Rudd

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**COUNSEL FOR NEXPOINT REAL ESTATE
PARTNERS, LLC F/K/A HCRE PARTNERS, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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/s/ Lauren K. Drawhorn

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EXHIBIT 33

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COUNSEL FOR HIGHLAND CAPITAL
MANAGEMENT FUND ADVISORS, L.P.

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03004
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

DEFENDANT’S AMENDED ANSWER

COMES NOW Highland Capital Management Fund Advisors, L.P. (the “Defendant”), the defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), and files this its *Defendant’s Amended Answer* (the “Answer”), responding to the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate* (the “Complaint”). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMFA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant denies ¶ 14 of the Complaint.

15. The Defendant denies ¶ 15 of the Complaint.

16. The Defendant denies ¶ 16 of the Complaint. The document speaks for itself and the quote set forth in ¶ 16 is not verbatim.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. HCMFA's Default under Each Note

19. The Defendant admits that Exhibit 3 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 19 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 19 of the Complaint is denied.

20. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 20 of the Complaint.

21. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 21 of the Complaint and therefore denies the same.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 22 of the Complaint and therefore denies the same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 23 of the Complaint and therefore denies the same.

24. The Defendant denies ¶ 24 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. Paragraph 25 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

26. Paragraph 26 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 26 of the Complaint.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 27 of the Complaint.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 28 of the Complaint.

29. The Defendant denies ¶ 29 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. Paragraph 30 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

31. Paragraph 31 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 31 of the Complaint.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 32 of the Complaint.

33. The Defendant denies ¶ 33 of the Complaint.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter. To the extent ¶ 34 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 34 of the Complaint and therefore denies the same.

35. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 36 of the Complaint.

37. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

38. At all material times to the Complaint, the Defendant, a registered advisor, advised various third-party funds as to their investments. One such fund was Highland Global Allocation Fund (“HGAF”).

39. At all material times to the Complaint, the Defendant contracted with the Plaintiff whereby the Plaintiff, through its employees, would provide certain services to the Defendant,

including with respect to the Defendant's advice to the third-party funds. These services so provided included accounting, legal, regulatory, valuation, and compliance services.

40. In March, 2018, HGAF sold equity interests it held in TerreStar. As part of this, it was necessary to calculate the "net asset value" ("NAV") of these securities and of HGAF assets. The Defendant was responsible for advising on the NAV. In turn, pursuant to the Shared Services Agreement in effect at that time between the Plaintiff and the Defendant, the Plaintiff was responsible to the Defendant to calculate the NAV, and the Plaintiff had several employees charged with these and similar calculations as part of the Plaintiff's routine business services and as part of what the Plaintiff regularly provided to the Defendant and affiliated companies.

41. The Plaintiff made a mistake in calculating the NAV (the "NAV Error"). The NAV Error was discovered in early 2019 as HGAF was being converted from an open-ended fund to a closed-ended fund. The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. Ultimately, and working with the SEC, the Plaintiff determined that the losses from the NAV Error to HGAF and its shareholders amounted to \$7.5 million: (i) \$6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) \$1.4 million of losses to the shareholders of HGAF.

42. The Defendant accepted responsibility for the NAV Error and paid out \$5,186,496 on February 15, 2019 and \$2,398,842 on May 21, 2019. In turn, the Plaintiff accepted responsibility to the Defendant for having caused the NAV Error, and the Plaintiff ultimately, whether through insurance or its own funds, compensated the Defendant for the above payments by paying, or causing to be paid, approximately \$7.5 million to the Defendant directly or indirectly to HGAF and its investors.

43. At this time, Frank Waterhouse (“Waterhouse”) was the Chief Financial Officer to both the Plaintiff and the Defendant. Waterhouse signed the two promissory notes the subject of the Complaint (the “Notes”). He did not sign the Notes in any representative capacity for the Defendant. The Defendant did not authorize Waterhouse to sign the Notes or to bind the Defendant in any way to the Note.

44. Waterhouse made a mistake in preparing and signing the Notes for the Defendant. Upon information and belief, Waterhouse was not aware that payments from the Plaintiff to the Defendant were to compensate the Defendant for the NAV Error and resulting damages, instead assuming that the Notes were like prior notes between the Plaintiff and the Defendant. Waterhouse failed to properly inquire into the underlying transaction and, either for unknown accounting or other purposes, Waterhouse prepared and signed the Notes on his own, without proper knowledge of the underlying facts and without actual authority from either the Plaintiff or the Defendant.

45. In sum, neither the Plaintiff nor the Defendant intended that any funds paid by the Plaintiff to the Defendant be treated as debt but that they instead be treated as compensation by the Plaintiff to the Defendant for the NAV Error that the Plaintiff caused. The Notes are an unauthorized mistake and a nullity, and are void for a lack of consideration.

46. To the extent Waterhouse had apparent authority to bind the Defendant to the Notes, such apparently authority does not apply to the Notes because Waterhouse’s lack of actual authority is imputed to the Plaintiff, as Waterhouse was the CFO for the Plaintiff.

47. Accordingly, the Notes are void or unenforceable for lack of consideration, for mutual mistake, and for the lack of authority from the Defendant to Waterhouse to execute the same for the Defendant.

JURY DEMAND

48. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

49. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 6th day of July, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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MANAGEMENT FUND ADVISORS,
L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 6th day of July, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the plaintiff.

By: /s/ Davor Rukavina

Davor Rukavina, Esq.

EXHIBIT 34

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COUNSEL FOR HIGHLAND CAPITAL
MANAGEMENT FUND ADVISORS, L.P.

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	Case No. 19-34054-sgj11
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03004
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

DEFENDANT’S MOTION FOR LEAVE TO AMEND ANSWER

TO THE HONORABLE COURT:

COMES NOW Highland Capital Management Fund Advisors, L.P., the defendant (the “Defendant”) in the above styled and numbered adversary proceeding (the “Adversary Proceeding”), and files this its *Defendant’s Motion for Leave to Amend Answer* (the “Motion”), respectfully stating as follows:

I. SUMMARY

1. This Adversary Proceeding concerns two promissory notes allegedly payable by the Defendant to Highland Capital Management, L.P. (the “Plaintiff”) in the combined amounts of \$7.4 million (the “Notes”). Now that the Defendant has access to former employees of the Plaintiff and to various books and records, the Defendant has learned that the Notes were unauthorized, represent a mutual mistake, and were never intended as debt, but rather that the Plaintiff was compensating the Defendant for the Plaintiff’s own liability to the Defendant for causing a serious valuation error. Accordingly, and not having learned of these facts until recently, the Defendant respectfully seeks leave to assert resulting affirmative defenses.

II. PROCEDURAL BACKGROUND

2. On January 22, 2021, the Plaintiff filed its *Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor’s Estate* (the “Complaint”), thereby initiating this Adversary Proceeding.

3. On March 1, 2021, the Defendant filed its *Defendant’s Original Answer* (the “Answer”). The Answer does not contain any affirmative defenses.

4. The agreed scheduling order entered in this Adversary Proceeding does not contain a deadline to amend operative pleadings. *See* Docket No. 13.

5. This Adversary Proceeding is non-core and the Defendant has not consented to the Bankruptcy Court’s entry of final orders or judgment. The Defendant has asserted a right to trial by jury.

6. The Defendant has filed a motion for withdrawal of the reference, which motion remains pending, and this Motion is subject to, and without prejudice to, any and all arguments raised in support of the withdrawal of the reference.

III. FACTUAL BACKGROUND

7. This Motion is supported by the Declaration of Dennis C. Sauter (the “Sauter Declaration”), attached hereto as Exhibit “A” and incorporated herein.

8. The Defendant is a registered advisor under the Investment Advisors Act of 1940. Sauter Declaration at ¶ 4. As such, the Defendant advises various independent funds which, in turn, are investment vehicles for a large number of investors. *See id.* One such fund was Highland Global Allocation Fund (“HGAF”). *Id.* at ¶ 24.

9. Prior to the end of February, 2021, and during all times relevant to the Notes, the Plaintiff and the Defendant were parties to that certain *Second Amended and Restated Shared Services Agreement* dated February 8, 2013 (the “Shared Services Agreement”). *Id.* at ¶ 6. This was standard business practices for the Plaintiff and various other affiliated companies, including other advisers, within the Plaintiff’s “complex” of business: the Plaintiff would employ most of the employees and then share those employees with the Defendant and other “complex” entities, in exchange for payments by the Defendant and such other entities. *Id.* at ¶ 7. The Defendant otherwise had very few direct employees. *Id.* at ¶ 5. Thus, under the Shared Services Agreement, employees of the Plaintiff (many of whom were highly trained and specialized) provided many of the key services to the Defendant on an as-needed basis. *Id.* at ¶ 8. These services included legal, accounting, regulatory, compliance, IT, valuation, and tax services, among others. *Id.* at ¶ 8. Additionally, under the Shared Services Agreement the Debtor provided critical electronic infrastructure to HCMFA and other “complex” entities, such that the books and records, and e-mail communications, of HCMFA were actually stored. *Id.* at ¶ 8.

10. In March, 2018, HGAF sold equity interests it held in TerreStar. *Id.* at ¶ 24. As part of this, it was necessary to calculate the “net asset value” (“NAV”) of these securities and of

HGAF assets. *Id.* at ¶ 24. The Defendant was responsible for advising on the NAV. In turn, pursuant to the Shared Services Agreement, the Plaintiff was responsible to the Defendant to calculate the NAV, and the Plaintiff had several employees charged with these and similar calculations as part of the Plaintiff's routine business services and as part of what the Plaintiff regularly provided to the Defendant and affiliated companies. *Id.* at ¶ 24.

11. The Plaintiff made a mistake in calculating the NAV (the "NAV Error"). *Id.* at ¶ 25. The NAV Error was discovered in early 2019 as HGAF was being converted from an open-ended fund to a closed-ended fund. *Id.* at ¶ 25. The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. *Id.* at ¶ 25. Ultimately, and working with the SEC, the Plaintiff determined that the losses from the NAV Error to HGAF and its shareholders amounted to \$7.5 million: (i) \$6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) \$1.4 million of losses to the shareholders of HGAF. *Id.* at ¶ 26.

12. The Defendant accepted responsibility for the NAV Error and paid out \$5,186,496 on February 15, 2019 and \$2,398,842 on May 21, 2019. *Id.* at ¶ 27. In turn, the Plaintiff accepted responsibility to the Defendant for having caused the NAV Error, and the Plaintiff ultimately, whether through insurance or its own funds, compensated the Defendant for the above payments. *Id.* at ¶ 28. The Defendant is unsure as to the flow of funds; *i.e.* whether the Plaintiff paid HGAF directly or through the Defendant, and is awaiting discovery from the Plaintiff on that point. Either way, the Plaintiff accepted, and paid, approximately \$7.5 million to compensate for the NAV Error that it caused.

13. Frank Waterhouse (“Waterhouse”) was the Chief Financial Officer of both the Plaintiff and the Defendant. *Id.* at ¶ 29. Waterhouse prepared and signed the Notes. Interestingly, Waterhouse did not sign the Notes in a representative capacity for the Defendant, but rather as:

MAKER:



FRANK WATERHOUSE

This was highly unusual and indicates that the Plaintiff’s legal department did not prepare the Notes. It is also highly unusual that the Notes were not signed by Jim Dondero or by the general partner of the Defendant.

14. Waterhouse was not authorized to execute the Notes on behalf of the Defendant, and he was not authorized to lend funds by the Plaintiff. *Id.* at ¶ 22. It appears that what happened is that Waterhouse, either for some internal accounting purpose or because funds were flowing from the Plaintiff to the Defendant, believed that some document was necessary or that what was being funded was a loan, so he unilaterally, and in mistake, prepared and signed the Notes. *Id.* at ¶ 30. In short, Waterhouse made a mistake, there was no loan, there was no return consideration for any loan, and the Notes, if anything, are a mutual mistake and are void. *Id.* at ¶ 30 & 32.

15. The Defendant only learned of these facts in April, 2021, and was therefore unable to assert defenses and affirmative defenses based on these facts at the time that it filed its Answer. *Id.* at ¶ 21. This is because the Defendant’s own employees had no knowledge of the facts and circumstances surrounding the Notes; the Plaintiff, through its CEO Mr. Seery, had prohibited employees of the Plaintiff from discussing matters with the Defendant that may relate to controversies or litigation under penalty of termination; the Defendant did not have access to all

of its books and records, as they were in the possession of the Plaintiff pursuant to the Shared Services Agreement; and an injunction from the Bankruptcy Court prohibited Mr. Dondero from “indirectly” communicating with the Plaintiff’s employees (Mr. Dondero controls the Defendant). *Id.* at ¶¶ 13-17.

16. By mid-April, 2021, the Plaintiff has terminated most of its employees, those employees formed their own company, and the Defendant retained that company to provide services to the Defendant basically in continuation of the services provided by the Plaintiff pursuant to the Shared Services Agreement. *Id.* at ¶¶ 19-20. Additionally, the Plaintiff provided many, but not all, of the Defendant’s books and records to the Defendant. *See id.* Thus, it was not until then that the Defendant was meaningfully able to talk to persons with some knowledge regarding the facts and circumstances surrounding the Notes and to review its books and records to determine that the NAV Error had occurred and that the Plaintiff paying for the resulting damages was compensation by the Plaintiff for its own error, as opposed to a loan from the Plaintiff to the Defendant. *Id.* at ¶¶ 21-22.

17. The Defendant also notes that the Plaintiff, on its schedules, did not schedule the Notes even though it scheduled various other promissory notes owed by its affiliates. *See* Docket No. 247 at 13 of 74. Additionally, on April 15, 2019, the Plaintiff agreed to extend the date that certain demand notes payable by the Defendant to the Plaintiff could be demanded to May 31, 2021, as the Defendant expected to be unable to pay those notes. *See* Sauter Declaration at ¶ 31. It is illogical and highly improbable that, notwithstanding that admission and acknowledgement, the Plaintiff would nevertheless loan the Defendant \$7.4 million some two weeks later. Rather, as the evidence suggests, Waterhouse made a mistake in not realizing that the funds being paid by the Plaintiff to the Defendant were in compensation for the NAV Error and not a loan.

IV. DISCUSSION

18. Attached hereto as Exhibit “B” is the Defendant’s proposed Amended Answer, incorporating new defenses or affirmative defenses resulting from the knowledge of the facts above.

19. Federal Rule of Civil Procedure 15, as made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7015, provides for leave to amend a pleading, which leave “[t]he court should freely give [] when justice so requires.” FED. R. CIV. P. 15(a)(2).

20. The Court must “possess a ‘substantial reason’ to deny a request for leave to amend.” *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). The Fifth Circuit has outlined five “consideration” guiding the Rule 15 inquiry: “1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment.” *Id.*

21. No Undue Delay. There has been no undue delay. The Defendant filed its Answer only some seventy (80) days ago. This Adversary Proceeding has been pending for four (4) months. The Defendant has not filed a prior motion for leave to amend. And, most importantly, as evidenced by the Sauter Declaration, the Defendant had no way of knowing of these defenses and affirmative defenses until the termination of the Shared Services Agreement and the ability of the Defendant to communicate with former employees of the Plaintiff who, prior to that time, were under instructions to not discuss matters of a potential litigation nature with the Defendant under penalty of termination, and to have access to its books and records. Thus, it was not until April, 2021, that the Defendant was even able to learn of these defenses to the Notes or the facts and circumstances surrounding the Notes.

22. No Bad Faith or Dilatory Motive. There is no bad faith or dilatory motive for the same reasons as above; the Defendant only recently learned of its defenses, the Defendant moved for leave promptly after learning of them; and leave to amend is not sought to avoid summary judgment or continue trial.

23. No Repeated Failures to Cure By Prior Amendments. This is the Defendant's first motion to amend.

24. No Undue Prejudice. There is no undue prejudice to the Plaintiff. Discovery is ongoing and depositions have not been scheduled. The Defendant is agreeable to further extending discovery. The Plaintiff will have every reasonable opportunity to test the new defenses, and all underlying witness and documents related to the same are available.

25. No Futility of the Amendment. The Defendant's defense is not futile:

- (i) it is supported by *prima facie* evidence by the Sauter Declaration;
- (ii) the amount of the Notes, one for \$5 million and one for \$2.4 million, is almost identical to the ultimate \$5,186,496 payment by the Defendant on February 15, 2019 and the \$2,398,842 May 21, 2019 payment by the Defendant;
- (iii) the fact that the Plaintiff did not schedule the Notes, while scheduling many others, is evidence that the Plaintiff itself did not consider the Notes legitimate (or know of their existence);
- (iv) the fact that Waterhouse signed the Notes, and not in a representative capacity for the Defendant, whereas all other notes are prepared by the Plaintiff's legal department and signed by other agents in representative capacities, is evidence that Waterhouse made a mistake or did not understand what was going on, and had no authority or clearance to bind the Defendant to the Notes, and that, perhaps, the

Notes were done for some draft, or accounting, or temporary purpose with no intention or expectation, even on the part of Waterhouse, that the Notes ever be legitimate.

26. The Defendant is not suggesting that the merits of its defenses be tried through this Motion; only that its defenses and the Motion are not “futile.”

27. Accordingly, as no substantial reason exists to deny the amendment, the Court should “freely” grant leave to the Defendant to amend its Answer.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that the Court enter an order: (i) granting this Motion; (ii) granting the Defendant leave to file the Amended Answer attached hereto as Exhibit “B”; and (iii) granting the Defendant such other and further relief to which it may be justly entitled.

RESPECTFULLY SUBMITTED this 22d day of May, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with Jeff Pomerantz, Esq. and John Morris, Esq., on March 21, 2021, but that, as of the filing hereof, he has not heard back regarding whether the Plaintiff opposes said relief.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 22d day of May, 2021, true and correct copies of this document and the exhibits hereto were electronically served by the Court's ECF system on parties entitled to notice thereof, including on the Plaintiff through its counsel of record.

/s/ Davor Rukavina

Davor Rukavina

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Chapter 11
L.P.,	§	
	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
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HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03004
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

DECLARATION OF DENNIS C. SAUTER, JR.

I, Dennis C. Sauter, Jr., hereby swear under oath and penalty of perjury pursuant to the laws of the United States of America that the following is true and correct to the best of my knowledge and belief:

1. My name is Dennis C. Sauter, Jr. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise qualified to give this Declaration. I have personal knowledge of the facts stated in this Declaration, or such facts are known to me from my review of the books and records of Highland Capital Management Fund Advisors, L.P. (“HCMFA”).

2. I am an attorney licensed to practice law in the State of Texas and have been such since 2001.

3. While I provided limited legal services to Highland Capital Management, L.P. (the “Debtor”) and its affiliated entities as outside counsel before I became in-house counsel, those services were limited to real estate transactions having nothing to do with the facts discussed in this Declaration.

4. HCMFA is a registered advisor under the Investment Advisors Act of 1940. CITE. As such, HCMFA advises various independent funds, which, in turn, are investment vehicles for a large number of investors.

5. HCMFA has always had very few employees. During 2019, for example, HCMFA had only 7 to 9 employees.

6. Instead, most of the services needed by HCMFA to transact its business were provided by the Debtor pursuant to that certain *Second Amended and Restated Shared Services Agreement* dated February 8, 2013 (the “Shared Services Agreement”), a true and correct copy of which is attached hereto as Exhibit 1.

7. This was standard business practices for the Debtor and various other affiliated companies, including other advisers within the Debtor’s and its affiliates “complex” of businesses: the Debtor would employ most of the employees and then share those employees with HCMFA and other “complex” entities in exchange for payments by HCMFA and such other entities.

8. Thus, under the Shared Services Agreement, employees of the Debtor (many of whom were highly trained and specialized) provided many of the key services to HCMFA on an as-needed basis. These services included legal, accounting, regulatory, compliance, IT, and tax services, among others. Additionally, under the Shared Services Agreement the Debtor provided critical electronic infrastructure to HCMFA and other “complex” entities, such that the books and records, and e-mail communications, of HCMFA were actually stored on the Debtor’s server.

9. These facts are very important to the issues I will discuss below.

10. On January 22, 2021, the Debtor filed its *Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* (the "Complaint") against HCMFA, thereby initiating this Adversary Proceeding.

11. The Complaint concerns two promissory notes each dated May 2, 2019 (the "Notes") that the Debtor seeks a judgment against HCMFA for: (i) a note for \$5 million; and (ii) a note for \$2.4 million.

12. On March 1, 2021, HCMFA filed its *Defendant's Original Answer* (the "Answer").

13. At the time that the Debtor filed the Complaint, I promptly undertook an internal review of the background facts concerning the Notes. I had no knowledge of them since I had not been employed by HCMFA, and the few employees of HCMFA had no knowledge of the Notes. I also discussed the Notes with James Dondero, formerly the CEO of the Debtor, and Mr. Dondero could not recall the genesis of the Notes. My review of the limited books and records of HCMFA that were not in the possession of the Debtor did not reveal any background facts regarding the Notes or the existence of the Notes.

14. Normally, I would have discussed the Notes with employees of the Debtor who also provided services to HCMFA pursuant to the Shared Services Agreement in order to assess what defenses or affirmative defenses to the Complaint existed. However, in this instance I was precluded from doing so.

15. First, attached hereto as Exhibit 2 is a true and correct copy of an e-mail exchange between me and Mr. James Seery dated September 17, 2020. Mr. Seery was and remains the Chief Executive Officer of the Debtor. As stated in Exhibit 2, Mr. Seery was informing me that Debtor employees had been instructed not to discuss with me anything that is "inimical" to the interests of the Debtor, and that they would be terminated if they did so. This e-mail communication comports with other communications between myself and Mr. Seery and/or Debtor's counsel,

where I was cautioned not to discuss with Debtor employees matters that may be adverse to the Debtor.

16. Second, by the time of the filing of the Complaint, the Court had entered a preliminary injunction against Mr. Dondero, a true and correct copy of which is attached hereto as Exhibit 3. That injunction prohibited Mr. Dondero from “directly or indirectly . . . communicating with any of the Debtor’s employees, except as it specifically relates to shared services currently provided.” As the information concerning the Notes was background information and not related to “services currently provided,” I was concerned that, if I discussed the Notes with the Debtor’s employees, the Debtor would argue that either Mr. Dondero or I violated the Court’s injunction.

17. In sum, after the Complaint was filed, no one at HCMFA knew anything about the Notes, and I was precluded from contacting the people that would have known something about the notes, *i.e.* the Debtor’s employees, to discuss what they may have known. I also had very limited access to HCMFA books and records and, even if I had had full access, I would not have known what relevant books and records to search for in the many millions of files without first obtaining a generalized background of the facts regarding the Notes from Debtor employees.

18. I then worked with outside counsel at Munsch Hardt Kopf & Harr, P.C. to review the Complaint and prepare and file the Answer. That original Answer did not contain any affirmative defenses because, as explained above, no one at HCMFA knew of any facts that might give rise to an affirmative defense.

19. The situation changed by mid-April, 2021. As of late February, 2021, the Debtor terminated the Shared Services Agreement and terminated most of its former employees. Many of those employees then formed their own company, Skyview Group, which then contracted with HCMFA (and others) to continue providing essentially the same services that they had previously provided under the Shared Services Agreement. Additionally, the Debtor provided access to

HCMFA of much of its books and records (although not all). Thus, as of March, 2021, I was able to communicate with most former Debtor employees and to access the books and records of HCMFA without fear of violating any court order.

20. March, 2021, was exceedingly busy, to say the least. With the termination of the Shared Services Agreement, HCMFA, other entities that I am general counsel to, and I were preoccupied with transitioning the services that the Debtor had been providing for more than a decade to a new entity, using new infrastructure, new offices, new networks, etc., all for the primary goal of ensuring a smooth and uninterrupted continuity of business and services provided by HCMFA and others to third parties.

21. By mid-April, 2021, the situation had calmed down to the point that I was able to discuss the Notes with former employees, most importantly Frank Waterhouse (“Waterhouse”) and Will Mabry (“Mabry”). Mabry in particular was able to provide me internal documents and memorandums that I had not previously known about or had access to that helped with the factual background of the Notes.

22. From these discussions and documents, I have been able to understand the factual background concerning the Notes, ultimately concluding that the Notes were signed by mistake by Waterhouse without authority from HCMFA and have no consideration and were never intended to be debt instruments of HCMFA.

23. My investigation has revealed the following.

24. One of the funds that HCMFA advises is Highland Global Allocation Fund (“GAF”). In March, 2018, GAF sold equity interests it held in TerreStar. As part of this, it was necessary to calculate the “net asset value” (“NAV”) of these securities and of GAF assets. HCMFA was responsible for advising on the NAV. In turn, pursuant to the Shared Services Agreement and in accordance with applicable compliance and operating procedures, the Debtor

was responsible to HCMFA to calculate the NAV, and the Debtor had several employees charged with these and similar calculations as part of the Debtor's routine business services and as part of what the Debtor regularly provided to HCMFA and affiliated companies.

25. The Debtor made a mistake in calculating the NAV (the "NAV Error"). The NAV Error was discovered in early 2019 as GAF was being converted from an open-ended fund to a closed-ended fund. The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Debtor, HCMFA, and GAF worked with the SEC to correct the error and to compensate GAF and the various investors in GAF harmed by the NAV Error.

26. Ultimately, and working with the SEC, the Debtor determined that the losses from the NAV Error to GAF and its shareholders amounted to \$7.5 million: (i) \$6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) \$1.4 million of losses to the shareholders of GAF.

27. HCMFA accepted responsibility for the NAV Error and paid out \$5,186,496 on February 15, 2019 and \$2,398,842 on May 21, 2019. I am not sure of the flow of funds, whether the funds flowed through HCMFA or were paid by the Debtor on behalf of HCMFA, and discovery will likely clear that up. Either way, however, the payments were of HCMFA funds and on behalf of HCMFA.

28. In turn, the Debtor accepted responsibility to HCMFA for having caused the NAV Error, and the Debtor ultimately, whether through insurance or its own funds, compensated HCMFA for the above payments.

29. Returning to the Notes, Waterhouse was the Chief Financial Officer of both the Debtor and HCMFA during the above events and at the time he signed the Notes.

30. It appears clear that Waterhouse made a mistake in preparing and signing the Notes. First, , the Notes correspond very closely to the ultimate \$5,186,496 and \$2,398,842 payments. Second, it appears that Waterhouse assumed, incorrectly, that the funds being paid by the Debtor were a loan to HCMFA, instead of payments as compensation and restitution to HCMFA for the Debtor having caused the NAV Error. Third, it therefore appears that Waterhouse prepared the Notes for some internal accounting or other purpose, but without there being actual consideration for the Notes and without any intention on the part of the Debtor and HCMFA that there be Notes or that there be a loan transaction.

31. I also note that, as of May, 2019, HCMFA had executed other demand notes payable to the Debtor. On April 15, 2019, the Debtor executed that certain *Acknowledgement from HCMLP*, a true and correct copy of which is attached hereto as Exhibit 4. By the same, the Debtor agreed not to demand payment of these notes prior to May 31, 2021, because HCMFA believed that it would not be able to repay those notes prior to that time. It is illogical that, in light of the same, the Debtor would shortly thereafter lend an additional \$7.4 million to HCMFA. Rather, as my investigation has shown, the Debtor did not lend the funds to HCMFA but instead paid the funds, directly or indirectly, to compensate HCMFA for the NAV Error, which was the Debtor's error and therefore its obligation to correct and compensate for.

32. Therefore, in light of having learned of these facts in mid to late-April, 2019, HCMFA now believes that it has affirmative defenses to the Notes in the nature of mutual mistake, void for lack of consideration, and no proper authority of Waterhouse to sign the Notes.

33. Neither I, nor HCMFA, nor any of HCMFA's agents, have been less than diligent in investigating the Notes and the Complaint.

34. HCMFA respectfully requests that it be granted leave to assert these affirmative defenses in the Adversary Proceeding.

Signed: May 21, 2021


DENNIS C. SAUTER, JR.

**SECOND AMENDED AND RESTATED
SHARED SERVICES AGREEMENT**

THIS SECOND AMENDED AND RESTATED SHARED SERVICES AGREEMENT (this “*Agreement*”) is entered into to be effective as of 8th day of February, 2013 (the “*Effective Date*”) by and among Highland Capital Management, L.P., a Delaware limited partnership (“*HCMLP*”), and Highland Capital Management Fund Advisors, L.P., formerly known as Pyxis Capital, L.P., a Delaware limited partnership (“*HCMFA*”), and any affiliate of HCMFA that becomes a party hereto. Each of the signatories hereto is individually a “*Party*” and collectively the “*Parties*”.

RECITALS

A. During the Term, HCMLP will provide to HCMFA certain services as more fully described herein and the Parties desire to allocate the costs incurred for such services and assets among them in accordance with the terms and conditions in this Agreement.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, as follows:

ARTICLE I
DEFINITIONS

“*Actual Cost*” means, with respect to any period hereunder, one hundred percent (100%) of the actual costs and expenses caused by, incurred or otherwise arising from or relating to (i) the Shared Services and (ii) the Shared Assets, in each case during such period.

“*Affiliate*” means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified Person. The term “*control*” (including, with correlative meanings, the terms “*controlled by*” and “*under common control with*”) means the possession of the power to direct the management and policies of the referenced Person, whether through ownership interests, by contract or otherwise.

“*Agreement*” has the meaning set forth in the preamble.

“*Allocation Percentage*” has the meaning set forth in Section 4.01.

“*Applicable Margin*” shall mean an additional amount equal to 5% of all costs allocated by Service Provider to the other parties hereto under Article IV; provided that the parties may agree on a different margin percentage as to any item or items to the extent the above margin percentage, together with the allocated cost of such item or service, would not reflect an arm’s length value of the particular service or item allocated.

“*Change*” has the meaning set forth in Section 2.02(a).

“*Change Request*” has the meaning set forth in Section 2.02(b).

“*Code*” means the Internal Revenue Code of 1986, as amended, and the related regulations and published interpretations.

“**Effective Date**” has the meaning set forth in the preamble.

“**Governmental Entity**” means any government or any regulatory agency, bureau, board, commission, court, department, official, political subdivision, tribunal or other instrumentality of any government, whether federal, state or local, domestic or foreign.

“**Liabilities**” means any cost, liability, indebtedness, obligation, co-obligation, commitment, expense, claim, deficiency, guaranty or endorsement of or by any Person of any nature (whether direct or indirect, known or unknown, absolute or contingent, liquidated or unliquidated, due or to become due, accrued or unaccrued, matured or unmatured).

“**Loss**” means any cost, damage, disbursement, expense, liability, loss, obligation, penalty or settlement, including interest or other carrying costs, legal, accounting and other professional fees and expenses incurred in the investigation, collection, prosecution and defense of claims and amounts paid in settlement, that may be imposed on or otherwise incurred or suffered by the referenced Person; provided, however, that the term “**Loss**” will not be deemed to include any special, exemplary or punitive damages, except to the extent such damages are incurred as a result of third party claims.

“**New Shared Service**” has the meaning set forth in Section 2.03.

“**Party**” or “**Parties**” has the meaning set forth in the preamble.

“**Person**” means an association, a corporation, an individual, a partnership, a limited liability company, a trust or any other entity or organization, including a Governmental Entity.

“**Quarterly Report**” has the meaning set forth in Section 5.01.

“**Recipient**” means HCMFA and any of HCMFA’s direct or indirect Subsidiaries or managed funds or accounts in their capacity as a recipient of the Shared Services and/or Shared Assets.

“**Service Provider**” means any of HCMLP and its direct or indirect Subsidiaries in its capacity as a provider of Shared Services or Shared Assets.

“**Service Standards**” has the meaning set forth in Section 6.01.

“**Shared Assets**” shall have the meaning set forth in Section 3.02.

“**Shared Services**” shall have the meaning set forth in Section 2.01.

“**Subsidiary**” means, with respect to any Person, any Person in which such Person has a direct or indirect equity ownership interest in excess of 50%.

“**Tax**” or “**Taxes**” means: (i) all state and local sales, use, value-added, gross receipts, foreign, privilege, utility, infrastructure maintenance, property, federal excise and similar levies, duties and other similar tax-like charges lawfully levied by a duly constituted taxing authority against or upon the Shared Services and the Shared Assets; and (ii) tax-related surcharges or fees that are related to the Shared Services and the Shared Assets identified and authorized by applicable tariffs.

“**Term**” has the meaning set forth in Section 7.01.

ARTICLE II SHARED SERVICES

Section 2.01 Services. During the Term, Service Provider will provide Recipient with Shared Services, including without limitation, all of the (i) finance and accounting services, (ii) human resources services, (iii) marketing services, (iv) legal services, (v) corporate services, (vi) information technology services, and (vii) operations services; each as requested by HCMFA and as described more fully on Annex A attached hereto, the “*Shared Services*”), it being understood that personnel providing Shared Services may be deemed to be employees of HCMFA to the extent necessary for purposes of the Investment Advisers Act of 1940, as amended.

Section 2.02 Changes to the Shared Services.

(a) During the Term, the Parties may agree to modify the terms and conditions of a Service Provider’s performance of any Shared Service in order to reflect new procedures, processes or other methods of providing such Shared Service, including modifying the applicable fees for such Shared Service to reflect the then current fair market value of such service (a “*Change*”). The Parties will negotiate in good faith the terms upon which a Service Provider would be willing to provide such New Shared Service to Recipient.

(b) The Party requesting a Change will deliver a description of the Change requested (a “*Change Request*”) and no Party receiving a Change Request may unreasonably withhold, condition or delay its consent to the proposed Change.

(c) Notwithstanding any provision of this Agreement to the contrary, a Service Provider may make: (i) Changes to the process of performing a particular Shared Service that do not adversely affect the benefits to Recipient of Service Provider’s provision or quality of such Shared Service in any material respect or increase Recipient’s cost for such Shared Service; (ii) emergency Changes on a temporary and short-term basis; and/or (iii) Changes to a particular Shared Service in order to comply with applicable law or regulatory requirements, in each case without obtaining the prior consent of Recipient. A Service Provider will notify Recipient in writing of any such Change as follows: in the case of clauses (i) and (iii) above, prior to the implementation of such Change, and, in the case of clause (ii) above, as soon as reasonably practicable thereafter.

Section 2.03 New Shared Services. The Parties may, from time to time during the Term of this Agreement, negotiate in good faith for Shared Services not otherwise specifically listed in Section 2.01 (a “*New Shared Service*”). Any agreement between the Parties on the terms for a New Shared Service must be in accordance with the provisions of Article IV and Article V hereof, will be deemed to be an amendment to this Agreement and such New Shared Service will then be a “*Shared Service*” for all purposes of this Agreement.

Section 2.04 Subcontractors. Nothing in this Agreement will prevent Service Provider from, with the consent of Recipient, using subcontractors, hired with due care, to perform all or any part of a Shared Service hereunder. A Service Provider will remain fully responsible for the performance of its obligations under this Agreement in accordance with its terms, including any obligations it performs through subcontractors, and a Service Provider will be solely responsible for payments due to its subcontractors.

ARTICLE III
SHARED ASSETS

Section 3.01 Shared IP Rights. Each Service Provider hereby grants to Recipient a non-exclusive right and license to use the intellectual property and other rights granted or licensed, directly or indirectly, to such Service Provider (the “*Shared IP Rights*”) pursuant to third party intellectual property Agreements (“*Third Party IP Agreements*”), provided that the rights granted to Recipient hereunder are subject to the terms and conditions of the applicable Third Party IP Agreement, and that such rights shall terminate, as applicable, upon the expiration or termination of the applicable Third Party IP Agreement. Recipient shall be licensed to use the Shared IP Rights only for so long as it remains an Affiliate of HCMLP. In consideration of the foregoing licenses, Recipient agrees to take such further reasonable actions as a Service Provider deems to be necessary or desirable to comply with its obligations under the Third Party IP Agreements.

Section 3.02 Other Shared Assets. Subject to Section 3.01, each Service Provider hereby grants Recipient the right, license or permission, as applicable, to use and access the benefits under the agreements, contracts and licenses that such Service Provider will purchase, acquire, become a party or beneficiary to or license on behalf of Recipient (the “*Future Shared Assets*” and collectively with the Shared IP Rights, the “*Shared Assets*”).

ARTICLE IV
COST ALLOCATION

Section 4.01 Actual Cost Allocation Formula. The Actual Cost of any item relating to any Shared Services or Shared Assets shall be allocated based on the Allocation Percentage. For purposes of this Agreement, “*Allocation Percentage*” means:

(a) To the extent 100% of such item is demonstrably attributable to HCMFA, 100% of the Actual Cost of such item shall be allocated to HCMFA as agreed by HCMFA;

(b) To the extent a specific percentage of use of such item can be determined (e.g., 70% for HCMLP and 30% for HCMFA), that specific percentage of the Actual Cost of such item will be allocated to HCMLP or HCMFA, as applicable and as agreed by HCMFA; and

(c) All other portions of the Actual Cost of any item that cannot be allocated pursuant to clause (a) or (b) above shall be allocated between HCMLP and HCMFA in such proportion as is agreed in good faith between the parties.

Section 4.02 Non-Cash Cost Allocation. The actual, fully burdened cost of any item relating to any Shared Services or Shared Assets that does not result in a direct, out of pocket cash expense may be allocated to HCMLP and HCMFA for financial statement purposes only, as agreed by HCMFA, without any corresponding cash reimbursement required, in accordance with generally accepted accounting principles, based on the Allocation Percentage principles described in Section 4.01 hereof.

ARTICLE V
PAYMENT OF COST AND REVENUE SHARE; TAXES

Section 5.01 Quarterly Statements. Within thirty (30) days following the end of each calendar quarter during the Term (or at such time as may be otherwise agreed by the parties), each Service Provider shall furnish the other Parties hereto with a written statement with respect to the Actual Cost paid by it in respect of Shared Services and Shared Assets provided by it, in each case, during such

period, setting forth (i) the cost allocation in accordance with Article IV hereof together with the Applicable Margin on such allocated amounts, and (ii) any amounts paid pursuant to Section 5.02 hereof, together with such other data and information necessary to complete the items described in Section 5.03 hereof (hereinafter referred to as the “*Quarterly Report*”).

Section 5.02 Settlement Payments. At any time during the Term, any Party may make payment of the amounts that are allocable to such Party together with the Applicable Margin related thereto, regardless of whether an invoice pursuant to Section 5.03 hereof has been issued with respect to such amounts.

Section 5.03 Determination and Payment of Cost and Revenue Share.

(a) Within ten (10) days of the submission of the Quarterly Report described in Section 5.02 hereof (or at such other time as may be agreed by the parties), the Parties shall (i) agree on the cost share of each of the Parties and Applicable Margin as calculated pursuant to the provisions of this Agreement; and (ii) prepare and issue invoices for the cost share and Applicable Margin payments that are payable by any of the Parties.

(b) Within ten (10) days of preparation of the agreement and the issuance of the invoice described in Section 5.03(a) (or at such other time as may be agreed by the parties), the Parties shall promptly make payment of the amounts that are set forth on such cost allocation invoice. Notwithstanding anything in this Agreement to the contrary, provision of the Shared Services shall commence from the Effective Date, but no fees shall be payable from Recipient or otherwise accrue with respect to such services provided during the month of December 2011.

Section 5.04 Taxes.

(a) Recipient is responsible for and will pay all Taxes applicable to the Shared Services and the Shared Assets provided to Recipient, provided, that such payments by Recipient to Service Provider will be made in the most tax-efficient manner and provided further, that Service Provider will not be subject to any liability for Taxes applicable to the Shared Services and the Shared Assets as a result of such payment by Recipient. Service Provider will collect such Tax from Recipient in the same manner it collects such Taxes from other customers in the ordinary course of Service Provider’s business, but in no event prior to the time it invoices Recipient for the Shared Services and Shared Assets, costs for which such Taxes are levied. Recipient may provide Service Provider with a certificate evidencing its exemption from payment of or liability for such Taxes.

(b) Service Provider will reimburse Recipient for any Taxes collected from Recipient and refunded to Service Provider. In the event a Tax is assessed against Service Provider that is solely the responsibility of Recipient and Recipient desires to protest such assessment, Recipient will submit to Service Provider a statement of the issues and arguments requesting that Service Provider grant Recipient the authority to prosecute the protest in Service Provider’s name. Service Provider’s authorization will not be unreasonably withheld. Recipient will finance, manage, control and determine the strategy for such protest while keeping Service Provider reasonably informed of the proceedings. However, the authorization will be periodically reviewed by Service Provider to determine any adverse impact on Service Provider, and Service Provider will have the right to reasonably withdraw such authority at any time. Upon notice by Service Provider that it is so withdrawing such authority, Recipient will expeditiously terminate all proceedings. Any adverse consequences suffered by Recipient as a result of the withdrawal will be submitted to arbitration pursuant to Section 9.14. Any contest for Taxes brought by Recipient may not result in any lien attaching to any property or rights of Service Provider or otherwise jeopardize Service Provider’s interests or rights in any of its property. Recipient agrees to

indemnify Service Provider for all Losses that Service Provider incurs as a result of any such contest by Recipient.

(c) The provisions of this Section 5.04 will govern the treatment of all Taxes arising as a result of or in connection with this Agreement notwithstanding any other Article of this Agreement to the contrary.

ARTICLE VI SERVICE PROVIDER RESPONSIBILITIES

Section 6.01 Service Provider General Obligations. Service Provider will provide the Shared Services and the Shared Assets to Recipient on a non-discriminatory basis and will provide the Shared Services and the Shared Assets in the same manner as if it were providing such services and assets on its own account (the “*Service Standards*”). Service Provider will conduct its duties hereunder in a lawful manner in compliance with applicable laws, statutes, rules and regulations and in accordance with the Service Standards, including, for avoidance of doubt, laws and regulations relating to privacy of customer information.

Section 6.02 Books and Records; Access to Information. Service Provider will keep and maintain books and records on behalf of Recipient in accordance with past practices and internal control procedures. Recipient will have the right, at any time and from time to time upon reasonable prior notice to Service Provider, to inspect and copy (at its expense) during normal business hours at the offices of Service Provider the books and records relating to the Shared Services and Shared Assets, with respect to Service Provider’s performance of its obligations hereunder. This inspection right will include the ability of Recipient’s financial auditors to review such books and records in the ordinary course of performing standard financial auditing services for Recipient (but subject to Service Provider imposing reasonable access restrictions to Service Provider’s and its Affiliates’ proprietary information and such financial auditors executing appropriate confidentiality agreements reasonably acceptable to Service Provider). Service Provider will promptly respond to any reasonable requests for information or access. For the avoidance of doubt, all books and records kept and maintained by Service Provider on behalf of Recipient shall be the property of Recipient, and Service Provider will surrender promptly to Recipient any of such books or records upon Recipient’s request (provided that Service Provider may retain a copy of such books or records) and shall make all such books and records available for inspection and use by the Securities and Exchange Commission or any person retained by Recipient at all reasonable times. Such records shall be maintained by Service Provider for the periods and in the places required by laws and regulations applicable to Recipient.

Section 6.03 Return of Property and Equipment. Upon expiration or termination of this Agreement, Service Provider will be obligated to return to Recipient, as soon as is reasonably practicable, any equipment or other property or materials of Recipient that is in Service Provider’s control or possession.

ARTICLE VII TERM AND TERMINATION

Section 7.01 Term. The term of this Agreement will commence as of the Effective Date and will continue in full force and effect until the first anniversary of the Effective Date (the “*Term*”), unless terminated earlier in accordance with Section 9.02. The Term shall automatically renew for successive one year periods unless sooner terminated under Section 7.02.

Section 7.02 Termination. Either Party may terminate this Agreement, with or without cause, upon at least 60 days advance written notice at any time prior to the expiration of the Term.

ARTICLE VIII LIMITED WARRANTY

Section 8.01 Limited Warranty. Service Provider will perform the Shared Services hereunder in accordance with the Service Standards. Except as specifically provided in this Agreement, Service Provider makes no express or implied representations, warranties or guarantees relating to its performance of the Shared Services and the granting of the Shared Assets under this Agreement, including any warranty of merchantability, fitness, quality, non-infringement of third party rights, suitability or adequacy of the Shared Services and the Shared Assets for any purpose or use or purpose. Service Provider will (to the extent possible and subject to Service Provider's contractual obligations) pass through the benefits of any express warranties received from third parties relating to any Shared Service and Shared Asset, and will (at Recipient's expense) assist Recipient with any warranty claims related thereto.

ARTICLE IX MISCELLANEOUS

Section 9.01 No Partnership or Joint Venture; Independent Contractor. Nothing contained in this Agreement will constitute or be construed to be or create a partnership or joint venture between or among HCMLP or HCMFA or their respective successors or assigns. The Parties understand and agree that, with the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, this Agreement does not make any of them an agent or legal representative of the other for any purpose whatsoever. With the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, no Party is granted, by this Agreement or otherwise, any right or authority to assume or create any obligation or responsibilities, express or implied, on behalf of or in the name of any other Party, or to bind any other Party in any manner whatsoever. The Parties expressly acknowledge that Service Provider is an independent contractor with respect to Recipient in all respects, including with respect to the provision of the Shared Services.

Section 9.02 Amendments; Waivers. Except as expressly provided herein, this Agreement may be amended only by agreement in writing of all Parties. No waiver of any provision nor consent to any exception to the terms of this Agreement or any agreement contemplated hereby will be effective unless in writing and signed by all of the Parties affected and then only to the specific purpose, extent and instance so provided. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.03 Schedules and Exhibits; Integration. Each Schedule and Exhibit delivered pursuant to the terms of this Agreement must be in writing and will constitute a part of this Agreement, although schedules need not be attached to each copy of this Agreement. This Agreement, together with such Schedules and Exhibits constitutes the entire agreement among the Parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the Parties in connection therewith.

Section 9.04 Further Assurances. Each Party will take such actions as any other Party may reasonably request or as may be necessary or appropriate to consummate or implement the transactions contemplated by this Agreement or to evidence such events or matters.

Section 9.05 Governing Law. This Agreement and the legal relations between the Parties will be governed by and construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines unless certain matters are preempted by federal law.

Section 9.06 Assignment. Except as otherwise provided hereunder, neither this Agreement nor any rights or obligations hereunder are assignable by one Party without the express prior written consent of the other Parties.

Section 9.07 Headings. The descriptive headings of the Articles, Sections and subsections of this Agreement are for convenience only and do not constitute a part of this Agreement.

Section 9.08 Counterparts. This Agreement and any amendment hereto or any other agreement delivered pursuant hereto may be executed in one or more counterparts and by different Parties in separate counterparts. All counterparts will constitute one and the same agreement and will become effective when one or more counterparts have been signed by each Party and delivered to the other Parties.

Section 9.09 Successors and Assigns; No Third Party Beneficiaries. This Agreement is binding upon and will inure to the benefit of each Party and its successors or assigns, and nothing in this Agreement, express or implied, is intended to confer upon any other Person or Governmental Entity any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Section 9.10 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given: (i) immediately when personally delivered; (ii) when received by first class mail, return receipt requested; (iii) one day after being sent for overnight delivery by Federal Express or other overnight delivery service; or (iv) when receipt is acknowledged, either electronically or otherwise, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to the other Parties will, unless another address is specified by such Parties in writing, be sent to the addresses indicated below:

If to HCMLP, addressed to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

If to HCMFA, addressed to:

Highland Capital Management Fund Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

Section 9.11 Expenses. Except as otherwise provided herein, the Parties will each pay their own expenses incident to the negotiation, preparation and performance of this Agreement, including the fees, expenses and disbursements of their respective investment bankers, accountants and counsel.

Section 9.12 Waiver. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.13 Severability. If any provision of this Agreement is held to be unenforceable for any reason, it will be adjusted rather than voided, if possible, to achieve the intent of the Parties. All other provisions of this Agreement will be deemed valid and enforceable to the extent possible.

Section 9.14 Arbitration: Jurisdiction. Notwithstanding anything contained in this Agreement or the Annexes hereto to the contrary, in the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that either party or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and, thereafter, require arbitration of all issues of final relief. The Arbitration will be conducted by the American Arbitration Association, or another, mutually agreeable arbitration service. The arbitrator(s) shall be duly licensed to practice law in the State of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each. Each deposition is to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admission; (v) ten requests for production. In response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents. The total pages of documents shall include electronic documents; (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrator(s) shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. No arbitrator will have authority to render a decision that contains an outcome determinative error of state or federal law, or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrator(s) has failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable, arbitration service rules. The party initiating arbitration shall pay all arbitration costs and arbitrator's fees, subject to a final arbitration award on who should bear costs and fees. All proceedings shall be conducted in Dallas, Texas, or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and/or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

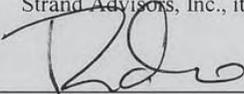
Section 9.15 General Rules of Construction. For all purposes of this Agreement and the Exhibits and Schedules delivered pursuant to this Agreement: (i) the terms defined in Article I have the meanings assigned to them in Article I and include the plural as well as the singular; (ii) all accounting terms not otherwise defined herein have the meanings assigned under GAAP; (iii) all references in this Agreement to designated "Articles," "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of the body of this Agreement; (iv) pronouns of either gender or neuter will include, as appropriate, the other pronoun forms; (v) the words "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision; (vi) "or" is not exclusive; (vii) "including" and "includes" will be deemed to be followed by "but not limited to" and "but is not limited to, "respectively; (viii) any definition of or

reference to any law, agreement, instrument or other document herein will be construed as referring to such law, agreement, instrument or other document as from time to time amended, supplemented or otherwise modified; and (ix) any definition of or reference to any statute will be construed as referring also to any rules and regulations promulgated thereunder.

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

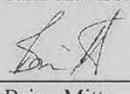
By:  _____

Name: James Dondero

Title: President

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

By: Strand Advisors XVI, Inc., its general partner

By:  _____

Name: Brian Mitts

Title: Assistant Secretary

Annex A

Shared Services

Compliance

General compliance
Compliance systems

Facilities

Equipment
General Overhead
Office Supplies
Rent & Parking

Finance & Accounting

Book keeping
Cash management
Cash forecasting
Credit facility reporting
Financial reporting
Accounts payable
Accounts receivable
Expense reimbursement
Vendor management

HR

Drinks/snacks
Lunches
Recruiting

IT

General support & maintenance (OMS, development, support)
Telecom (cell, phones, broadband)
WSO

Legal

Corporate secretarial services
Document review and preparation
Litigation support
Management of outside counsel

Marketing and PR

Public relations

Tax

Tax audit support
Tax planning
Tax prep and filing

Investments

Investment research on an ad hoc basis as requested by HCMFA

Valuation Committee
Trading
Trading desk services
Operations
Trade settlement

Rukavina, Davor

From: James Seery <jpseeryjr@gmail.com>
Sent: Thursday, September 17, 2020 4:17 PM
To: DC Sauter
Cc: Gregory V. Demo
Subject: Re: Acis Settlement

DC

I believe your concerns regarding the release are misplaced as it does not bind entities that HCMLP does not control. Greg can walk you through the language, but I do not believe it requires adjustment nor does it create any liability. To the contrary, it reduces liability.

With regard to the HCMLP employee prohibitions, no employee whether legal or non-legal can work on any matter that is inimical to the interests of HCMLP. I, as CEO, and the Independent Board will make the determination as to whether an action violates the prohibition, and a breach of the prohibition will lead to termination for cause. I believe that most of the employees have been informed of this requirement and are following the directive.

With regard to transactional matters, HCMLP employees will continue to work with you on those issues that do not run afoul of the prohibition above. If there is a particular matter where you are taking a potentially adversarial action vis a vis HCMLP, please let me know what it is. We can then consider whether a customized operating protocol for that issue is needed or whether you will simply be on your own. I will make the determination with the advice of counsel. We do not believe the Texas rules of professional responsibility apply in this situation.

Please let me know what matter you are considering with respect to the immediately preceding paragraph, and we will consider how to best address your concerns.

Best. Jim

Jim Seery
631-804-2049
jpseeryjr@gmail.com

From: DC Sauter <DSauter@NexPointadvisors.com>
Date: Thursday, September 17, 2020 at 4:56 PM
To: Jim Seery <jpseeryjr@gmail.com>
Cc: Greg Demo <GDemo@pszjlaw.com>
Subject: RE: Acis Settlement

Jim/Greg, follow up on my email below. I have a few items that have been placed on my plate, and I really need to understand who I can speak with and the extent to which they are permitted to share information with me.

D.C. SAUTER

NEXPOINT

O: 972.628.4117 | C: 469.877.6440

From: DC Sauter
Sent: Tuesday, September 15, 2020 8:55 AM
To: 'James Seery' <jpseeryjr@gmail.com>
Cc: Gregory V. Demo <GDemo@pszjlaw.com>
Subject: RE: Acis Settlement

My apologies for copying Isaac. I was under the mistaken impression that he would have assisted in the settlement.

In my view, the requested clarification is beneficial to Strand, HCMLP, and the other "HCMLP Entities." The documents purport to release ACIS from claims on behalf of, among others, any entity that is "managed" by HCMLP and "respective current advisors, trustees, directors, officers, managers, members, partners, current or former employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns" of any "HCMLP Entity." Those "HCMLP Entities" lack the authority to bind a whole host of parties in that laundry list, which could result in claims against HCMLP, Strand, and the other "HCMLP Entities" by both the "ACIS Released Parties," who will claim they didn't receive the benefit of the bargain, and the parties on whose behalf the "HCMLP Parties" purported to release claims who didn't consent to the release.

Additionally, I'd like to visit with you all regarding the board's position that prohibits certain HCMLP personnel from working on certain matters.

First, I am unclear whether the prohibition applies to only HCMLP legal personnel or whether it applies to all HCMLP employees. Please clarify.

Second, as you may know, virtually all of these matters are falling into my lap, and in most cases I lack any knowledge about them. It would help me tremendously if current HCMLP employees, and particularly the legal personnel, could provide me with transactional background to assist in the transition of the matter. While I understand the board's concern with Judge Jernigan's order, I don't believe that the Texas Disciplinary Rules of Professional Conduct mandate or even permit an attorney licensed in the State of Texas to refuse to cooperate with a former client in the transfer of a matter to a new attorney. Rule 1.15(d) states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned." The comments to that rule provide additional clarity: "In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client." T.D.R.P.C. Rule 1.15, comment 9. Proper steps may include providing information to new counsel or even continuing to represent the client for a limited time to meet impending deadlines. *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Org.*, 2007 U.S. Dist. LEXIS 91550 *23-24 fn. 11 (E.D. Tex. Dec. 13, 2007). Even if the board insists that the HCMLP legal personnel cannot continue to represent others in non-HCMLP matters or matters adverse to HCMLP (irrespective of any conflict of interest analysis of whether those attorneys may continue to represent HCMLP in those matters), the ethical rules require that the attorneys provide assistance in transferring those matters to me or others.

Finally, I routinely handle, and am routinely asked to handle, legal matters that relate to real estate for entities owned or controlled by HCMLP (Park West, the Arizona assets, the Maple Ave. property, to name a few). I am not an HCMLP employee, and it's my understanding that NexPoint Advisors, L.P. is not compensated for the time I spend on HCMLP matters. I'm not suggesting that this arrangement should change, but it feels from my perspective that the board's position is only working in one direction. In other words, if I understand the board's position correctly, I can work on both NexPoint and HCMLP matters, but the HCMLP legal employees may only work on HCMLP-related matters. It has also put a significant amount of additional work on my plate. I would like to understand two things. First, what is the scope of my authority in these matters, and what is the proper protocol vis-à-vis you, DSI, and the board? I have tried to take the conservative approach in keeping you all informed and asking for consent or approval where I thought it

appropriate. I assume this is how you'd like to continue to handle things, but I would like confirmation of that. Second, I have heard that you all were working to transfer a couple of the legal personnel (perhaps Thedford and Post) to HCMFA so they could assist with the work load (particularly in the areas where I don't have a significant amount of experience). I'd like to know where that stands and when relief can be expected.

I'm available most of today and tomorrow to discuss.

D.C. SAUTER

NEXPOINT

O: 972.628.4117 | C: 469.877.6440

From: James Seery <jmseeryjr@gmail.com>
Sent: Tuesday, September 15, 2020 7:01 AM
To: DC Sauter <DSauter@NexPointadvisors.com>
Cc: Gregory V. Demo <GDemo@pszjlaw.com>; Isaac Leventon <ILeventon@HighlandCapital.com>
Subject: Re: Acis Settlement

DC. We will discuss and revert to you. Neither Isaac nor anyone else at HCMLP is permitted to work on any issues related to the settlement and release other than as directed by me.

Thanks

Sent from my iPad

On Sep 14, 2020, at 7:08 PM, DC Sauter <DSauter@nexpointadvisors.com> wrote:

Greg,

I've been asked to review the attached release on behalf of HCMFA and the closed-end funds. I'm concerned that the language below creates an ambiguity as to whether the closed-end funds and HCMFA have released claims against the ACIS parties:

1. The release by Strand, which also serves as the general partner of HCMFA; and
2. The release by each "HCMLP Entity" of its "respective current advisors, trustees, directors, officers, managers, members, partners, current or former employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns."

We would like the final sentence in paragraph 1.a. of the Release to be revised to specifically identify HCMFA and the closed-end funds as parties not covered by the release. Please let me know if you'd like to discuss in more detail.

D.C. SAUTER | GENERAL COUNSEL, REAL ESTATE

<image001.jpg>

300 Crescent Court | Suite 700 | Dallas, Texas 75201
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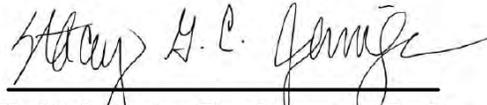
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 11, 2021


United States Bankruptcy Judge

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

In re:	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	Chapter 11
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	No. 20-03190-sgj
JAMES D. DONDERO,	§	
Defendant.	§	

**ORDER GRANTING DEBTOR'S MOTION FOR A PRELIMINARY INJUNCTION
AGAINST JAMES DONDERO**

This matter having come before the Court on *Plaintiff Highland Capital Management,*

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

L.P.’s Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero [Adv. Pro. Docket No. 2] (the “Motion”), filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”); and this Court having considered (a) the Motion, (b) *Plaintiff Highland Capital Management, L.P.’s Verified Original Complaint for Injunctive Relief* [Adv. Pro. Docket No. 1] (the “Complaint”), (c) the arguments and law cited in the *Debtor’s Amended Memorandum of Law in Support of its Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero* [Adv. Pro. Docket No. 3] (the “Memorandum of Law,” and together with the Motion and Complaint, the “Debtor’s Papers”), (d) *James Dondero’s Response in Opposition to Debtor’s Motion for a Preliminary Injunction* [Adv. Pro. Docket No. 52] (the “Opposition”) filed by James Dondero, (e) the testimonial and documentary evidence admitted into evidence during the hearing held on January 8, 2021 (the “Hearing”), including assessing the credibility of Mr. James Dondero, (f) the arguments made during the Hearing, and (g) all prior proceedings relating to the Motion, including the December 10, 2020 hearing on the *Debtor’s Motion for a Temporary Restraining Order and Preliminary Injunction against James Dondero* [Adv. Pro. Docket No. 6] (the “TRO Hearing”); and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that injunctive relief is warranted under sections 105(a) and 362(a) of the Bankruptcy Code and that the relief requested in the Motion is in the best interests of the Debtor’s estate, its creditors, and other parties-in-interest;

and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted in support thereof, establish good cause for the relief granted herein, and that (1) such relief is necessary to avoid immediate and irreparable harm to the Debtor's estate and reorganization process; (2) the Debtor is likely to succeed on the merits of its underlying claim for injunctive relief; (3) the balance of the equities tip in the Debtor's favor; and (4) such relief serves the public interest; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.
2. James Dondero is preliminarily enjoined and restrained from (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Mr. Dondero's counsel and counsel for the Debtor are included in any such communication; (b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents, in whatever capacity they are acting; (c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero; (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned, controlled or managed by the Debtor, and the pursuit of the Plan or any

alternative to the Plan; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the “Prohibited Conduct”).²

3. James Dondero is further preliminarily enjoined and restrained from causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting with him or on his behalf, to, directly or indirectly, engage in any Prohibited Conduct.

4. James Dondero is further preliminarily enjoined and restrained from communicating (in person, telephonically, by e-mail, text message or otherwise) with Scott Ellington and/or Isaac Leventon, unless otherwise ordered by the Court.

5. James Dondero is further preliminarily enjoined and restrained from physically entering, or virtually entering through the Debtor’s computer, email, or information systems, the Debtor’s offices located at Crescent Court in Dallas, Texas, or any other offices or facilities owned or leased by the Debtor, regardless of any agreements, subleases, or otherwise, held by the Debtor’s affiliates or entities owned or controlled by Mr. Dondero, without the prior written permission of Debtor’s counsel made to Mr. Dondero’s counsel. If Mr. Dondero enters the Debtor’s office or other facilities or systems without such permission, such entrance will constitute trespass.

6. James Dondero is ordered to attend all future hearings in this Bankruptcy Case by Webex (or whatever other video platform is utilized by the Court), unless otherwise ordered by the Court.

7. This Order shall remain in effect until the date that any plan of reorganization or liquidation resolving the Debtor’s case becomes effective, unless otherwise ordered by the Court.

² For the avoidance of doubt, this Order does not enjoin or restrain Mr. Dondero from (1) seeking judicial relief upon proper notice or from objecting to any motion filed in this Bankruptcy Case, or (2) communicating with the committee of unsecured creditors (the “UCC”) and its professionals regarding a pot plan.

8. All objections to the Motion are overruled in their entirety.
9. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

Acknowledgement from HCMLP

April 15, 2019

Reference is hereby made to certain outstanding amounts loaned from HIGHLAND CAPITAL MANAGEMENT, L.P. ("HCMLP") to HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. ("HCMF") for funding of HCMF's ongoing operations, which are payable on demand and remained outstanding on December 31, 2018 and as of the date hereof.

HCMF expects that it may be unable to repay such amounts should they become due, for the period commencing today and continuing through May 31, 2021.

HCMLP hereby agrees to not demand payment on amounts owed by HCMF prior to May 31, 2021.

Highland Capital Management, L.P.
By: Strand Advisors, Inc., its general partner

By:  _____

Acknowledged By:

Highland Capital Management Fund Advisors, L.P.
By: Strand XVI, Inc., its general partner

By:  _____

EXHIBIT 4

Davor Rukavina, Esq.
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 Julian P. Vasek, Esq.
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COUNSEL FOR HIGHLAND CAPITAL
 MANAGEMENT FUND ADVISORS, L.P.

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	Case No. 19-34054-sgj11
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03004
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

DEFENDANT’S AMENDED ANSWER

COMES NOW Highland Capital Management Fund Advisors, L.P. (the “Defendant”), the defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), and files this its *Defendant’s Amended Answer* (the “Answer”), responding to the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate* (the “Complaint”). Where an allegation in the Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of ¶ 1 sets forth the Plaintiff's objective in bringing the Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Paragraph 2 contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

3. The Defendant admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Case to adjudicate this dispute. Any allegations in ¶ 3 not expressly admitted are denied.

4. The Defendant admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in ¶ 4 not expressly admitted are denied.

5. The Defendant denies that a breach of contract claim is core. The Defendant denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. The Defendant admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. The Defendant does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in ¶ 5 not expressly admitted are denied.

6. The Defendant admits ¶ 6 of the Complaint.

THE PARTIES

7. The Defendant admits ¶ 7 of the Complaint.

8. The Defendant admits ¶ 8 of the Complaint.

CASE BACKGROUND

9. The Defendant admits ¶ 9 of the Complaint.

10. The Defendant admits ¶ 10 of the Complaint.

11. The Defendant admits ¶ 11 of the Complaint.

12. The Defendant admits ¶ 12 of the Complaint.

STATEMENT OF FACTS

A. The HCMFA Notes

13. The Defendant admits that it has executed at least one promissory note under which the Debtor is the payee. Any allegations in ¶ 13 not expressly admitted are denied.

14. The Defendant denies ¶ 14 of the Complaint.

15. The Defendant denies ¶ 15 of the Complaint.

16. The Defendant denies ¶ 16 of the Complaint. The document speaks for itself and the quote set forth in ¶ 16 is not verbatim.

17. The Defendant denies ¶ 17 of the Complaint. The document speaks for itself and the quote set forth in ¶ 17 is not verbatim.

18. The Defendant admits ¶ 18 of the Complaint.

B. HCMFA's Default under Each Note

19. The Defendant admits that Exhibit 3 to the Complaint (the "Demand Letter") is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent ¶ 19 of the Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, ¶ 19 of the Complaint is denied.

20. To the extent ¶ 20 of the Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits ¶ 20 of the Complaint.

21. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 21 of the Complaint and therefore denies the same.

22. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 22 of the Complaint and therefore denies the same.

23. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 23 of the Complaint and therefore denies the same.

24. The Defendant denies ¶ 24 of the Complaint.

FIRST CLAIM FOR RELIEF
(For Breach of Contract)

25. Paragraph 25 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

26. Paragraph 26 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 26 of the Complaint.

27. Paragraph 27 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 27 of the Complaint.

28. Paragraph 28 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 28 of the Complaint.

29. The Defendant denies ¶ 29 of the Complaint.

SECOND CLAIM FOR RELIEF
(Turnover by HCMFA Pursuant to 11 U.S.C. § 542(b))

30. Paragraph 30 of the Complaint is a sentence of incorporation that does not require a response. All prior denials are incorporated herein by reference.

31. Paragraph 31 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 31 of the Complaint.

32. Paragraph 32 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 32 of the Complaint.

33. The Defendant denies ¶ 33 of the Complaint.

34. Paragraph 34 of the Complaint states a legal conclusion that does not require a response. The Defendant admits that the Plaintiff transmitted the Demand Letter. To the extent ¶ 34 alleges other facts, the Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 34 of the Complaint and therefore denies the same.

35. The Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in ¶ 35 of the Complaint and therefore denies the same.

36. Paragraph 36 of the Complaint states a legal conclusion that does not require a response. To the extent it alleges facts, the Defendant denies the allegations in ¶ 36 of the Complaint.

37. The Defendant denies that the Plaintiff is entitled to the relief requested in the prayer, including parts (i), (ii), and (iii).

AFFIRMATIVE DEFENSES

38. At all material times to the Complaint, the Defendant, a registered advisor, advised various third-party funds as to their investments. One such fund was Highland Global Allocation Fund (“HGAF”).

39. At all material times to the Complaint, the Defendant contracted with the Plaintiff whereby the Plaintiff, through its employees, would provide certain services to the Defendant, including with respect to the Defendant's advice to the third-party funds. These services so provided included accounting, legal, regulatory, valuation, and compliance services.

40. In March, 2018, HGAF sold equity interests it held in TerreStar. As part of this, it was necessary to calculate the "net asset value" ("NAV") of these securities and of HGAF assets. The Defendant was responsible for advising on the NAV. In turn, pursuant to the Shared Services Agreement in effect at that time between the Plaintiff and the Defendant, the Plaintiff was responsible to the Defendant to calculate the NAV, and the Plaintiff had several employees charged with these and similar calculations as part of the Plaintiff's routine business services and as part of what the Plaintiff regularly provided to the Defendant and affiliated companies.

41. The Plaintiff made a mistake in calculating the NAV (the "NAV Error"). The NAV Error was discovered in early 2019 as HGAF was being converted from an open-ended fund to a closed-ended fund. The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. Ultimately, and working with the SEC, the Plaintiff determined that the losses from the NAV Error to HGAF and its shareholders amounted to \$7.5 million: (i) \$6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) \$1.4 million of losses to the shareholders of HGAF.

42. The Defendant accepted responsibility for the NAV Error and paid out \$5,186,496 on February 15, 2019 and \$2,398,842 on May 21, 2019. In turn, the Plaintiff accepted responsibility to the Defendant for having caused the NAV Error, and the Plaintiff ultimately, whether through insurance or its own funds, compensated the Defendant for the above payments

by paying, or causing to be paid, approximately \$7.5 million to the Defendant directly or indirectly to HGAF and its investors.

43. At this time, Frank Waterhouse (“Waterhouse”) was the Chief Financial Officer to both the Plaintiff and the Defendant. Waterhouse signed the two promissory notes the subject of the Complaint (the “Notes”). He did not sign the Notes in any representative capacity for the Defendant. The Defendant did not authorize Waterhouse to sign the Notes or to bind the Defendant in any way to the Note.

44. Waterhouse made a mistake in preparing and signing the Notes for the Defendant. Upon information and belief, Waterhouse was not aware that payments from the Plaintiff to the Defendant were to compensate the Defendant for the NAV Error and resulting damages, instead assuming that the Notes were like prior notes between the Plaintiff and the Defendant. Waterhouse failed to properly inquire into the underlying transaction and, either for unknown accounting or other purposes, Waterhouse prepared and signed the Notes on his own, without proper knowledge of the underlying facts and without actual authority from either the Plaintiff or the Defendant.

45. In sum, neither the Plaintiff nor the Defendant intended that any funds paid by the Plaintiff to the Defendant be treated as debt but that they instead be treated as compensation by the Plaintiff to the Defendant for the NAV Error that the Plaintiff caused. The Notes are an unauthorized mistake and a nullity, and are void for a lack of consideration.

46. To the extent Waterhouse had apparent authority to bind the Defendant to the Notes, such apparently authority does not apply to the Notes because Waterhouse’s lack of actual authority is imputed to the Plaintiff, as Waterhouse was the CFO for the Plaintiff.

47. Accordingly, the Notes are void or unenforceable for lack of consideration, for mutual mistake, and for the lack of authority from the Defendant to Waterhouse to execute the same for the Defendant.

JURY DEMAND

48. The Defendant demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

49. The Defendant does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully request that, following a trial on the merits, the Court enter a judgment that the Plaintiff take noting on the Complaint and provide the Defendant such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this _____ day of May, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	
<hr/>		

**JAMES DONDERO’S MOTION AND MEMORANDUM OF LAW IN SUPPORT TO
WITHDRAW THE REFERENCE**

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John Y. Bonds, III
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Fed. R. Bankr. P. 5011(a)1

Pursuant to 28 U.S.C. §§ 157(d) and (e), Federal Rule of Bankruptcy Procedure 5011 and L.B.R 5011-1, Defendant James Dondero (“Dondero”) hereby respectfully moves the district court to withdraw the reference of Plaintiff’s Complaint from the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”) to the United States District Court for the Northern District of Texas (the “District Court”).¹ Withdrawal of the reference is mandatory because: (1) this motion is timely; (2) a non-Bankruptcy Code federal law at issue (here, federal tax law) has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. *In re Nat’l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992); *City of Clinton, Ark. v. Pilgrim’s Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009). The reference should also be withdrawn because Mr. Dondero has a right to a jury trial – which the Bankruptcy Court cannot provide – on the non-core breach of contract claim. Plaintiff’s turnover claim does not change the analysis because resolution of the breach of contract claim is fully determinative of the turnover claim (including the amount of offset Dondero is entitled to per 11 U.S.C. §§ 542(b) and 553), and it is improper to bring a turnover claim “as a Trojan Horse for bringing garden variety contract claims . . .” *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016) (citation omitted). Finally, it is most efficient for the District Court to hear the case because the matter will be subject to *de novo* review.

¹ This motion for withdrawal “shall be heard by a district judge.” Fed. R. Bankr. P. 5011(a). Under Local Bankruptcy Rule 5011-1(a), motions for withdrawal must be filed with the Clerk of the Bankruptcy Court. Accordingly, this motion is addressed to the District Court, but filed in the Bankruptcy Court.

INTRODUCTION

1. On January 22, 2021, Plaintiff Highland Capital Management, L.P. (“Plaintiff”), commenced this adversary proceeding against Dondero, asserting two causes of action, Count I asserting the state law, non-core breach of contract claim and Count II averring turnover per 11 U.S.C. § 542(b). Dondero, in his subsequent Answer and Amended Answer filed on March 16, 2021 and April 6, 2021, respectively, expressly stated that he did not consent to the Bankruptcy Court entering final orders or judgment, that he did not consent to the Bankruptcy Court conducting a jury trial, and that he demanded a jury trial.²

2. The largest \$3.82 million note of the three underlying Notes on which Count I is based, attached to the Complaint as Exhibits 1 – 3, states as follows:

4. Tax Loan. This Note is paid to the Maker to help satisfy any current tax obligations of a former partner or current partner.

3. Thus, the funds reflected by the largest of the Notes (and others) were advanced to Dondero, at least in part, to address a tax incurred related to federal partnership tax. The Plaintiff recognizes this in the *Declaration of John A. Morris in Support of the Debtor’s Objection to Defendant James Dondero’s Emergency Motion to Continue Docket Call and Trial and/or Amend Scheduling Order*,³ which includes the Plaintiff’s monthly operating reports and backup for the same reflecting the nature of the Notes being “DUE FROM OTHER – TAX LOANS” and “Partner Tax Loans.” Further, the balances of the three Notes were to be forgiven pursuant to certain benchmarks being met, including liquidity events.⁴ When forgiven, they would be taxed as compensation.

² Dkt. No. 6, ¶¶ 3-5, 44, 45; Dkt. No. 16, ¶¶ 3-5, 46, 47.

³ Dkt. No. 11, pp. 105, 117, 128, 130/130.

⁴ Dkt. No. 16, Amended Answer ¶ 40.

4. Whether the Notes reflect bona fide loans that only become compensation once those benchmarks have been met is a matter determined by federal tax law applicable to the Plaintiff, a Delaware limited partnership, and Dondero, a resident of Texas. To determine the validity of Dondero's defense to the demand for payment on the Notes, the factfinder will have to hear evidence about the use of forgivable notes as a tax-efficient method of compensation in the private equity industry.⁵ Whether the criteria for effective (not yet taxable) deferred compensation are met will also be pertinent to determining that payment on the Notes is not yet able to be demanded. Parties "engaging in legitimate tax planning" can design advance agreements with an expectation that the instruments be characterized differently in different jurisdictions for different purposes (*i.e.* "bona fide debt" for U.S. federal income tax purposes while being something else entirely under other law). *See PepsiCo P.R. c. Comm'r*, 104 T.C.M. (CCH) 322, T.C. Memo 2012-269, *P88, 2012 Tax Ct. Memo LEXIS 270, **105 (U.S.T.C. Sep. 20, 2012) (recognizing the legitimacy of "efforts to secure this hybrid dynamic").

5. For example, the existence of a forgiveness agreement, or subjecting a loan to partial or total cancellation upon the occurrence of a subsequent event, does not necessarily invalidate that arrangement as "bona fide debt" for federal income tax purposes, *Salloum v. Comm'r*, 113 T.C.M. (CCH) 1563 (U.S.T.C. June 29, 2017); *Porten v. Comm'r*, 65 T.C.M. (CCH) 1994 (U.S.T.C. Mar. 3, 1993), while that same arrangement could, under Texas law, be something "which appears to be a completely integrated agreement" but for which "[w]e may consider parol evidence . . . to establish the real consideration given for an instrument."

⁵ *See, e.g., Sibarium v. NCNB Texas Nat'l Bank*, 107 B.R. 108, 110 (N.D. Tex. 1989) ("Before withdrawing the reference, the district court must make an 'affirmative determination' that the relevant non-Code legal issues will require substantial and material consideration, and the Court must be satisfied that consideration of these federal laws requires 'significant interpretation' on the part of the Court . . . Withdrawal should not be made base on 'speculation about . . . issues which may or may not arise and may or may not be germane to resolution' of the proceedings"). This proceeding will revolve around the tax justifications for the deferred compensation agreement that incorporated the subject notes.

See Audubon Indem. Co. v. Custom Site-Prep, Inc., 358 S.W.3d 309, 316 (Tex. App. – Houston [1st Dist.] 2011). This proceeding will revolve around expert testimony regarding tax-optimized deferred compensation arrangements such as that between the Plaintiff and the Defendant, and will require the Court to analyze both federal tax law and title 11.

6. Because resolution of this proceeding “requires consideration of both title 11 and other laws of the United States regulating organizations and activities affecting interstate commerce[.]” 28 U.S.C. § 157(d), withdrawal of the reference is mandatory. Federal tax law has more than a *de minimis* impact upon interstate commerce, and was a driving factor in the transaction between the Delaware and Texas parties in this case and any decision regarding the use of such vehicles as potential future income will have large reverberations within the private equity industry, thus affecting interstate commerce.

7. Alternatively, because this case involves non-core proceedings of a state law claim (Count I breach of contract) for which Dondero is entitled to a jury trial, the result of which will wholly control the determination of the turnover claim per 11 U.S.C. § 542, including the amount of offset per 11 U.S.C. §§ 542(b) and 553, and because at a minimum, the District Court will be conducting a *de novo* review, cause exists for permissive withdrawal of the reference. Finally, Dondero submits that the reference should be immediately withdrawn inasmuch as: (1) the Bankruptcy Court has not decided any substantive matters related to these claims yet; (2) the inherent nature of Count I and the federal tax issues are not within the specialized expertise of the Bankruptcy Court; and (3) efficiency and expediency would be served when the District Court can efficiently and cost-effectively address the pretrial matters and jury trial which will revolve around the forgivable loan structure driven by federal tax loan implications.

ARGUMENTS

I. Count I Is Subject To Mandatory Withdrawal Of The Reference.

8. Under 28 U.S.C. § 157(a) and this District's standing order of reference, proceedings arising in, or related to, a case under Title 11 are automatically referred to the Bankruptcy Court. *See* Misc. Order No. 33. However, 28 U.S.C. § 157(d) provides for the withdrawal of the reference from the Bankruptcy Court as follows:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

9. Withdrawal of the reference is mandatory in this case. Under this Court's precedent, a motion to withdraw must be granted when: (1) the motion was timely filed; (2) a non-Bankruptcy Code federal law at issue (here, federal tax law) has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. *In re Nat'l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992); *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009). All three criteria are met.

10. First, this Motion is indisputably timely, being filed within a few weeks of the Answer, and before the Bankruptcy Court entered any substantive rulings. *In re Liljeberg Enters., Inc.*, 161 B.R. 21, 27 (E.D. La. 1993) (finding the motion to withdraw reference timely when filed fifty-two days after debtor filed motion to assume); *Met-Al, Inc. v. Hanson Storage Co.*, 157 B.R. 993, 998 (E.D. Wis. 1993) (motion timely when filed five days after filing of amended complaint first alleging Federal statutory claim).

11. Second, Count I, the state law, non-core, breach of contract claim based upon the three Notes, the balance owed of which is contested and intertwined with federal tax law, has more than a *de minimis* effect on interstate commerce.

12. Count I necessarily requires the Court to give “substantial and material consideration” to federal tax law – a non-Bankruptcy Code federal law. In Count I, Plaintiff alleges that Dondero failed to pay “the total outstanding principal and accrued but unpaid interest due under the Notes [of] \$9,004,013.07,” which does not take into effect the related agreements regarding the forgiveness of the Notes that is to occur when certain business benchmarks (which are not in Dondero’s control) are met pursuant to an acceptable federal tax plan. [Dkt. No. 1, ¶¶ 20-25.] These allegations independently mandate withdrawal of the reference. *See Great W. Sugar Co. v. Interfirst Bank, Dallas, N.A.*, No. 3-85-1755-H, 1985 WL 17671, at *2 (N.D. Tex. Nov. 7, 1985) (holding that withdrawal of the reference was mandatory because the resolution of the adversary proceeding required consideration of ERISA and the Internal Revenue Code); *see also In re Nat’l Gypsum Co.*, 145 B.R. at 541-42 (withdrawing the reference when the case necessarily involved a determination of patent claims). As noted above, to determine the validity of Dondero’s defense to the demand for payment on the Notes, the factfinder will have to hear evidence about the use of forgivable notes as a tax-efficient method of compensation in the private equity industry. Whether the relevant criteria are met will also be pertinent to determining whether the Debtor is entitled at this point to demand payment. Thus, resolution will require consideration of federal tax law that regulates organizations and activities affecting interstate commerce.

13. That the issues mandating withdrawal of the reference are raised in defense to the Plaintiff’s Complaint changes nothing here. The need to consider those issues drives the § 157(d) analysis. *Bear, Stearns Sec. Corp. v. Gredd*, 2001 U.S. Dist. LEXIS 10324, 2001 WL 840187 (S.D.N.Y. July 25, 2001) (granting defendant’s motion to withdraw the reference of a trustee’s

avoidance action because resolution of issues raised by defendant required substantial and material consideration of federal securities laws and regulations issued thereunder). Because resolution of this matter requires material and substantial consideration, interpretation, and application of federal tax law, withdrawal of the reference is mandatory.

II. There Is Good Cause For Permissive Withdrawal Of The Reference On All Counts.

14. If the District Court agrees that withdrawal of the reference on Count I is mandatory, “the interest of courts in trying together all claims arising from the same transaction is adequate cause to exercise discretionary power” to withdraw the reference of the Plaintiff’s Complaint in its entirety. *See In re Contemporary Lithographers, Inc.*, 127 B.R. 122, 128 (M.D.N.C. 1991). But even if the District Court does not agree that withdrawal of the reference is mandatory on Count I, it should withdraw the reference “for cause shown”⁶ below.

15. While “cause” is not defined, the Fifth Circuit Court of Appeals has identified the following factors to consider in determining whether to withdraw the reference: (1) whether the matter is core or non-core; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors’ and creditors’ resources; and (6) whether withdrawal would expedite the bankruptcy process. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 112-113 (N.D. Tex. 2006). As set forth below, the factors weigh heavily in favor of an order to immediately withdraw the reference.

⁶ 28 U.S.C. § 157(d).

1. Count I Is A State Law Claim That Is Non-Core, Subject To A Jury Trial, And Entirely Determinative Of The Turnover Claim; Dondero Demands A Jury Trial While Not Consenting To A Jury Trial In The Bankruptcy Court.

16. Count I asserts a breach of contract claim on the Notes. All of the Notes are “governed by the laws of the United States of America and by the laws of the State of Texas”⁷ The Texas Constitution guarantees a party to a contract a jury trial, and Mr. Dondero is therefore entitled to a jury trial on Count I. *McManus-Wyatt Produce Co. v. Texas Dep't of Agric. Produce Recovery Fund Bd.*, 140 S.W.3d 826, 833 (Tex. App. 2004) (holding the Texas Constitution, at Art. 1, § 15, and by practice previously, provides a right to jury trial in breach of contract cases, such that a party’s “right to defend against [a breach of contract claim], and to bring its own claim for breach of contract, were established rights that could be tried to a jury before the enactment of our constitution in 1876”).⁸

17. Plaintiff contends that Mr. Dondero has no right to a jury trial because its claim is a core proceeding. Plaintiff is wrong. Its breach of contract claim is non-core. A claim involving a pre-petition contract (even if the alleged breach is post-petition) is not a core proceeding. *In re Keener*, No. 03-44804, 2008 WL 912933, at *3 (Bankr. S.D. Tex. Apr. 2, 2008) (where a contract entered pre-petition was allegedly breached post-petition, the bankruptcy court, assessing 28 U.S.C. § 157(b)(2), determined the breach of contract claim to be non-core); *In re Bella Vita Custom Homes*, No. 16-34790-BJH, 2018 WL 2966838, at *2 (N.D. Tex. May 29, 2018), report and recommendation adopted sub nom. *In re Bella Vita Custom Homes, LLC*, No. 3:18-CV-0994-N, 2018 WL 2926149 (N.D. Tex. June 8, 2018) (holding the sole cause of action is a breach of contract claim against a non-debtor, which is non-core under 28 U.S.C. § 157(b)(2)). Bringing a

⁷ Dkt. No. 1, Exs. 1-3.

⁸ We anticipate Debtor may argue that Dondero’s filing of proofs of claim (mostly withdrawn) and participation in the Chapter 11 case waived his right to a jury trial in this adversary proceeding. There is substantial authority to the contrary, which Dondero will address if Debtor so argues.

turnover claim – which if free-standing is a core claim – that is wholly derivative of the contract claim does not transform a non-core matter to a core matter; it is improper to bring a turnover claim “as a Trojan Horse for bringing garden variety contract claims . . .” *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016) (citation omitted). As the bankruptcy court in *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1327 (2nd Cir. 1993) observed, citing *Granfinanciará v. Nordberg*, 492 U.S. 33, 61 (1989): “Neither Congress nor the court may deprive litigants of their constitutional rights simply by labeling a cause of action ‘core.’”

18. For example, in *In re Soundview Elite Ltd.*, 543 B.R. 78, 82 (Bankr. S.D.N.Y. 2016), the trustee sought turnover of the debtor’s investment in the debtor’s wholly owned company. When determining whether the bankruptcy court had the constitutional authority to hear the turnover claim, the SDNY found that, while this “matter [was] close” on this issue, the trustee using turnover to pursue non-core claims was constitutionally inappropriate given *Stern v. Marshall*, 564 U.S. 462 (2011), in substantial part because the amount to be turned over was uncertain. *Soundview*, at 97-8.

19. Here the amount to be turned over is similarly uncertain because it depends on the resolution of the breach of contract claim. The result is that Count I must be tried before a jury, in District Court, to determine what (if any) balance is owed, the result directly driving the turnover claim.

20. Compounding the above with Mr. Dondero’s clear demand for a jury trial, and express lack of consent to the Bankruptcy Court entering final orders or holding a jury trial, the result is the first two factors are met.

2. Uniformity Favors Withdrawal, Withdrawal Would Not Constitute Forum Shopping or Present Confusion, and Withdrawal Would Provide The Most Efficient, Economical Use of Judicial and Party Resources.

21. With this proceeding being at-issue for only a few weeks, withdrawing the reference would not at all undermine uniformity in the administration of the bankruptcy. This factor favors withdrawal the earlier it is demanded. *In re EbaseOne Corp.*, 2006 WL 2405732, at *4 (Bankr. S.D. Tex. June 14, 2006) (withdrawal favored when motion to withdraw reference is filed shortly after complaint and court has not reached significant level of familiarity). With Dondero maintaining his right to jury trial, the most efficient and cost-effective path for the parties (including the estate should it successfully collect for creditors) is directly through the District Court presiding over the case, rather than the Bankruptcy Court first addressing the case and then either referring the matter to the District Court for the jury trial and/or for *de novo* review.

22. While it is true that any motion to withdraw the reference is “[i]n some sense . . . forum shopping[,] . . . ‘[a] good faith claim of right, even when motivated (at least in part) by a desire for a more favorable decision maker, should not on that basis alone be denied as forum shopping.’” *In re Royce Homes, LP*, 578 B.R. 748, 761 (Bankr. S.D. Tex. 2017) (citation omitted). The critical focus is whether the movant is engaging in bad faith or improper forum shopping by, for example, “‘lay[ing] behind the log’ to determine how [the Bankruptcy Court] would rule before filing its motion to withdraw the reference.” *Id.* Given the early stage of this adversary proceeding, Dondero is plainly not engaging in bad faith or improper forum shopping.⁹

⁹ Compare *In re Royce Homes, LP*, 578 B.R. at 761 (where party moved quickly to withdraw the reference, before any substantive rulings had been made, party did not engage in bad faith forum shopping) with *In re Lopez*, No. 09-70659, 2017 WL 3382099, at *10 (Bankr. S.D. Tex. Mar. 20, 2017) (holding that confusion was more likely if reference was withdrawn when defendant did not move to withdraw the reference until over one year after adversary proceeding was filed).

23. From the viewpoint of the efficiency and economical use of resources perspectives, while a turnover claim may be core, the turnover claim is the sidecar to the motorcycle of Count I, the breach of contract claim, in that the turnover claim only goes where the jury on the breach of contract claim goes. The District Court adjudicating the breach of contract claim while the Bankruptcy Court simultaneously hears the turnover claim is obviously the most inefficient, impractical, and expensive path forward. The Bankruptcy Court adjudicating both the non-core, state law, breach of contract claim and the turnover claim would be violative of the applicable law cited earlier in this motion, and further, the Bankruptcy Court would need to submit its recommended findings of fact and conclusions of law on the entirely pivotal breach of contract claim to the District Court, which would then conduct a *de novo* review. 28 U.S.C. § 157(c)(1).

24. This leaves the only practical and cost-effective manner of proceeding – the District Court conducting a jury trial on both Count I, the non-core, breach of contract claim, while the turnover claim is tried in that same case.¹⁰

25. The uniformity, forum shopping, and efficiency factors all favor withdrawal of the reference.

III. Lastly, The District Court, Hearing The Sole Pending And Determinative Breach Of Contract Claim, Is Best Suited To Conduct Pretrial Proceedings.

26. While the District Court does have discretion to allow the Bankruptcy Court to preside over pretrial proceedings, with the District Court then trying the jury trial (*In re Guynes Printing Co. of Tex., Inc.*, No. 15-CV-149-KC, 2015 WL 3824070, at *3 (W.D. Tex. June 19, 2015)), because the case is subject to both mandatory and permissive withdrawal of the reference,

¹⁰ *In re MPF Holding US, LLC*, No. 08–36084–H4–11, 2013 WL 12146958, at *3 (Bankr. S.D. Tex. Apr. 26, 2013) (recommending withdrawal, and noting “immediate withdrawal of [the] reference will serve the interests of judicial economy” because it would allow the District Court to familiarize itself with the matter).

with the District Court necessarily conducting the trial, it would be most efficient for the District Court to conduct all pretrial proceedings.

27. Courts consider the following factors when determining whether the District Court should retain all pretrial matters: (1) does referral promote judicial efficiency; (2) is the Bankruptcy Court familiar with the allegations; and (3) do the allegations require interpretation of federal bankruptcy law.¹¹ The factors weigh heavily toward the District Court withdrawing the pretrial matters.

28. First, because the contract claim is dispositive of the turnover claim, and the contract claim requires a jury trial, it is most efficient for the District Court to hear the case from the start. Second, the Bankruptcy Court has not decided any substantive issues on this adversary proceeding yet. Therefore the Bankruptcy Court is no more familiar with the substance of the matter than the District Court can be in relatively short order.

29. Second, Count I is a breach of contract claim that will require analysis of federal tax law, to determine whether and when the balance on the Notes may be demanded, and various state law doctrine to determine whether the Notes and/or the side agreement regarding the Notes are enforceable. There is no particular area of bankruptcy law expertise required.

CONCLUSION

WHEREFORE, for the reasons above, Dondero respectfully requests that the District Court enter an order: (1) immediately withdrawing the reference to the Bankruptcy Court per 28 U.S.C. § 157(d), based upon mandatory withdrawal for substantial and material consideration of non-Bankruptcy federal tax laws affecting interstate commerce or permissive withdrawal based on

¹¹ See *Curtis v. Cerner Corp.*, No. 7:29-CV-00417, 2020 WL 1983937, at *5 (S.D. Tex. Apr. 27, 2020); see also *In re Brown Med. Ctr., Inc.*, No. BR 15-3229, 2016 WL 406959, at *2 (S.D. Tex. Feb. 3, 2016) (exercising its discretion to retain all pretrial matters as a means to maintain an active role in the case, gain familiarity with the issues that will be presented for trial, and ensure the efficient use of judicial resources).

pivotal Count I being a non-core, state law claim for which Dondero is entitled to a jury trial; and
(2) granting such further relief as equity and justice requires.

Dated: April 15, 2021

Respectfully submitted,

/s/ Clay Taylor
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State Bar I.D. No. 02589100
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on April 15, 2021, he conferred with counsel for the Plaintiff, who opposed the relief requested in this motion.

/s/ Bryan Assink
Bryan Assink

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 15, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Clay Taylor
Clay Taylor

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION**

In re:	§	
	§	Bankruptcy Court
	§	Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	Chapter 11
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Bankruptcy Court
	§	Adversary Proceeding No.
Plaintiff.	§	21-03003-sgj
v.	§	
	§	District Court Case No.
JAMES D. DONDERO,	§	
	§	
Defendant.	§	
<hr/>		

ORDER GRANTING MOTION TO WITHDRAW THE REFERENCE

On April 15, 2021, the above-captioned Defendant filed a Motion to Withdraw the Reference of the Plaintiff’s Complaint. Having considered the motion and the record of this proceeding, it is ORDERED that the motion is GRANTED. The Court finds that withdrawal of the reference under 28 U.S.C. § 157(d) is mandatory as to Count I of the Plaintiff’s Complaint. Because “the interest of courts in trying together all claims arising from the same transaction is adequate cause to exercise discretionary power” to withdraw the reference of the Plaintiff’s Complaint in its entirety, *see, e.g., In re Contemporary Lithographers, Inc.*, 127 B.R. 122, 128 (M.D.N.C. 1991), the reference of this adversary proceeding is withdrawn.

SO ORDERED.

Dated _____, 2021,

 UNITED STATES DISTRICT JUDGE

Proposed form of order prepared by:

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

EXHIBIT 36

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Chapter 11
L.P.,	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03004
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE

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Julian P. Vasek, Esq.
Texas Bar No. 24070790
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**COUNSEL FOR HIGHLAND CAPITAL
MANAGEMENT FUND ADVISORS, L.P.**

DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COMES NOW Highland Capital Management Fund Advisors, L.P., the defendant (the “Defendant”) in the above styled and numbered adversary proceeding (the “Adversary Proceeding”), and files this its *Defendant’s Motion to Withdraw the Reference* (the “Motion”), respectfully stating as follows:

This Adversary Proceeding was automatically referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and District Court Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*.

Pursuant to 28 U.S.C. § 157(d), and for the reasons given in the accompanying *Brief in Support of the Defendant’s Motion to Withdraw the Reference*, as supported by the *Appendix In Support of Defendant’s Motion to Withdraw the Reference*, filed contemporaneously herewith and all of which is incorporated herein by reference, the Defendant requests that the Court withdraw from the Bankruptcy Court the reference (*i.e.*, the referral) of the Adversary Proceeding, in which case the Adversary Proceeding will continue as a Civil Action in the District Court.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that the District Court enter an order: (i) granting the Motion; (ii) withdrawing from the Bankruptcy Court the reference of this Adversary Proceeding; and (iii) granting the Defendant such other and further relief to which it shows itself to be entitled.

RESPECTFULLY SUBMITTED this 13th day of April, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with Jeff Pomerantz, Esq., counsel for record for the Plaintiff, who informed the undersigned that the Plaintiff opposes said relief.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 13th day of April, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on the Plaintiff through its counsel of record.

/s/ Davor Rukavina

Davor Rukavina

EXHIBIT 37

Case 21-03005-sgj Doc 19 Filed 04/13/21 Entered 04/13/21 17:07:12 Page 1 of 3

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

In re	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Chapter 11
L.P.,	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 21-03005
	§	
NEXPOINT ADVISORS, L.P.,	§	
	§	
Defendant.	§	
	§	

DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COMES NOW NexPoint Advisors, L.P., the defendant (the “Defendant”) in the above styled and numbered adversary proceeding (the “Adversary Proceeding”), and files this its *Defendant’s Motion to Withdraw the Reference* (the “Motion”), respectfully stating as follows:

This Adversary Proceeding was automatically referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and District Court Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*.

Pursuant to 28 U.S.C. § 157(d), and for the reasons given in the accompanying *Brief in Support of the Defendant’s Motion to Withdraw the Reference*, as supported by the *Appendix In Support of Defendant’s Motion to Withdraw the Reference*, filed contemporaneously herewith and all of which is incorporated herein by reference, the Defendant requests that the Court withdraw from the Bankruptcy Court the reference (*i.e.*, the referral) of the Adversary Proceeding, in which case the Adversary Proceeding will continue as a Civil Action in the District Court.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that the District Court enter an order: (i) granting the Motion; (ii) withdrawing from the Bankruptcy Court the reference of this Adversary Proceeding; and (iii) granting the Defendant such other and further relief to which it shows itself to be entitled.

RESPECTFULLY SUBMITTED this 13th day of April, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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Julian P. Vasek, Esq.
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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with Jeff Pomerantz, Esq., counsel for record for the Plaintiff, who informed the undersigned that the Plaintiff opposes said relief.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 13th day of April, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on the Plaintiff through its counsel of record.

/s/ Davor Rukavina

Davor Rukavina

EXHIBIT 38

Texas (the “District Court”) under 28 U.S.C. §§ 157(d) and (e), Federal Rule of Bankruptcy Procedure 5011 and Local Bankruptcy Rule 5011-1.¹ In support of its Motion, Defendant respectfully states as follows:

1. This Adversary Proceeding was automatically referred to the Bankruptcy Court under 28 U.S.C. § 157(a) and District Court Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*.

2. Under 28 U.S.C. § 157(d) and for the reasons set forth in the accompanying *Brief in Support of Defendant’s Motion to Withdraw the Reference*, as supported by the *Appendix in Support of Defendant’s Motion to Withdraw the Reference*, filed contemporaneously herewith and incorporated by reference herein, Defendant respectfully requests that the District Court withdraw from the Bankruptcy Court the reference (*i.e.* the referral) of the Adversary Proceeding, in which case the Adversary Proceeding will continue as a Civil Action in the District Court.

For these reasons, Defendant respectfully requests that the Court enter an order (i) granting the Motion; (ii) withdrawing from the Bankruptcy Court the reference of this Adversary Proceeding; and (iii) granting Defendant such other and further relief to which it may be entitled.

¹ This motion for withdrawal “shall be heard by a district judge;” however, under Local Bankruptcy Rule 5011-1(a), the motion must be filed with the Clerk of the Bankruptcy Court. Fed. R. Bankr. P. 5011(a); L.B.R. 5011-1(a). Accordingly, this motion is addressed to the District Court, but filed in the Bankruptcy Court.

Respectfully submitted,

/s/ Lauren K. Drawhorn _____

Jason M. Rudd

Texas Bar No. 24028786

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**COUNSEL FOR HIGHLAND MANAGEMENT
SERVICES, INC.**

CERTIFICATE OF CONFERENCE

I hereby certify that on June 2-3, 2021, I conferred with counsel for the Plaintiff regarding the relief requested herein. Counsel for Plaintiff indicated it is unopposed to the Motion to Withdraw on the condition that the Bankruptcy Court include in its report and recommendation to the District Court that the Bankruptcy Court will hear all pre-trial matters, including summary judgment motions.

/s/ Lauren K. Drawhorn _____

Lauren K. Drawhorn

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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/s/ Lauren K. Drawhorn _____

Lauren K. Drawhorn

EXHIBIT 39

District of Texas (the “District Court”) under 28 U.S.C. §§ 157(d) and (e), Federal Rule of Bankruptcy Procedure 5011 and Local Bankruptcy Rule 5011-1.¹ In support of its Motion, Defendant respectfully states as follows:

1. This Adversary Proceeding was automatically referred to the Bankruptcy Court under 28 U.S.C. § 157(a) and District Court Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*.

2. Under 28 U.S.C. § 157(d) and for the reasons set forth in the accompanying *Brief in Support of Defendant’s Motion to Withdraw the Reference*, as supported by the *Appendix in Support of Defendant’s Motion to Withdraw the Reference*, filed contemporaneously herewith and incorporated by reference herein, Defendant respectfully requests that the District Court withdraw from the Bankruptcy Court the reference (*i.e.* the referral) of the Adversary Proceeding, in which case the Adversary Proceeding will continue as a Civil Action in the District Court.

For these reasons, Defendant respectfully requests that the Court enter an order (i) granting the Motion; (ii) withdrawing from the Bankruptcy Court the reference of this Adversary Proceeding; and (iii) granting Defendant such other and further relief to which it may be entitled.

¹ This motion for withdrawal “shall be heard by a district judge;” however, under Local Bankruptcy Rule 5011-1(a), the motion must be filed with the Clerk of the Bankruptcy Court. Fed. R. Bankr. P. 5011(a); L.B.R. 5011-1(a). Accordingly, this motion is addressed to the District Court, but filed in the Bankruptcy Court.

Respectfully submitted,

/s/ Lauren K. Drawhorn

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COUNSEL FOR NEXPOINT REAL ESTATE

PARTNERS, LLC F/K/A HCRE PARTNERS, LLC

CERTIFICATE OF CONFERENCE

I hereby certify that on June 2-3, 2021, I conferred with counsel for the Plaintiff regarding the relief requested herein. Counsel for Plaintiff indicated it is unopposed to the Motion to Withdraw on the condition that the Bankruptcy Court include in its report and recommendation to the District Court that the Bankruptcy Court will hear all pre-trial matters, including summary judgment motions.

/s/ Lauren K. Drawhorn

Lauren K. Drawhorn

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system upon counsel for the Plaintiff and all other parties requesting or consenting to such service in this adversary case.

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/s/ Lauren K. Drawhorn _____

Lauren K. Drawhorn

EXHIBIT 40



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 6, 2021

United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
DEBTOR.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	ADVERSARY NO. 21-03003
PLAINTIFF,	§	(CIV. ACTION #3:21-CV-01010-E)
	§	
VS.	§	
	§	
JAMES DONDERO,	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT PROPOSING THAT IT:
(A) GRANT DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE AT SUCH
TIME AS BANKRUPTCY COURT CERTIFIES THAT ACTION IS TRIAL READY;
AND (B) DEFER PRETRIAL MATTERS TO BANKRUPTCY COURT

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (the “Debtor” or “Highland”) filed a voluntary Chapter 11 petition on October 16, 2019 in the United States Bankruptcy Court of Delaware. That court subsequently entered an order transferring venue to the Northern District of Texas, Dallas Division, on December 4, 2019. A Chapter 11 plan was confirmed by the bankruptcy court on February 22, 2021. The chapter 11 plan has been appealed by the Defendant in this action, James D. Dondero (“Dondero-Defendant”), and certain parties related to him. The appeal of the plan is now pending before the Fifth Circuit, but no stay pending appeal has been granted.

On January 22, 2021, shortly before its Chapter 11 plan was confirmed, the Debtor, as Plaintiff, brought this Adversary Proceeding against Dondero-Defendant, who was Highland’s co-founder and former President and Chief Executive Officer. The Adversary Proceeding pertains to three promissory notes (collectively, the “Notes”) executed by Mr. Dondero in favor of the Debtor in 2018. Each of the Notes were demand notes. On December 3, 2020, the Debtor sent Dondero-Defendant a letter demanding payment by December 11, 2020, as allowed under the terms of the notes. Following Dondero-Defendant’s failure to pay on the Notes in response to the demand letter, the Debtor brought this action to collect on the Notes. The Debtor’s Chapter 11 plan contemplates collection on these Notes (as well as several other notes of parties related to Dondero-Defendant) as part of its funding to pay creditors.

¹ Bankruptcy Case No. 19-34054.

Under the United States District Court for the Northern District of Texas' standing order of reference², proceedings arising in, or related to, a case under Title 11 are automatically referred to the bankruptcy court. Dondero-Defendant submitted a *Motion and Memorandum of Law in Support to Withdrawal the Reference*³ (the "Motion") seeking to have the reference withdrawn, such that this Adversary Proceeding would be adjudicated in the District Court. The bankruptcy court conducted a status conference concerning the Motion, pursuant to Local Bankruptcy Rule 5011-1, on May 25, 2021.

The bankruptcy court submits the following report and recommendation to the District Court, ultimately recommending that the Motion be granted, ***but only at such time as the bankruptcy court certifies to the District Court that the lawsuit is trial ready***. The bankruptcy court further recommends that the District Court ***defer to the bankruptcy court the handling of all pretrial matters***.

II. NATURE OF THE ADVERSARY PROCEEDING

a. The Complaint and Procedural History

The Debtor commenced this Adversary Proceeding by filing its *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate*⁴ on January 22, 2021. The Debtor's Complaint asserts two causes of action: (1) a breach of contract claim ("Count 1") and (2) a turnover action under 11 U.S.C. § 542(b) for the amounts owed on the Notes ("Count 2"). The principal amounts and execution dates for each of the three Notes were: (i) \$3,825,000, executed February 2, 2018, (ii) \$2,500,000, executed August 1, 2018, and (iii) \$2,500,000, executed August 13, 2018. The Debtor now seeks monetary damages totaling \$9,004,013.07, inclusive of accrued but unpaid

² Misc. Order No. 33.

³ Adversary Case No. 21-03003, Dkt. 21.

⁴ Adversary Case No. 21-03003, Dkt. 1.

interest and cost of collection. Because the Debtor alleges the amounts due on the Notes are property of its estate, it argues that turnover pursuant to 11 U.S.C. § 542(b) is appropriate.

After being served with summons on January 28, 2021, Dondero-Defendant filed his *Original Answer*⁵ on March 16, 2021 before subsequently filing his *Amended Answer*⁶ on April 6, 2021.

Dondero-Defendant has three pending proofs of claim in the Bankruptcy Case that are unliquidated, contingent claims. Two other proofs of claim previously filed by Mr. Dondero were withdrawn with prejudice before the commencement of the Adversary Proceeding on December 4, 2020.⁷ ***Proof of Claim No. 188 was Dondero-Defendant's proof of claim directly relating to the Notes and was one of the two proofs of claim withdrawn with prejudice.***

b. The Motion to Withdraw the Reference, Response Opposed, and Reply

On April 15, 2021, Dondero-Defendant filed the Motion. As a result, the above-captioned civil action was created in the District Court. On May 6, 2021, the Debtor filed its *Response Opposed to Defendant's Motion to Withdraw the Reference*⁸ (the "Response Opposed"). On May 21, 2021, Dondero-Defendant filed his *Reply in Support of the Motion to Withdraw the Reference*⁹ (the "Reply"). The bankruptcy court held a status conference, as required by Local Bankruptcy Rule 5011-1, on May 25, 2021, to assist in the bankruptcy court's preparation of this Report and Recommendation.

i. The Movant's Position

⁵ Adversary Case No. 21-03003, Dkt. 6.

⁶ Adversary Case No. 21-03003, Dkt. 16.

⁷ *Order Approving Stipulation and Agreed Order Authorizing Withdrawals of Proofs of Claim 138 and 188 Filed by James Dondero*, Bankruptcy Case No. 19-34054, Dkt. 1510.

⁸ Adversary Case No. 21-03003, Dkt. 30.

⁹ Adversary Case No. 21-03003, Dkt. 44.

Dondero-Defendant argues that the withdrawal of the reference is mandatory for the Debtor's breach of contract count and, alternatively, permissive withdrawal of the reference is proper for both counts.¹⁰

Dondero-Defendant argues that mandatory withdraw of the reference is required under the precedent of this court.¹¹ Specifically, he argues that the Notes were, in essence, tax loans that were forgivable and issued in lieu of compensation. Further, forgivable loans as compensation are allegedly used throughout the private equity industry as a tax-efficient form of compensation and any decision made by the bankruptcy court will have resounding consequences on the private equity industry. Thus, the breach of contract claim will allegedly involve a substantial and material consideration of non-Bankruptcy federal law (tax law) that will result in more than a *de minimis* effect on interstate commerce, making withdrawal mandatory.¹²

Alternatively, Dondero-Defendant argues that, if mandatory withdrawal is not required, there is cause shown for permissive withdrawal of the reference because: (1) the Texas Constitution guarantees a party to a contract a right to a jury trial; (2) the contract claim is a purely state law, non-core claim; (3) the turnover claim, under the Bankruptcy Code, is wholly derivative of the contract claim, as the amount to be turned over is based on the resolution of the contract claim; and (4) efficiency, uniformity and forum shopping factors all favor withdrawal.¹³

Further, Dondero-Defendant contends he has made a demand for a jury trial and has not consented, expressly or impliedly, to the equitable jurisdiction of the bankruptcy court to enter

¹⁰ See Adversary Case No. 21-03003, Dkt. 21 at 5-7.

¹¹ See *In re Nat'l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992) (stating "withdrawal must be granted if it can be established (1) that the proceeding involves a substantial and material question of both Title 11 and non-Bankruptcy Code federal law; (2) that the non-Code federal law has more than a *de minimis* effect on interstate commerce; and (3) that the motion for withdrawal was timely."); see also *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009).

¹² Adversary Case No. 21-03003, Dkt. 21 at 5-7.

¹³ *Id.* at 7-11.

final orders in the Adversary Proceeding or hold a jury trial. Dondero-Defendant further argues he has withdrawn his only proof of claim relating to the Notes, thus negating any argument he has consented to the bankruptcy court having jurisdiction over the litigation of the Notes.

In summary, Dondero-Defendant views mandatory withdrawal of the reference as warranted, because the contract claim will allegedly be substantially based on federal tax law issues, and permissive withdrawal as alternatively proper, because the turnover claim is being used as a “Trojan Horse” to attempt to make a non-core breach of contract claim become core.¹⁴

As far as timing, Dondero-Defendant requests that the District Court immediately withdraw the reference and hear all pre-trial matters until the parties are trial-ready.

ii. *The Debtor-Plaintiff's Position*

The Debtor argues that no basis exists for mandatory withdrawal of the reference because no substantial and material consideration of federal tax law issues will be necessary in this Adversary Proceeding. The Debtor argues that Dondero-Defendant has provided no specificity as to what tax issues would be in play, and mere speculation about tax issues is not enough to justify mandatory withdrawal of the reference.¹⁵ To that point, the Debtor notes that Dondero-Defendant has not pointed to any section of the federal tax code to support a basis for his defenses. The Debtor characterizes the entirety of the Motion as an attempt to forum shop and avoid another hearing in front of the bankruptcy court through assertion of baseless tax defenses.

The Debtor further argues that there is no cause shown for permissive withdrawal because a turnover action under Section 542(b) of the Bankruptcy Code is an inherently core claim. The Notes, as argued, are already property of the bankruptcy estate, as matured and payable on

¹⁴ *Id.* at 8-9; see *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016).

¹⁵ See *In re White Motor Corp.*, 42 B.R. 693, 705-06 (N.D. Ohio 1984).

December 11, 2020, and the turnover action only concerns federal bankruptcy law.¹⁶ The Debtor argues that the defenses and disputes raised by Dondero-Defendant do not restrict the Debtor's ability to collect property of the estate under 11 U.S.C. § 542(b).¹⁷

The Debtor additionally argues that Dondero-Defendant's assertion that he has retained his jury trial rights is wrong, as he has consented to the equitable jurisdiction of the bankruptcy court through the filing of five proofs of claims and asserting setoffs in his defense to the Adversary Proceeding. The Debtor further argues that the filing of Proof of Claim No. 188 (related to the Notes), clearly demonstrated Dondero-Defendant's consent to the jurisdiction and authority of the bankruptcy court to resolve the interconnected claims and setoff defenses he has asserted—thereby directly impacting the claims-allowance process and the restructuring of the debtor-creditor relations. Further, the Debtor argues, in a supplemental filing, that Dondero-Defendants' withdrawing Proof of Claim No. 188 in December 2020 with prejudice does not allow him to withdraw his consent to the jurisdiction of the bankruptcy court.¹⁸ In essence, the Debtor argues that, as soon as Dondero-Defendant filed Proof of Claim No. 188, he had consented to bankruptcy court jurisdiction for any proceeding involving the Notes during the Bankruptcy Case and waived his jury trial rights.

As far as timing, the Debtor argues that, if the court finds permissive withdrawal of the reference is appropriate, the reference should not be withdrawn until after the parties are trial-ready, and all pretrial matters should be handled by the bankruptcy court until such time.

¹⁶ See *Tow v. Park Lake Cmtys., LP*, 2018 U.S. Dist. LEXIS 1720, at *3-*5 (S.D. Tex. Jan. 4, 2018); see also *Porretto v. Nelson (In re Porretto)*, 2012 Bankr. LEXIS 4919, at *11-*12 (Bankr. S.D. Tex. Oct. 18, 2012); see also *Romo v. Monetmayor (In re Montemayor)*, 547 B.R. 684, 692 (Bankr. S.D. Tex. 2016) (bankruptcy court had authority under *Stern* to issue a final order in an action brought pursuant to Section 542(b), because an action “to turnover assets belonging to the bankruptcy estate [is] a matter which solely concerns federal bankruptcy law”).

¹⁷ See *Tow*, 2018 U.S. Dist. LEXIS 1720, at *3-*5; see also *Shaia v. Taylor (In re Connelly)*, 476 B.R. 223, 230 (Bankr. E.D. Va. 2012).

¹⁸ *Addendum to Plaintiff's Opposition to Defendant's Motion to Withdraw the Reference*, Adversary Case No. 21-03003, Dkt. 31 at 1.

III. MANDATORY WITHDRAWAL OF THE REFERENCE IS NOT APPLICABLE

Withdrawal of the reference pursuant to 28 U.S.C. § 157(d) provides for the possibility of mandatory withdrawal of the reference from the bankruptcy court: “The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Under the precedent of this District, in *Nat’l Gypsum Co.* and *Pilgrim’s Pride*, mandatory withdrawal of the reference must be granted when: (1) the motion was timely filed; (2) a non-Bankruptcy Code federal law at issue has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law.¹⁹

It has been well established that “mandatory withdrawal is to be applied narrowly” and to “prevent 157(d) from becoming an ‘escape hatch.’”²⁰ Unsubstantiated assertions that non-bankruptcy federal law issues are substantial and material to an adversary proceeding are insufficient to warrant mandatory withdrawal.²¹ The bankruptcy court routinely considers tax law issues and, here, Dondero-Defendant has provided no meaningful explanation of the alleged materiality, complexity, and relevance of federal tax issues to the Adversary Proceeding. No relevant portions of the tax laws that will allegedly be implicated are cited, nor is there any explanation of how the issues are beyond the expertise of the bankruptcy court. Thus, Dondero-

¹⁹ 145 B.R. at 541; 2009 WL 10684933 at *1.

²⁰ *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 101134, at *6 (N.D. Tex. Oct. 1, 2009), *adopted in its entirety*, 2009 U.S. Dist. LEXIS 102071 (N.D. Tex. Nov. 3, 2009).

²¹ *Keach v. World Fuel Servs. Corp. (In re Montreal Me. & Atl. Ry.)*, 2015 U.S. Dist. LEXIS 74006, at *21-*23 (D. Me. June 8, 2015) (insufficient basis for mandatory withdrawal where party failed to demonstrate specifically why a court would have to “engage in anything beyond routine application of current law” and the party “tries to kick up some dust to make the relevant analysis seem complicated”).

Defendant has failed to meet his burden to demonstrate that mandatory withdrawal of the reference is appropriate.

IV. THE BREACH OF CONTRACT CLAIMS AT THE CENTER OF THE ADVERSARY PROCEEDING ARE NONCORE CLAIMS, AND THE PENDING PROOFS OF CLAIM OF DONDERO-DEFENDANT ARE UNRELATED TO THEM

Permissive withdrawal of the reference is described in 28 U.S.C. § 157(d) as follows: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” The Bankruptcy Code does not define “cause shown,” but the United States Court of Appeal for the Fifth Circuit, interpreting the Supreme Court case of *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, has identified a number of factors for courts to consider in determining whether permissive withdrawal of the reference is appropriate: (1) whether the matter is core or noncore; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors’ and creditors’ resources; and (6) whether withdrawal would expedite the bankruptcy process.²² Courts in this District have placed an emphasis on the first two factors.²³

As explained by the Supreme Court in *Stern v. Marshall*, Congress has divided bankruptcy *proceedings* (*i.e.*, adversary proceedings or contested matter within a bankruptcy case)—over which there is bankruptcy subject matter jurisdiction—into three different categories: (a) those that “aris[e] under” Title 11; (b) those that “aris[e] in” a Title 11 case; and (c) those that are “related

²² *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 115-23 (N.D. Tex. 2006); 458 U.S. 50 (1982).

²³ See *Mirant*, 337 B.R. at 115-122.

to” a case under Title 11.²⁴ Further, those that arise under Title 11 or arise in a Title 11 case are defined as “core” matters²⁵ and those that are merely “related to” a Title 11 case are defined as “noncore” matters. The significance of the “core”/“noncore” distinction is that bankruptcy courts may statutorily enter final judgments in “core” proceedings in a bankruptcy case, while in “noncore” proceedings, the bankruptcy courts instead may only (absent consent from all of the parties) submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. This is the statutory framework collectively set forth in 28 U.S.C. § 1334 and 28 U.S.C. § 157. But while a proceeding may be “core” in nature, under 28 U.S.C. § 157(b)(2), and the bankruptcy court, therefore, has the *statutory* power to enter a final judgment on the claim under 28 U.S.C. § 157(b)(1), *Stern* instructs that any district court, in evaluating whether a bankruptcy court has the ability to issue final orders and judgments, must resolve not only: (a) whether the bankruptcy court has the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on a particular claim; but also (b) whether the conferring of that authority on an Article I bankruptcy court is *constitutional* (and this turns on whether “the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process”).²⁶

With respect to the claims asserted against Dondero-Defendant, it might be argued that both counts asserted against him are *statutorily* core in nature.²⁷ While Count 1 is a breach of contract claim for collection of amounts due under promissory notes—one of the simplest forms of a state law lawsuit—it might be argued that Count 1 is statutorily core under the catchall provision of 28

²⁴ 28 U.S.C. § 1334(b); *Stern v. Marshall*, 564 U.S. 462, 473-474 (2011).

²⁵ *Stern*, 564 U.S. at 473-474. Core proceedings include, but are not limited to, 16 different types of matters, including “counterclaims by [a debtor's] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C).

²⁶ *Stern*, 564 U.S. at 499.

²⁷ 28 U.S.C. § 157(b)(2)(E), (O).

U.S.C. § 157(b)(2)(O), as the resolution of the claim would be “affecting the liquidation of the assets of the estate.” However, this position would not pass constitutional muster. The cause of action does not stem from the bankruptcy itself (*i.e.*, it stems from defaults on pre-petition notes) and would not be resolved through the claims allowance process (*since the only related proof of claim related to the Notes has been withdrawn*). In other words, the resolution of Count 1 is not so inextricably intertwined with the resolution of Dondero-Defendant’s still-remaining proofs of claim so as to confer constitutional authority on the bankruptcy court to enter a final judgment on the breach of contract claims.

Count 2, the turnover cause of action, is brought pursuant to 11 U.S.C. § 542(b) and is listed as statutorily core under 28 U.S.C. § 157(b)(2)(E). If Count 2 were freestanding and the debts due under the Notes were undisputed, it is unrefuted by Dondero-Defendant that a turnover action under 11 U.S.C. § 542(b) would be both a statutory and constitutional core claim. *The issue is whether a turnover action to collect on a disputed pre-petition promissory note can be viewed as a core claim.* There is a split in authority on this issue. The Debtor cites authority that a turnover action is a core claim when collecting *matured* debts, as property of the estate, regardless of whether the indebtedness is *disputed*.²⁸ In contrast, Dondero-Defendant cites authority that the scope of turnover claims under the Bankruptcy Code should not be expanded to encompass debts in dispute that arose outside of bankruptcy, including authority from this court.²⁹

²⁸ *Shaia*, 476 B.R. at 230 (“To properly constitute a core proceeding under § 157(b)(2)(E), the debt must be ‘matured, payable on demand, or payable on order.’ ‘Matured’ refers to ‘debts that are presently payable, as opposed to those that are contingent and become payable only upon the occurrence of a certain act or event.’ While the Defendants assert they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. ... A cause of action is a turnover proceeding under § 542(b) of the Bankruptcy Code where it seeks collection rather than creation or liquidation of a matured debt.”); *see also In re Willington Convalescent Home, Inc.*, 850 F.2d at 52 n.2 (“The mere fact that Connecticut denies that it owes the matured debt for Willington’s services because of a recoupment right ‘does not take the trustee’s action outside the scope of section 542(b)’”).

²⁹ *In re Se. Materials, Inc.*, 467 B.R. 337, 354 (Bankr. M.D.N.C. 2012) (The distinction is when “an adversary proceeding presents a bona fide dispute as to liability, the matter cannot be viewed as a turnover proceeding”); *In re*

This court views the turnover claim as derivative of the breach of contract claims. The breach of contract claims are clearly non-core, and the bankruptcy court lacks constitutional authority to confer jurisdiction over them (absent consent—which does not exist here). A turnover action under 11 U.S.C. § 542(b) cannot be tacked onto a complaint so as to confer authority in the bankruptcy court to adjudicate an otherwise non-core claim. To hold otherwise would run counter to the dictates of the Supreme Court in *Marathon*.

In summary, this court believes that the turnover claim in the Complaint, to collect on a disputed indebtedness under the Notes, “do[es] not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E),” absent a judgment or stipulation resolving the dispute as to the indebtedness.³⁰ Thus, the turnover claim, as brought, is not a core claim that the bankruptcy court can finally adjudicate, absent the consent of all parties.

V. JURY TRIAL RIGHTS AND DEMAND

Pursuant to 28 U.S.C. § 157(e), if a litigant has the right to a jury trial under applicable non-bankruptcy law, a bankruptcy court may conduct the jury trial only if: (a) the matters to be finally adjudicated fall within the scope of bankruptcy subject matter jurisdiction; (b) the district court of which the bankruptcy court is a unit authorizes the bankruptcy court to do so; and (c) all of the parties consent.³¹

Starting first with whether a right to a jury trial even exists, the Seventh Amendment, of course, provides a jury trial right in cases in which the value in controversy exceeds twenty dollars and

Satelco, Inc., 58 B.R. 781, 789 (Bankr. N.D. Tex. 1986) (“[T]his Court holds that actions to collect accounts receivable based upon state law contract principles do not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability.”).

³⁰ *Satelco*, 58 B.R. at 789.

³¹ “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.” 28 U.S.C. § 157(e) (West 2019).

the cause of action is to enforce statutory rights that are at least analogous to rights that were tried at law in the late 18th century English courts.³² Suits “at law” refers to “suits in which legal rights were to be ascertained and determined” as opposed to “those where equitable rights alone were recognized and equitable remedies were administered.”³³ This analysis requires two steps: (1) a comparison of the “statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity”; and (2) whether the remedy sought is “legal or equitable in nature . . . [t]he second stage of this analysis” being “more important than the first.”³⁴

It is well established that the act of filing a proof of claim can operate to deprive a creditor of a jury trial right, by subjecting a claim, that would otherwise sound only in law, to the equitable claims allowance process.³⁵ Thus, Dondero-Defendant, by having several *pending* proofs of claims, has consented to the bankruptcy court’s equitable jurisdiction and waived his right to a jury trial as to the subject matter of the *pending* proofs of claim.³⁶ However, as earlier noted, prior to the commencement of this Adversary Proceeding on January 22, 2021, Dondero-Defendant withdrew two of his proofs of claim on December 4, 2020 with prejudice—including Proof of Claim No. 188 which related to the Notes. To be sure, Proof of Claim No. 188, if pending, would have made the claims asserted in the Adversary Proceeding so inextricably intertwined with the equitable process of claims resolution, so as to constitute consent to the equitable jurisdiction of the bankruptcy court. Without a pending proof of claim, the breach of contract claims is precisely the kind of action that would sound in law rather than in equity. By withdrawing his proof of claim

³² See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999).

³³ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

³⁴ See *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera*, 492 U.S. at 42).

³⁵ See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990).

³⁶ *Id.*

related to the Notes, Dondero-Defendant withdrew the claim from the claims allowance process of the bankruptcy court and preserved his right to a jury trial on the Notes.³⁷

To reiterate, Dondero-Defendant's three remaining proofs of claims are unrelated to the collection on the Notes, and he has not otherwise consented to the jurisdiction of the bankruptcy court for claims related to the Notes. Dondero-Defendant has also withdrawn his affirmative defense of setoff in the Adversary Proceeding. Dondero-Defendant has also not consented to the bankruptcy court conducting a jury trial pursuant to 11 U.S.C. § 157(e).

In summary, Dondero-Defendant's lack of waiver of his jury trial rights, expressly or impliedly, is further reason why the bankruptcy court does not believe it can finally adjudicate the claims in the Adversary Proceeding.

VI. PENDING MATTERS

On May 25, 2021, the bankruptcy court held a status conference with regard to the Motion. At such time, the bankruptcy court approved, in part, *James Dondero's Motion to Stay Pending the Motion to Withdraw the Reference of Plaintiff's Complaint*,³⁸ and thereafter issued the *Order Granting In Part James Dondero's Motion to Stay Pending the Motion to Withdraw the Reference of Plaintiff's Complaint*³⁹ (the "Stay Order") on June 4, 2021. The Stay Order dictated that all response deadlines, pre-trial deadlines, and hearing dates would be stayed until July 28, 2021. Discovery under the *Amended Scheduling Order*⁴⁰ was to proceed with two changes: (i) the deadline for service of expert disclosures to be changed to May 28, 2021, and (ii) the deadline for

³⁷ *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) ("[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee's initiation of an adversarial proceeding renders the withdrawn claim a legal nullity and leaves parties as if the claim had never been brought."); *In re Goldblatt's Bargain Stores, Inc.*, No. 05 C 03840, 2005 WL 8179250, at *5 (N.D. Ill. Dec. 6, 2005) (claims withdrawn before adversary proceeding are as if never filed); *see generally, In re Manchester, Inc.*, No. 08-30703-11-BJH, 2008 WL 5273289, at *3-6 (Bankr. N.D. Tex. Dec. 19, 2008) (permissible to withdraw a claim to preserve jury trial right).

³⁸ Adversary Case No. 21-03003, Dkt. 22.

³⁹ Adversary Case No. 21-03003, Dkt. 64.

⁴⁰ Adversary Case No. 21-03003, Dkt. 18.

completion of expert discovery to be changed to June 14, 2021. At this point, the parties are not trial-ready.

VII. RECOMMENDATION

In light of: (a) the noncore, related-to claims in the Complaint; (b) the withdrawal of Proof of Claim No. 188, relating to the Notes, by Dondero-Defendant on December 4, 2020, which was the only proof of claim inextricably intertwined with the causes of action in the Adversary Proceeding; and (c) the lack of any other consent by Dondero-Defendant to the equitable jurisdiction of the bankruptcy court related to the Notes, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.

With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

*****END OF REPORT AND RECOMMENDATION*****

EXHIBIT 41



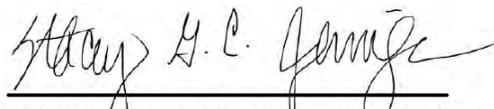
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 8, 2021


United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
DEBTOR.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	ADVERSARY NO. 21-03004
PLAINTIFF,	§	(CIV. ACTION #3:21-CV-00881-X)
	§	
VS.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
FUND ADVISORS, L.P.,	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT PROPOSING THAT IT:
(A) GRANT DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE AT SUCH
TIME AS BANKRUPTCY COURT CERTIFIES THAT ACTION IS TRIAL READY;
AND (B) DEFER PRETRIAL MATTERS TO BANKRUPTCY COURT

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (the “Debtor” or “Highland”) filed a voluntary Chapter 11 petition on October 16, 2019 in the United States Bankruptcy Court of Delaware. That court subsequently entered an order transferring venue to the Northern District of Texas, Dallas Division, on December 4, 2019. A Chapter 11 plan was confirmed by the bankruptcy court on February 22, 2021. The chapter 11 plan has been appealed by the Defendant in this action, Highland Capital Management Fund Advisors (“HCMFA-Defendant”), and certain parties related to it. The appeal of the plan is now pending before the Fifth Circuit, but no stay pending appeal has been granted.

On January 22, 2021, shortly before its Chapter 11 plan was confirmed, the Debtor, as Plaintiff, brought this Adversary Proceeding against HCMFA-Defendant. The Adversary Proceeding pertains to two promissory notes (collectively, the “Notes”) executed by HCMFA-Defendant in favor of the Debtor in 2019. Each of the Notes were demand notes. On December 3, 2020, the Debtor sent HCMFA-Defendant a letter demanding payment by December 11, 2020, as allowed under the terms of the notes. Following HCMFA-Defendant’s failure to pay on the Notes in response to the demand letter, the Debtor brought this action to collect on the Notes. The Debtor’s Chapter 11 plan contemplates collection on these Notes (as well as several other notes of parties related to HCMFA-Defendant) as part of its funding to pay creditors.

¹ Bankruptcy Case No. 19-34054.

Under the United States District Court for the Northern District of Texas' standing order of reference², proceedings arising in, or related to, a case under Title 11 are automatically referred to the bankruptcy court. HCMFA-Defendant submitted a *Motion for Withdrawal the Reference*³ (the "Motion") and *Brief in Support of Motion to Withdraw the Reference*⁴ (the "Brief in Support") seeking to have the reference withdrawn, such that this Adversary Proceeding would be adjudicated in the District Court. The bankruptcy court conducted a status conference concerning the Motion, pursuant to Local Bankruptcy Rule 5011-1, on May 25, 2021.

The bankruptcy court submits the following report and recommendation to the District Court, ultimately recommending that the Motion be granted, ***but only at such time as the bankruptcy court certifies to the District Court that the lawsuit is trial ready***. The bankruptcy court further recommends that the District Court ***defer to the bankruptcy court the handling of all pretrial matters***.

II. NATURE OF THE ADVERSARY PROCEEDING

a. The Complaint and Procedural History

The Debtor commenced this Adversary Proceeding by filing its *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate*⁵ on January 22, 2021. The Debtor's Complaint asserts two causes of action: (1) a breach of contract claim ("Count 1") and (2) a turnover action under 11 U.S.C. § 542(b) for the amounts owed on the Notes ("Count 2"). The principal amounts and execution dates for each of the two Notes were: (i) \$2,400,000, executed May 2, 2019, and (ii) \$5,000,000, executed May 3, 2019. The Debtor now seeks monetary damages totaling \$7,687,653.07, plus accrued but unpaid interest and cost of collection. Because

² Misc. Order No. 33.

³ Adversary Case No. 21-03004, Dkt. 20.

⁴ Adversary Case No. 21-03004, Dkt. 21.

⁵ Adversary Case No. 21-03004, Dkt. 1.

the Debtor alleges the amounts due on the Notes are property of its estate, it argues that turnover pursuant to 11 U.S.C. § 542(b) is appropriate.

After being served with summons on January 25, 2021, HCMFA-Defendant filed its *Original Answer*⁶ on March 1, 2021 before subsequently filing its *Amended Answer*⁷ on July 6, 2021.

HCMFA-Defendant filed two proofs of claim in the Bankruptcy Case, Proof of Claim Nos. 95 and 119. Proof of Claim No. 95 was based on alleged overpayments made by HCMFA-Defendant to the Debtor under a shared services agreement. Proof of Claim No. 119 was based on alleged overpayments made by HCMFA-Defendant to the Debtor under a payroll reimbursement agreement. On October 9, 2020, the bankruptcy court entered a *First Supplemental Order Sustaining First Omnibus Claims Objection*⁸, which disallowed both of HCMFA-Defendant's proofs of claim. The HCMFA-Defendant filed an application for an administrative expense claim on January 24, 2021, relating to services it alleges the Debtor did not perform under a shared services agreement. The Debtor has since filed an objection to the application and the matter is set for trial on September 28, 2021. The administrative expense claim *does not directly relate to the causes of action for collection under the Notes*. Similarly, the disallowed *proofs of claim did not relate to the Notes*.

b. The Motion to Withdraw the Reference, Response Opposed, and Reply

On April 15, 2021, HCMFA-Defendant filed the Motion. As a result, the above-captioned civil action was created in the District Court. On May 4, 2021, the Debtor filed its *Response Opposed to Defendant's Motion to Withdraw the Reference*⁹ (the "Response Opposed"). On May

⁶ Adversary Case No. 21-03004, Dkt. 6.

⁷ Adversary Case No. 21-03004, Dkt. 48.

⁸ Bankruptcy Case No. 19-34054, Dkt. 1155.

⁹ Adversary Case No. 21-03004, Dkt. 28.

18, 2021, HCMFA-Defendant filed its *Reply in Support of the Motion to Withdraw the Reference*¹⁰ (the “Reply”). The bankruptcy court held a status conference, as required by Local Bankruptcy Rule 5011-1, on May 25, 2021, to assist in the bankruptcy court’s preparation of this Report and Recommendation.

i. The Movant’s Position

HCMFA-Defendant argues there is cause shown for permissive withdrawal of the reference because: (1) the contract claim is a purely state law, non-core claim; (2) the turnover claim, under the Bankruptcy Code, is wholly derivative of the contract claim, as the amount to be turned over is based on the resolution of the contract claim; and (3) efficiency, uniformity and forum shopping factors all favor withdrawal.¹¹

Further, HCMFA-Defendant contends it has made a demand for a jury trial and has not consented, expressly or impliedly, to the equitable jurisdiction of the bankruptcy court to enter final orders in the Adversary Proceeding or hold a jury trial. HCMFA-Defendant further argues it has never filed a proof of claim related to the Notes, thus negating any argument it has consented to the bankruptcy court having jurisdiction over the litigation of the Notes.

Finally, HCMFA-Defendant alleges that permissive withdrawal as proper, because the turnover claim is being used as an to attempt to relabel a non-core breach of contract claim to place jurisdiction within the bankruptcy court.¹²

As far as timing, HCMFA-Defendant requests that the District Court immediately withdraw the reference and hear all pre-trial matters until the parties are trial-ready.

¹⁰ Adversary Case No. 21-03004, Dkt. 30.

¹¹ Adversary Case No. 21-03004, Dkt. 21 at 5-11.

¹² *Id.* at 8-9; see *Granfinanciera, Granfinanciera. S.A. v. Nordberg*, 492 U.S. 33, 61 (1989).

ii. *The Debtor-Plaintiff's Position*

The Debtor argues that there is no cause shown for permissive withdrawal because a turnover action under Section 542(b) of the Bankruptcy Code is an inherently core claim. The Notes, as argued, are already property of the bankruptcy estate, as matured and payable on December 11, 2020, and the turnover action only concerns federal bankruptcy law.¹³ The Debtor argues that the defenses and disputes raised by HCMFA-Defendant do not restrict the Debtor's ability to collect property of the estate under 11 U.S.C. § 542(b).¹⁴

The Debtor does not directly, in its Response, address whether jury trial rights exist for HCMFA-Defendant. Rather, the Debtor focuses on the core nature of the turnover action and the forum shopping attempts by HCMFA-Defendant.

As far as timing, the Debtor argues that, if the court finds permissive withdrawal of the reference is appropriate, the reference should not be withdrawn until after the parties are trial-ready, and all pretrial matters should be handled by the bankruptcy court until such time.

III. THE BREACH OF CONTRACT CLAIMS AT THE CENTER OF THE ADVERSARY PROCEEDING ARE NONCORE CLAIMS, AND THE PENDING ADMINISTRATIVE EXPENSE CLAIM OF HCMFA-DEFENDANT IS UNRELATED TO THEM

Permissive withdrawal of the reference is described in 28 U.S.C. § 157(d) as follows: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” The Bankruptcy Code does not define “cause shown,” but the United States Court of Appeal for the Fifth Circuit, interpreting

¹³ See *Tow v. Park Lake Cmty's., LP*, 2018 U.S. Dist. LEXIS 1720, at *3-*5 (S.D. Tex. Jan. 4, 2018); see also *Porretto v. Nelson (In re Porretto)*, 2012 Bankr. LEXIS 4919, at *11-*12 (Bankr. S.D. Tex. Oct. 18, 2012); see also *Romo v. Monetmayor (In re Montemayor)*, 547 B.R. 684, 692 (Bankr. S.D. Tex. 2016) (bankruptcy court had authority under *Stern* to issue a final order in an action brought pursuant to Section 542(b), because an action “to turnover assets belonging to the bankruptcy estate [is] a matter which solely concerns federal bankruptcy law”).

¹⁴ See *Tow*, 2018 U.S. Dist. LEXIS 1720, at *3-*5; see also *Shaia v. Taylor (In re Connelly)*, 476 B.R. 223, 230 (Bankr. E.D. Va. 2012).

the Supreme Court case of *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, has identified a number of factors for courts to consider in determining whether permissive withdrawal of the reference is appropriate: (1) whether the matter is core or noncore; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors' and creditors' resources; and (6) whether withdrawal would expedite the bankruptcy process.¹⁵ Courts in this District have placed an emphasis on the first two factors.¹⁶

As explained by the Supreme Court in *Stern v. Marshall*, Congress has divided bankruptcy *proceedings* (*i.e.*, adversary proceedings or contested matter within a bankruptcy case)—over which there is bankruptcy subject matter jurisdiction—into three different categories: (a) those that “aris[e] under” Title 11; (b) those that “aris[e] in” a Title 11 case; and (c) those that are “related to” a case under Title 11.¹⁷ Further, those that arise under Title 11 or arise in a Title 11 case are defined as “core” matters¹⁸ and those that are merely “related to” a Title 11 case are defined as “noncore” matters. The significance of the “core”/“noncore” distinction is that bankruptcy courts may statutorily enter final judgments in “core” proceedings in a bankruptcy case, while in “noncore” proceedings, the bankruptcy courts instead may only (absent consent from all of the parties) submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. This is the statutory framework collectively set forth in 28 U.S.C. § 1334 and 28 U.S.C. § 157. But while a proceeding may be “core” in nature, under 28

¹⁵ *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 115-23 (N.D. Tex. 2006); 458 U.S. 50 (1982).

¹⁶ See *Mirant*, 337 B.R. at 115-122.

¹⁷ 28 U.S.C. § 1334(b); *Stern v. Marshall*, 564 U.S. 462, 473-474 (2011).

¹⁸ *Stern*, 564 U.S. at 473-474. Core proceedings include, but are not limited to, 16 different types of matters, including “counterclaims by [a debtor's] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C).

U.S.C. § 157(b)(2), and the bankruptcy court, therefore, has the *statutory* power to enter a final judgment on the claim under 28 U.S.C. § 157(b)(1), *Stern* instructs that any district court, in evaluating whether a bankruptcy court has the ability to issue final orders and judgments, must resolve not only: (a) whether the bankruptcy court has the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on a particular claim; but also (b) whether the conferring of that authority on an Article I bankruptcy court is *constitutional* (and this turns on whether “the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process”).¹⁹

With respect to the claims asserted against HCMFA-Defendant, it might be argued that both counts asserted against it are *statutorily* core in nature.²⁰ While Count 1 is a breach of contract claim for collection of amounts due under promissory notes—one of the simplest forms of a state law lawsuit—it might be argued that Count 1 is statutorily core under the catchall provision of 28 U.S.C. § 157(b)(2)(O), as the resolution of the claim would be “affecting the liquidation of the assets of the estate.” However, this position would not pass constitutional muster. The cause of action does not stem from the bankruptcy itself (*i.e.*, it stems from alleged defaults on pre-petition notes) and would not be resolved through the claims allowance process (*since no pending proof of claim exists and the administrative expense claim is not directly related to the Notes*). In other words, the resolution of Count 1 is not so inextricably intertwined with the resolution of HCMFA-Defendant’s still-remaining administrative expense claim so as to confer constitutional authority on the bankruptcy court to enter a final judgment on the breach of contract claims.

Count 2, the turnover cause of action, is brought pursuant to 11 U.S.C. § 542(b) and is listed as statutorily core under 28 U.S.C. § 157(b)(2)(E). If Count 2 were freestanding and the debts due

¹⁹ *Stern*, 564 U.S. at 499.

²⁰ 28 U.S.C. § 157(b)(2)(E), (O).

under the Notes were undisputed, it is unrefuted by HCMFA-Defendant that a turnover action under 11 U.S.C. § 542(b) would be both a statutory and constitutional core claim. ***The issue is whether a turnover action to collect on a disputed pre-petition promissory note can be viewed as a core claim.*** There is a split in authority on this issue. The Debtor cites authority that a turnover action is a core claim when collecting ***matured*** debts, as property of the estate, regardless of whether the indebtedness is ***disputed***.²¹ In contrast, HCMFA-Defendant cites authority that the scope of turnover claims under the Bankruptcy Code should not be expanded to encompass debts in dispute that arose outside of bankruptcy, including authority from this court.²²

This court views the turnover claim as derivative of the breach of contract claims. The breach of contract claims are clearly non-core, and the bankruptcy court lacks constitutional authority to confer jurisdiction over them (absent consent—which does not exist here). A turnover action under 11 U.S.C. § 542(b) cannot be tacked onto a complaint so as to confer authority in the bankruptcy court to adjudicate an otherwise non-core claim. To hold otherwise would run counter to the dictates of the Supreme Court in *Marathon*.

In summary, this court believes that the turnover claim in the Complaint, to collect on a disputed indebtedness under the Notes, “do[es] not fall within the scope of turnover actions as

²¹ *Shaia*, 476 B.R. at 230 (“To properly constitute a core proceeding under § 157(b)(2)(E), the debt must be ‘matured, payable on demand, or payable on order.’ ‘Matured’ refers to ‘debts that are presently payable, as opposed to those that are contingent and become payable only upon the occurrence of a certain act or event.’ While the Defendants assert they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. . . . A cause of action is a turnover proceeding under § 542(b) of the Bankruptcy Code where it seeks collection rather than creation or liquidation of a matured debt.”); see also *In re Willington Convalescent Home, Inc.*, 850 F.2d at 52 n.2 (“The mere fact that Connecticut denies that it owes the matured debt for Willington’s services because of a recoupment right ‘does not take the trustee’s action outside the scope of section 542(b)’”).

²² *In re Se. Materials, Inc.*, 467 B.R. 337, 354 (Bankr. M.D.N.C. 2012) (“The distinction is when ‘an adversary proceeding presents a bona fide dispute as to liability, the matter cannot be viewed as a turnover proceeding’”); *In re Satecco, Inc.*, 58 B.R. 781, 789 (Bankr. N.D. Tex. 1986) (“[T]his Court holds that actions to collect accounts receivable based upon state law contract principles do not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability.”).

contemplated by § 542 and § 157(b)(2)(E),” absent a judgment or stipulation resolving the dispute as to the indebtedness.²³ Thus, the turnover claim, as brought, is not a core claim that the bankruptcy court can finally adjudicate, absent the consent of all parties.

IV. JURY TRIAL RIGHTS AND DEMAND

Pursuant to 28 U.S.C. § 157(e), if a litigant has the right to a jury trial under applicable non-bankruptcy law, a bankruptcy court may conduct the jury trial only if: (a) the matters to be finally adjudicated fall within the scope of bankruptcy subject matter jurisdiction; (b) the district court of which the bankruptcy court is a unit authorizes the bankruptcy court to do so; and (c) all of the parties consent.²⁴

Starting first with whether a right to a jury trial even exists, the Seventh Amendment, of course, provides a jury trial right in cases in which the value in controversy exceeds twenty dollars and the cause of action is to enforce statutory rights that are at least analogous to rights that were tried at law in the late 18th century English courts.²⁵ Suits “at law” refers to “suits in which legal rights were to be ascertained and determined” as opposed to “those where equitable rights alone were recognized and equitable remedies were administered.”²⁶ This analysis requires two steps: (1) a comparison of the “statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity”; and (2) whether the remedy sought is “legal or equitable in nature . . . [t]he second stage of this analysis” being “more important than the first.”²⁷

²³ *Satelco*, 58 B.R. at 789.

²⁴ “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.” 28 U.S.C. § 157(e) (West 2019).

²⁵ See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999).

²⁶ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

²⁷ See *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera*, 492 U.S. at 42).

It is well established that the act of filing a proof of claim can operate to deprive a creditor of a jury trial right, by subjecting a claim, that would otherwise sound only in law, to the equitable claims allowance process.²⁸ Thus, if both of HCMFA-Defendant's proofs of claims were *pending*, it would have consented to the bankruptcy court's equitable jurisdiction and waived its right to a jury trial as to the subject matter of the *pending* proofs of claim.²⁹ However, as earlier noted, prior to the commencement of this Adversary Proceeding on January 22, 2021, HCMFA-Defendant had both of its proofs of claim disallowed on October 9, 2020. The pending trial over the administrative expense claim sought by HCMFA-Defendant is separate from the collection under the Notes. Without a pending claim related to the Notes, the breach of contract claims is precisely the kind of action that would sound in law rather than in equity. By not having a filed proof of claim related to the Notes, HCMFA-Defendant never subjected the Notes to the claims allowance process of the bankruptcy court and preserved its right to a jury trial on the Notes.³⁰

To reiterate, HCMFA-Defendant's remaining administrative expense claim is not directly related to the collection on the Notes, and it has not otherwise consented to the jurisdiction of the bankruptcy court for claims related to the Notes. HCMFA-Defendant has also not consented to the bankruptcy court conducting a jury trial pursuant to 11 U.S.C. § 157(e).

In summary, HCMFA-Defendant's lack of waiver of its jury trial rights, expressly or impliedly, is further reason why the bankruptcy court does not believe it can finally adjudicate the claims in the Adversary Proceeding.

²⁸ See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990).

²⁹ *Id.*

³⁰ *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (“[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee's initiation of an adversarial proceeding renders the withdrawn claim a legal nullity and leaves parties as if the claim had never been brought.”); *In re Goldblatt's Bargain Stores, Inc.*, No. 05 C 03840, 2005 WL 8179250, at *5 (N.D. Ill. Dec. 6, 2005) (claims withdrawn before adversary proceeding are as if never filed); see generally, *In re Manchester, Inc.*, No. 08-30703-11-BJH, 2008 WL 5273289, at *3-6 (Bankr. N.D. Tex. Dec. 19, 2008) (permissible to withdraw a claim to preserve jury trial right).

V. PENDING MATTERS

No dispositive motions, or any other motions, remain pending at this time. The court has not granted a stay pending resolution of the Motion in the Adversary Proceeding.³¹ At this point, the parties are not trial-ready.

VI. RECOMMENDATION

In light of: (a) the noncore, related-to claims in the Complaint; (b) the lack of a proof of claim or any other claim related to the Notes asserted by HCMFA-Defendant; and (c) the lack of any other consent by HCMFA-Defendant to the equitable jurisdiction of the bankruptcy court related to the Notes, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.

With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

*****END OF REPORT AND RECOMMENDATION*****

³¹ The court did grant a stay pending resolution of the motion to withdraw the reference in the related case of *Highland Capital Management, L.P. v. Dondero* (Adversary Case No. 21-03003).

EXHIBIT 42



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 8, 2021


United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
DEBTOR.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	ADVERSARY NO. 21-03005
PLAINTIFF,	§	(CIV. ACTION #3:21-CV-00880-C)
	§	
VS.	§	
	§	
NEXPOINT ADVISORS, L.P.,	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT PROPOSING THAT IT:
(A) GRANT DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE AT SUCH
TIME AS BANKRUPTCY COURT CERTIFIES THAT ACTION IS TRIAL READY;
AND (B) DEFER PRETRIAL MATTERS TO BANKRUPTCY COURT

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (the “Debtor” or “Highland”) filed a voluntary Chapter 11 petition on October 16, 2019 in the United States Bankruptcy Court of Delaware. That court subsequently entered an order transferring venue to the Northern District of Texas, Dallas Division, on December 4, 2019. A Chapter 11 plan was confirmed by the bankruptcy court on February 22, 2021. The chapter 11 plan has been appealed by the Defendant in this action, NexPoint Advisors (“NPA-Defendant”), and certain parties related to it. The appeal of the plan is now pending before the Fifth Circuit, but no stay pending appeal has been granted.

On January 22, 2021, shortly before its Chapter 11 plan was confirmed, the Debtor, as Plaintiff, brought this Adversary Proceeding against NPA-Defendant. The Adversary Proceeding pertains to a promissory note (the “Note”) executed by NPA-Defendant in favor of the Debtor in 2017. The Note was a term note. On December 31, 2020, NPA-Defendant failed to make the payment due under the Note in the amount of \$1,406,111.92. On January 7, 2021, following NPA-Defendant’s failure to pay, the Debtor accelerated the Note, under its terms, and demanded full payment on \$24,471,804.98 outstanding and due under the Note. On January 14, 2021, NPA-Defendant attempted to cure its default by paying \$1,406,111.92, an amount equal to the payment due on December 31, 2020. However, there was no cure provision under the Note and the Debtor seeks to collect all outstanding principal and interest on the Note. The Debtor’s Chapter 11 plan

¹ Bankruptcy Case No. 19-34054.

contemplates collection on the Note (as well as several other notes of parties related to NPA-Defendant) as part of its funding to pay creditors.

Under the United States District Court for the Northern District of Texas' standing order of reference², proceedings arising in, or related to, a case under Title 11 are automatically referred to the bankruptcy court. NPA-Defendant submitted a *Motion for Withdrawal the Reference*³ (the "Motion") and *Brief in Support of Motion to Withdraw the Reference*⁴ (the "Brief in Support") seeking to have the reference withdrawn, such that this Adversary Proceeding would be adjudicated in the District Court. The bankruptcy court conducted a status conference concerning the Motion, pursuant to Local Bankruptcy Rule 5011-1, on May 25, 2021.

The bankruptcy court submits the following report and recommendation to the District Court, ultimately recommending that the Motion be granted, *but only at such time as the bankruptcy court certifies to the District Court that the lawsuit is trial ready*. The bankruptcy court further recommends that the District Court *defer to the bankruptcy court the handling of all pretrial matters*.

II. NATURE OF THE ADVERSARY PROCEEDING

a. The Complaint and Procedural History

The Debtor commenced this Adversary Proceeding by filing its *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate*⁵ on January 22, 2021. The Debtor's Complaint asserts two causes of action: (1) a breach of contract claim ("Count 1") and (2) a turnover action under 11 U.S.C. § 542(b) for the amounts owed on the Note ("Count 2"). The principal amount of the Note was originally \$30,746,812.33. The Debtor now seeks monetary

² Misc. Order No. 33.

³ Adversary Case No. 21-03005, Dkt. 19.

⁴ Adversary Case No. 21-03005, Dkt. 20.

⁵ Adversary Case No. 21-03005, Dkt. 1.

damages totaling \$23,071,195.03, plus accrued but unpaid interest and cost of collection. Because the Debtor alleges the amount due on the Note are property of its estate, it argues that turnover pursuant to 11 U.S.C. § 542(b) is appropriate.

After being served with summons on January 25, 2021, NPA-Defendant filed its *Original Answer*⁶ on March 1, 2021.

NPA-Defendant filed two proofs of claim in the Bankruptcy Case, Proof of Claim Nos. 104 and 108. Proof of Claim No. 104 was based on alleged overpayments made by NPA-Defendant to the Debtor under a payroll reimbursement agreement. Proof of Claim No. 108 was based on alleged overpayments made by NPA-Defendant to the Debtor under a shared services agreement. On October 9, 2020, the bankruptcy court entered a *First Supplemental Order Sustaining First Omnibus Claims Objection*⁷, which disallowed both of NPA-Defendant's proofs of claim. The NPA-Defendant filed an application for an administrative expense claim on January 24, 2021, relating to services it alleges the Debtor did not perform under a shared services agreement. The Debtor has since filed an objection to the application and the matter is set for trial on September 28, 2021. *The administrative expense claim does not directly relate to the causes of action for collection under the Note. Similarly, the disallowed proofs of claim did not relate to the Note.*

b. The Motion to Withdraw the Reference, Response Opposed, and Reply

On April 15, 2021, NPA-Defendant filed the Motion. As a result, the above-captioned civil action was created in the District Court. On May 4, 2021, the Debtor filed its *Response Opposed to Defendant's Motion to Withdraw the Reference*⁸ (the "Response Opposed"). On May 18, 2021,

⁶ Adversary Case No. 21-03005, Dkt. 6.

⁷ Bankruptcy Case No. 19-34054, Dkt. 1155.

⁸ Adversary Case No. 21-03004, Dkt. 28.

NPA-Defendant filed its *Reply in Support of the Motion to Withdraw the Reference*⁹ (the “Reply”). The bankruptcy court held a status conference, as required by Local Bankruptcy Rule 5011-1, on May 25, 2021, to assist in the bankruptcy court’s preparation of this Report and Recommendation.

i. The Movant’s Position

NPA-Defendant argues there is cause shown for permissive withdrawal of the reference because: (1) the contract claim is a purely state law, non-core claim; (2) the turnover claim, under the Bankruptcy Code, is wholly derivative of the contract claim, as the amount to be turned over is based on the resolution of the contract claim; and (3) efficiency, uniformity and forum shopping factors all favor withdrawal.¹⁰

Further, NPA-Defendant contends it has made a demand for a jury trial and has not consented, expressly or impliedly, to the equitable jurisdiction of the bankruptcy court to enter final orders in the Adversary Proceeding or hold a jury trial. NPA-Defendant further argues it has never filed a proof of claim related to the Note, thus negating any argument it has consented to the bankruptcy court having jurisdiction over the litigation of the Note.

Finally, NPA-Defendant alleges that permissive withdrawal as proper, because the turnover claim is being used as an to attempt to relabel a non-core breach of contract claim to place jurisdiction within the bankruptcy court.¹¹

As far as timing, NPA-Defendant requests that the District Court immediately withdraw the reference and hear all pre-trial matters until the parties are trial-ready.

⁹ Adversary Case No. 21-03005, Dkt. 25.

¹⁰ Adversary Case No. 21-03004, Dkt. 20 at 5-11.

¹¹ *Id.* at 8-9; see *Granfinanciera, Granfinanciera. S.A. v. Nordberg*, 492 U.S. 33, 61 (1989).

ii. *The Debtor-Plaintiff's Position*

The Debtor argues that there is no cause shown for permissive withdrawal because a turnover action under Section 542(b) of the Bankruptcy Code is an inherently core claim. The Note, as argued, are already property of the bankruptcy estate, as matured and payable on December 11, 2020, and the turnover action only concerns federal bankruptcy law.¹² The Debtor argues that the defenses and disputes raised by NPA-Defendant do not restrict the Debtor's ability to collect property of the estate under 11 U.S.C. § 542(b).¹³

The Debtor does not directly, in its Response, address whether jury trial rights exist for NPA-Defendant. Rather, the Debtor focuses on the core nature of the turnover action and the forum shopping attempts by NPA-Defendant.

As far as timing, the Debtor argues that, if the court finds permissive withdrawal of the reference is appropriate, the reference should not be withdrawn until after the parties are trial-ready, and all pretrial matters should be handled by the bankruptcy court until such time.

III. THE BREACH OF CONTRACT CLAIMS AT THE CENTER OF THE ADVERSARY PROCEEDING ARE NONCORE CLAIMS, AND THE PENDING ADMINISTRATIVE EXPENSE CLAIM OF NPA-DEFENDANT IS UNRELATED TO THEM

Permissive withdrawal of the reference is described in 28 U.S.C. § 157(d) as follows: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” The Bankruptcy Code does not define “cause shown,” but the United States Court of Appeal for the Fifth Circuit, interpreting

¹² See *Tow v. Park Lake Cmty., LP*, 2018 U.S. Dist. LEXIS 1720, at *3-*5 (S.D. Tex. Jan. 4, 2018); see also *Porretto v. Nelson (In re Porretto)*, 2012 Bankr. LEXIS 4919, at *11-*12 (Bankr. S.D. Tex. Oct. 18, 2012); see also *Romo v. Monemayor (In re Montemayor)*, 547 B.R. 684, 692 (Bankr. S.D. Tex. 2016) (bankruptcy court had authority under *Stern* to issue a final order in an action brought pursuant to Section 542(b), because an action “to turnover assets belonging to the bankruptcy estate [is] a matter which solely concerns federal bankruptcy law”).

¹³ See *Tow*, 2018 U.S. Dist. LEXIS 1720, at *3-*5; see also *Shaia v. Taylor (In re Connelly)*, 476 B.R. 223, 230 (Bankr. E.D. Va. 2012).

the Supreme Court case of *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, has identified a number of factors for courts to consider in determining whether permissive withdrawal of the reference is appropriate: (1) whether the matter is core or noncore; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors' and creditors' resources; and (6) whether withdrawal would expedite the bankruptcy process.¹⁴ Courts in this District have placed an emphasis on the first two factors.¹⁵

As explained by the Supreme Court in *Stern v. Marshall*, Congress has divided bankruptcy *proceedings* (i.e., adversary proceedings or contested matter within a bankruptcy case)—over which there is bankruptcy subject matter jurisdiction—into three different categories: (a) those that “aris[e] under” Title 11; (b) those that “aris[e] in” a Title 11 case; and (c) those that are “related to” a case under Title 11.¹⁶ Further, those that arise under Title 11 or arise in a Title 11 case are defined as “core” matters¹⁷ and those that are merely “related to” a Title 11 case are defined as “noncore” matters. The significance of the “core”/“noncore” distinction is that bankruptcy courts may statutorily enter final judgments in “core” proceedings in a bankruptcy case, while in “noncore” proceedings, the bankruptcy courts instead may only (absent consent from all of the parties) submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. This is the statutory framework collectively set forth in 28 U.S.C. § 1334 and 28 U.S.C. § 157. But while a proceeding may be “core” in nature, under 28

¹⁴ *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 115-23 (N.D. Tex. 2006); 458 U.S. 50 (1982).

¹⁵ See *Mirant*, 337 B.R. at 115-122.

¹⁶ 28 U.S.C. § 1334(b); *Stern v. Marshall*, 564 U.S. 462, 473-474 (2011).

¹⁷ *Stern*, 564 U.S. at 473-474. Core proceedings include, but are not limited to, 16 different types of matters, including “counterclaims by [a debtor's] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C).

U.S.C. § 157(b)(2), and the bankruptcy court, therefore, has the *statutory* power to enter a final judgment on the claim under 28 U.S.C. § 157(b)(1), *Stern* instructs that any district court, in evaluating whether a bankruptcy court has the ability to issue final orders and judgments, must resolve not only: (a) whether the bankruptcy court has the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on a particular claim; but also (b) whether the conferring of that authority on an Article I bankruptcy court is *constitutional* (and this turns on whether “the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process”).¹⁸

With respect to the claims asserted against NPA-Defendant, it might be argued that both counts asserted against it are *statutorily* core in nature.¹⁹ While Count 1 is a breach of contract claim for collection of amounts due under promissory notes—one of the simplest forms of a state law lawsuit—it might be argued that Count 1 is statutorily core under the catchall provision of 28 U.S.C. § 157(b)(2)(O), as the resolution of the claim would be “affecting the liquidation of the assets of the estate.” However, this position would not pass constitutional muster. The cause of action does not stem from the bankruptcy itself (*i.e.*, it stems from alleged defaults on pre-petition notes) and would not be resolved through the claims allowance process (*since no pending proof of claim exists and the administrative expense claim is not directly related to the Note*). In other words, the resolution of Count 1 is not so inextricably intertwined with the resolution of NPA-Defendant’s still-remaining administrative expense claim so as to confer constitutional authority on the bankruptcy court to enter a final judgment on the breach of contract claims.

Count 2, the turnover cause of action, is brought pursuant to 11 U.S.C. § 542(b) and is listed as statutorily core under 28 U.S.C. § 157(b)(2)(E). If Count 2 were freestanding and the debts due

¹⁸ *Stern*, 564 U.S. at 499.

¹⁹ 28 U.S.C. § 157(b)(2)(E), (O).

under the Note were undisputed, it is unrefuted by NPA-Defendant that a turnover action under 11 U.S.C. § 542(b) would be both a statutory and constitutional core claim. ***The issue is whether a turnover action to collect on a disputed pre-petition promissory note can be viewed as a core claim.*** There is a split in authority on this issue. The Debtor cites authority that a turnover action is a core claim when collecting *matured* debts, as property of the estate, regardless of whether the indebtedness is *disputed*.²⁰ In contrast, NPA-Defendant cites authority that the scope of turnover claims under the Bankruptcy Code should not be expanded to encompass debts in dispute that arose outside of bankruptcy, including authority from this court.²¹

This court views the turnover claim as derivative of the breach of contract claims. The breach of contract claims are clearly non-core, and the bankruptcy court lacks constitutional authority to confer jurisdiction over them (absent consent—which does not exist here). A turnover action under 11 U.S.C. § 542(b) cannot be tacked onto a complaint so as to confer authority in the bankruptcy court to adjudicate an otherwise non-core claim. To hold otherwise would run counter to the dictates of the Supreme Court in *Marathon*.

In summary, this court believes that the turnover claim in the Complaint, to collect on a disputed indebtedness under the Note, “do[es] not fall within the scope of turnover actions as

²⁰ *Shaia*, 476 B.R. at 230 (“To properly constitute a core proceeding under § 157(b)(2)(E), the debt must be ‘matured, payable on demand, or payable on order.’ ‘Matured’ refers to ‘debts that are presently payable, as opposed to those that are contingent and become payable only upon the occurrence of a certain act or event.’ While the Defendants assert they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. ... A cause of action is a turnover proceeding under § 542(b) of the Bankruptcy Code where it seeks collection rather than creation or liquidation of a matured debt.”); *see also In re Willington Convalescent Home, Inc.*, 850 F.2d at 52 n.2 (“The mere fact that Connecticut denies that it owes the matured debt for Willington’s services because of a recoupment right ‘does not take the trustee’s action outside the scope of section 542(b)’”).

²¹ *In re Se. Materials, Inc.*, 467 B.R. 337, 354 (Bankr. M.D.N.C. 2012) (The distinction is when “an adversary proceeding presents a bona fide dispute as to liability, the matter cannot be viewed as a turnover proceeding”); *In re Satelco, Inc.*, 58 B.R. 781, 789 (Bankr. N.D. Tex. 1986) (“[T]his Court holds that actions to collect accounts receivable based upon state law contract principles do not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability.”).

contemplated by § 542 and § 157(b)(2)(E),” absent a judgment or stipulation resolving the dispute as to the indebtedness.²² Thus, the turnover claim, as brought, is not a core claim that the bankruptcy court can finally adjudicate, absent the consent of all parties.

IV. JURY TRIAL RIGHTS AND DEMAND

Pursuant to 28 U.S.C. § 157(e), if a litigant has the right to a jury trial under applicable non-bankruptcy law, a bankruptcy court may conduct the jury trial only if: (a) the matters to be finally adjudicated fall within the scope of bankruptcy subject matter jurisdiction; (b) the district court of which the bankruptcy court is a unit authorizes the bankruptcy court to do so; and (c) all of the parties consent.²³

Starting first with whether a right to a jury trial even exists, the Seventh Amendment, of course, provides a jury trial right in cases in which the value in controversy exceeds twenty dollars and the cause of action is to enforce statutory rights that are at least analogous to rights that were tried at law in the late 18th century English courts.²⁴ Suits “at law” refers to “suits in which legal rights were to be ascertained and determined” as opposed to “those where equitable rights alone were recognized and equitable remedies were administered.”²⁵ This analysis requires two steps: (1) a comparison of the “statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity”; and (2) whether the remedy sought is “legal or equitable in nature . . . [t]he second stage of this analysis” being “more important than the first.”²⁶

²² *Satelco*, 58 B.R. at 789.

²³ “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.” 28 U.S.C. § 157(e) (West 2019).

²⁴ See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999).

²⁵ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

²⁶ See *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera*, 492 U.S. at 42).

It is well established that the act of filing a proof of claim can operate to deprive a creditor of a jury trial right, by subjecting a claim, that would otherwise sound only in law, to the equitable claims allowance process.²⁷ Thus, if both of NPA-Defendant's proofs of claims were *pending*, it would have consented to the bankruptcy court's equitable jurisdiction and waived its right to a jury trial as to the subject matter of the *pending* proofs of claim.²⁸ However, as earlier noted, prior to the commencement of this Adversary Proceeding on January 22, 2021, NPA-Defendant had both of its proofs of claim disallowed on October 9, 2020. The pending trial over the administrative expense claim sought by NPA-Defendant is separate from the collection under the Note. Without a pending claim related to the Note, the breach of contract claims is precisely the kind of action that would sound in law rather than in equity. By not having a filed proof of claim related to the Note, NPA-Defendant never subjected the Note to the claims allowance process of the bankruptcy court and preserved its right to a jury trial on the Note.²⁹

To reiterate, NPA-Defendant's remaining administrative expense claim is not directly related to the collection on the Note, and it has not otherwise consented to the jurisdiction of the bankruptcy court for claims related to the Note. NPA-Defendant has also not consented to the bankruptcy court conducting a jury trial pursuant to 11 U.S.C. § 157(e).

In summary, NPA-Defendant's lack of waiver of its jury trial rights, expressly or impliedly, is further reason why the bankruptcy court does not believe it can finally adjudicate the claims in the Adversary Proceeding.

²⁷ See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990).

²⁸ *Id.*

²⁹ *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (“[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee's initiation of an adversarial proceeding renders the withdrawn claim a legal nullity and leaves parties as if the claim had never been brought.”); *In re Goldblatt's Bargain Stores, Inc.*, No. 05 C 03840, 2005 WL 8179250, at *5 (N.D. Ill. Dec. 6, 2005) (claims withdrawn before adversary proceeding are as if never filed); see generally, *In re Manchester, Inc.*, No. 08-30703-11-BJH, 2008 WL 5273289, at *3-6 (Bankr. N.D. Tex. Dec. 19, 2008) (permissible to withdraw a claim to preserve jury trial right).

V. PENDING MATTERS

No dispositive motions, or any other motions, remain pending at this time. The court has not granted a stay pending resolution of the Motion in the Adversary Proceeding.³⁰ At this point, the parties are not trial-ready.

VI. RECOMMENDATION

In light of: (a) the noncore, related-to claims in the Complaint; (b) the lack of a proof of claim or any other claim related to the Note asserted by NPA-Defendant; and (c) the lack of any other consent by NPA-Defendant to the equitable jurisdiction of the bankruptcy court related to the Note, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.

With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

*****END OF REPORT AND RECOMMENDATION*****

³⁰ The court did grant a stay pending resolution of the motion to withdraw the reference in the related case of *Highland Capital Management, L.P. v. Dondero* (Adversary Case No. 21-03003).

EXHIBIT 43



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 14, 2021


United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
DEBTOR.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	ADVERSARY NO. 21-03006
PLAINTIFF,	§	(CIV. ACTION #3:21-CV-01378-N)
	§	
VS.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC.,	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT PROPOSING THAT IT:
(A) GRANT DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE AT SUCH
TIME AS BANKRUPTCY COURT CERTIFIES THAT ACTION IS TRIAL READY;
AND (B) DEFER PRETRIAL MATTERS TO BANKRUPTCY COURT

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (the “Debtor” or “Highland”) filed a voluntary Chapter 11 petition on October 16, 2019 in the United States Bankruptcy Court of Delaware. That court subsequently entered an order transferring venue to the Northern District of Texas, Dallas Division, on December 4, 2019. A Chapter 11 plan was confirmed by the bankruptcy court on February 22, 2021.

On January 22, 2021, shortly before its Chapter 11 plan was confirmed, the Debtor, as Plaintiff, brought this Adversary Proceeding against the Defendant, Highland Capital Management Services, Inc. (“HCMS-Defendant”).

The Adversary Proceeding pertains to five promissory notes (collectively, the “Notes”) executed by HCMS-Defendant in favor of the Debtor from 2017 through 2019. The Notes consist of a term note (the “Term Note”) with annual payments and four demand notes (the “Demand Notes”).

On December 3, 2020, the Debtor sent HCMS-Defendant a letter demanding payment by December 11, 2020 on each of the Demand Notes, as allowed under the terms of the Demand Notes. The HCMS-Defendant failed to make payment on any of the Demand Notes. On December 31, 2020, HCMS-Defendant failed to make the annual payment due under the Term Note. On January 7, 2021, following HCMS-Defendant’s failure to pay, the Debtor accelerated the Term

¹ Bankruptcy Case No. 19-34054.

Note, under its terms, and demanded full payment on \$6,757,248.95 outstanding and due under the Term Note.

Following HCMS-Defendant's failure to pay on the Notes in response to the demand letters, the Debtor brought this action to collect on the Notes. The Debtor's Chapter 11 plan contemplates collection on the Notes (as well as several other notes of parties related to HCMS-Defendant) as part of its funding to pay creditors.

Under the United States District Court for the Northern District of Texas' standing order of reference², proceedings arising in, or related to, a case under Title 11 are automatically referred to the bankruptcy court. HCMS-Defendant submitted a *Motion for Withdrawal the Reference*³ (the "Motion") and *Brief in Support of Motion to Withdraw the Reference*⁴ (the "Brief in Support") seeking to have the reference withdrawn, such that this Adversary Proceeding would be adjudicated in the District Court. The bankruptcy court conducted a status conference concerning the Motion, pursuant to Local Bankruptcy Rule 5011-1, on July 8, 2021.

The bankruptcy court submits the following report and recommendation to the District Court, ultimately recommending that the Motion be granted, ***but only at such time as the bankruptcy court certifies to the District Court that the lawsuit is trial ready.*** The bankruptcy court further recommends that the District Court ***defer to the bankruptcy court the handling of all pretrial matters.***

² Misc. Order No. 33.

³ Adversary Case No. 21-03006, Dkt. 19.

⁴ Adversary Case No. 21-03006, Dkt. 20.

II. NATURE OF THE ADVERSARY PROCEEDING

a. The Complaint and Procedural History

The Debtor commenced this Adversary Proceeding by filing its *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate*⁵ on January 22, 2021. The Debtor's Complaint asserts two causes of action: (1) a breach of contract claim ("Count 1") and (2) a turnover action under 11 U.S.C. § 542(b) for the amounts owed on the Notes ("Count 2"). The principal amounts and execution dates for each of the four Demand Notes were: (i) \$150,000, executed March 28, 2018, (ii) \$200,000, executed June 25, 2018, (iii) \$400,000, executed May 29, 2019, and (iv) \$150,000, executed June 26, 2019. The principal amount of the Term Note was originally \$20,247,628.02 and it was executed on May 31, 2017. The Debtor now seeks combined monetary damages on the Notes totaling \$7,704,768.38, plus accrued but unpaid interest and cost of collection. Because the Debtor alleges the amount due on the Notes are property of its estate, it argues that turnover pursuant to 11 U.S.C. § 542(b) is appropriate.

After being served with summons on January 25, 2021, HCMS-Defendant filed its *Original Answer*⁶ on March 3, 2021 and *First Amended Answer*⁷ on June 11, 2021.

HCMS-Defendant filed two proofs of claim in the Bankruptcy Case, Proof of Claim Nos. 175 and 176. Both proofs of claim were based on alleged post-petition actions or inaction of the Debtor as fund investment advisor in managing funds in which HCMS-Defendant is an investor. On October 9, 2020, the bankruptcy court entered a *First Supplemental Order Sustaining First Omnibus Claims Objection*⁸, which disallowed both of HCMS-Defendant's proofs of claim. ***The disallowed proofs of claim did not relate to the Notes.***

⁵ Adversary Case No. 21-03006, Dkt. 1.

⁶ Adversary Case No. 21-03006, Dkt. 6.

⁷ Adversary Case No. 21-03006, Dkt. 34.

⁸ Bankruptcy Case No. 19-34054, Dkt. 1155.

b. The Motion to Withdraw the Reference, Response Opposed, and Reply

On June 3, 2021, HCMS-Defendant filed the Motion. As a result, the above-captioned civil action was created in the District Court. The Debtor never filed a responsive pleading to the Motion filed by the HCMS-Defendant. The bankruptcy court held a status conference, as required by Local Bankruptcy Rule 5011-1, on July 8, 2021, to assist in the bankruptcy court's preparation of this Report and Recommendation.

i. The Movant's Position

HCMS-Defendant argues there is cause shown for permissive withdrawal of the reference because: (1) the Texas Constitution guarantees a party to a contract a right to a jury trial; (2) the contract claim is a purely state law, non-core claim; (3) the turnover claim, under the Bankruptcy Code, is wholly derivative of the contract claim, as the amount to be turned over is based on the resolution of the contract claim; and (4) efficiency, uniformity and forum shopping factors all favor withdrawal.⁹

Further, HCMS-Defendant contends it has made a demand for a jury trial and has not consented, expressly or impliedly, to the equitable jurisdiction of the bankruptcy court to enter final orders in the Adversary Proceeding or hold a jury trial. HCMS-Defendant argues it has never filed a proof of claim related to the Notes, thus negating any argument it has consented to the bankruptcy court having jurisdiction over the litigation of the Notes.

Finally, HCMS-Defendant alleges that permissive withdrawal is proper, because the turnover claim is being used as a "Trojan Horse" to attempt to make a non-core breach of contract claim become core.¹⁰

⁹ Adversary Case No. 21-03006, Dkt. 20 at 6-11.

¹⁰ *Id.* at 8-9; see *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016).

As far as timing, HCMS-Defendant requests that the District Court immediately withdraw the reference and hear all pre-trial matters until the parties are trial-ready.

III. THE BREACH OF CONTRACT CLAIMS AT THE CENTER OF THE ADVERSARY PROCEEDING ARE NONCORE CLAIMS, AND THE DISALLOWED PROOFS OF CLAIM OF HCMS-DEFENDANT ARE UNRELATED TO THEM

Permissive withdrawal of the reference is described in 28 U.S.C. § 157(d) as follows: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” The Bankruptcy Code does not define “cause shown,” but the United States Court of Appeal for the Fifth Circuit, interpreting the Supreme Court case of *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, has identified a number of factors for courts to consider in determining whether permissive withdrawal of the reference is appropriate: (1) whether the matter is core or noncore; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors’ and creditors’ resources; and (6) whether withdrawal would expedite the bankruptcy process.¹¹ Courts in this District have placed an emphasis on the first two factors.¹²

As explained by the Supreme Court in *Stern v. Marshall*, Congress has divided bankruptcy *proceedings* (*i.e.*, adversary proceedings or contested matter within a bankruptcy case)—over which there is bankruptcy subject matter jurisdiction—into three different categories: (a) those that “aris[e] under” Title 11; (b) those that “aris[e] in” a Title 11 case; and (c) those that are “related

¹¹ *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 115-23 (N.D. Tex. 2006); 458 U.S. 50 (1982).

¹² See *Mirant*, 337 B.R. at 115-122.

to” a case under Title 11.¹³ Further, those that arise under Title 11 or arise in a Title 11 case are defined as “core” matters¹⁴ and those that are merely “related to” a Title 11 case are defined as “noncore” matters. The significance of the “core”/“noncore” distinction is that bankruptcy courts may statutorily enter final judgments in “core” proceedings in a bankruptcy case, while in “noncore” proceedings, the bankruptcy courts instead may only (absent consent from all of the parties) submit proposed findings of fact and conclusions of law to the district court, for that court’s review and issuance of final judgment. This is the statutory framework collectively set forth in 28 U.S.C. § 1334 and 28 U.S.C. § 157. But while a proceeding may be “core” in nature, under 28 U.S.C. § 157(b)(2), and the bankruptcy court, therefore, has the *statutory* power to enter a final judgment on the claim under 28 U.S.C. § 157(b)(1), *Stern* instructs that any district court, in evaluating whether a bankruptcy court has the ability to issue final orders and judgments, must resolve not only: (a) whether the bankruptcy court has the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on a particular claim; but also (b) whether the conferring of that authority on an Article I bankruptcy court is *constitutional* (and this turns on whether “the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process”).¹⁵

With respect to the claims asserted against HCMS-Defendant, it might be argued that both counts asserted against it are *statutorily* core in nature.¹⁶ While Count 1 is a breach of contract claim for collection of amounts due under promissory notes—one of the simplest forms of a state law lawsuit—it might be argued that Count 1 is statutorily core under the catchall provision of 28

¹³ 28 U.S.C. § 1334(b); *Stern v. Marshall*, 564 U.S. 462, 473-474 (2011).

¹⁴ *Stern*, 564 U.S. at 473-474. Core proceedings include, but are not limited to, 16 different types of matters, including “counterclaims by [a debtor’s] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C).

¹⁵ *Stern*, 564 U.S. at 499.

¹⁶ 28 U.S.C. § 157(b)(2)(E), (O).

U.S.C. § 157(b)(2)(O), as the resolution of the claim would be “affecting the liquidation of the assets of the estate.” However, this position would not pass constitutional muster. The cause of action does not stem from the bankruptcy itself (*i.e.*, it stems from alleged defaults on pre-petition notes) and would not be resolved through the claims allowance process (*since no pending proof of claim exists related to the Notes*). In other words, the resolution of Count 1 cannot be inextricably intertwined with the resolution of HCMS-Defendant’s disallowed proofs of claim so as to confer constitutional authority on the bankruptcy court to enter a final judgment on the breach of contract claims.

Count 2, the turnover cause of action, is brought pursuant to 11 U.S.C. § 542(b) and is listed as statutorily core under 28 U.S.C. § 157(b)(2)(E). If Count 2 were freestanding and the debts due under the Notes were undisputed, it is unrefuted by HCMS-Defendant that a turnover action under 11 U.S.C. § 542(b) would be both a statutory and constitutional core claim. *The issue is whether a turnover action to collect on disputed pre-petition promissory notes can be viewed as a core claim.* There is a split in authority on this issue. Authority exists that a turnover action is a core claim when collecting *matured* debts, as property of the estate, regardless of whether the indebtedness is *disputed*.¹⁷ In contrast, HCMS-Defendant cites authority that the scope of turnover claims under the Bankruptcy Code should not be expanded to encompass debts in dispute that arose outside of bankruptcy, including authority from this court.¹⁸

¹⁷ *Shaia*, 476 B.R. at 230 (“To properly constitute a core proceeding under § 157(b)(2)(E), the debt must be ‘matured, payable on demand, or payable on order.’ ‘Matured’ refers to ‘debts that are presently payable, as opposed to those that are contingent and become payable only upon the occurrence of a certain act or event.’ While the Defendants assert they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. ... A cause of action is a turnover proceeding under § 542(b) of the Bankruptcy Code where it seeks collection rather than creation or liquidation of a matured debt.”); *see also In re Willington Convalescent Home, Inc.*, 850 F.2d at 52 n.2 (“The mere fact that Connecticut denies that it owes the matured debt for Willington’s services because of a recoupment right ‘does not take the trustee’s action outside the scope of section 542(b)’”).

¹⁸ *In re Se. Materials, Inc.*, 467 B.R. 337, 354 (Bankr. M.D.N.C. 2012) (The distinction is when “an adversary proceeding presents a bona fide dispute as to liability, the matter cannot be viewed as a turnover proceeding”); *In re*

This court views the turnover claim as derivative of the breach of contract claims. The breach of contract claims are clearly non-core, and the bankruptcy court lacks constitutional authority to confer jurisdiction over them (absent consent—which does not exist here). A turnover action under 11 U.S.C. § 542(b) cannot be tacked onto a complaint so as to confer authority in the bankruptcy court to adjudicate an otherwise non-core claim. To hold otherwise would run counter to the dictates of the Supreme Court in *Marathon*.

In summary, this court believes that the turnover claim in the Complaint, to collect on a disputed indebtedness under the Notes, “do[es] not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E),” absent a judgment or stipulation resolving the dispute as to the indebtedness.¹⁹ Thus, the turnover claim, as brought, is not a core claim that the bankruptcy court can finally adjudicate, absent the consent of all parties.

IV. JURY TRIAL RIGHTS AND DEMAND

Pursuant to 28 U.S.C. § 157(e), if a litigant has the right to a jury trial under applicable non-bankruptcy law, a bankruptcy court may conduct the jury trial only if: (a) the matters to be finally adjudicated fall within the scope of bankruptcy subject matter jurisdiction; (b) the district court of which the bankruptcy court is a unit authorizes the bankruptcy court to do so; and (c) all of the parties consent.²⁰

Starting first with whether a right to a jury trial even exists, the Seventh Amendment, of course, provides a jury trial right in cases in which the value in controversy exceeds twenty dollars and

Satelco, Inc., 58 B.R. 781, 789 (Bankr. N.D. Tex. 1986) (“[T]his Court holds that actions to collect accounts receivable based upon state law contract principles do not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability.”).

¹⁹ *Satelco*, 58 B.R. at 789.

²⁰ “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.” 28 U.S.C. § 157(e) (West 2019).

the cause of action is to enforce statutory rights that are at least analogous to rights that were tried at law in the late 18th century English courts.²¹ Suits “at law” refers to “suits in which legal rights were to be ascertained and determined” as opposed to “those where equitable rights alone were recognized and equitable remedies were administered.”²² This analysis requires two steps: (1) a comparison of the “statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity”; and (2) whether the remedy sought is “legal or equitable in nature . . . [t]he second stage of this analysis” being “more important than the first.”²³

It is well established that the act of filing a proof of claim can operate to deprive a creditor of a jury trial right, by subjecting a claim, that would otherwise sound only in law, to the equitable claims allowance process.²⁴ Thus, if both of HCMS-Defendant’s proofs of claims were *pending*, it would have consented to the bankruptcy court’s equitable jurisdiction and waived its right to a jury trial as to the subject matter of the *pending* proofs of claim.²⁵ However, as earlier noted, prior to the commencement of this Adversary Proceeding on January 22, 2021, HCMS-Defendant had both of its proofs of claim disallowed on October 9, 2020. Without a pending claim related to the Notes, the breach of contract claim is precisely the kind of action that would sound in law rather than in equity. By not having a filed proof of claim related to the Notes, HCMS-Defendant never subjected the Notes to the claims allowance process of the bankruptcy court and preserved its right to a jury trial on the Notes.²⁶ HCMS-Defendant has also not consented to the bankruptcy court conducting a jury trial pursuant to 11 U.S.C. § 157(e).

²¹ See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999).

²² *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

²³ See *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera*, 492 U.S. at 42).

²⁴ See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990).

²⁵ *Id.*

²⁶ *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (“[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee’s initiation of an adversarial proceeding renders the withdrawn claim a legal nullity and leaves parties as if the claim had never been brought.”); *In re Goldblatt’s Bargain Stores, Inc.*, No. 05 C 03840,

In summary, HCMS-Defendant's lack of waiver of its jury trial rights, expressly or impliedly, is further reason why the bankruptcy court does not believe it can finally adjudicate the claims in the Adversary Proceeding.

V. PENDING MATTERS

On July 8, 2021, the bankruptcy court held a status conference with regard to the Motion. At such time, the bankruptcy court approved, in part, *Defendant's Expedited Motion to Stay Pending the Resolution of Motion to Withdraw the Reference of Adversary Proceeding*.²⁷ In its oral ruling, the court granted the HCMS-Defendant's request for a stay pending resolution of the Motion as to dispositive motions in the Adversary Proceeding, but did not grant a stay as to any discovery. Under the *Agreed Scheduling Order*,²⁸ fact discovery concluded on July 5, 2021 and expert discovery will conclude on July 16, 2021. No dispositive motions have been filed at this time. At this point, the parties are not trial-ready.

VI. RECOMMENDATION

In light of: (a) the noncore, related-to claims in the Complaint; (b) the lack of a proof of claim or any other claim related to the Notes asserted by HCMS-Defendant; and (c) the lack of any other consent by HCMS-Defendant to the equitable jurisdiction of the bankruptcy court related to the Notes, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.

2005 WL 8179250, at *5 (N.D. Ill. Dec. 6, 2005) (claims withdrawn before adversary proceeding are as if never filed); *see generally, In re Manchester, Inc.*, No. 08-30703-11-BJH, 2008 WL 5273289, at *3-6 (Bankr. N.D. Tex. Dec. 19, 2008) (permissible to withdraw a claim to preserve jury trial right).

²⁷ Adversary Case No. 21-03006, Dkt. 26.

²⁸ Adversary Case No. 21-03006, Dkt. 9.

With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

*****END OF REPORT AND RECOMMENDATION*****

EXHIBIT 44



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 14, 2021

United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
DEBTOR.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	ADVERSARY NO. 21-03007
PLAINTIFF,	§	(CIV. ACTION #3:21-CV-01379-G)
	§	
VS.	§	
	§	
NEXPOINT REAL ESTATE PARTNERS,	§	
LLC,	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT PROPOSING THAT IT:
(A) GRANT DEFENDANT’S MOTION TO WITHDRAW THE REFERENCE AT SUCH
TIME AS BANKRUPTCY COURT CERTIFIES THAT ACTION IS TRIAL READY;
AND (B) DEFER PRETRIAL MATTERS TO BANKRUPTCY COURT

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (the “Debtor” or “Highland”) filed a voluntary Chapter 11 petition on October 16, 2019 in the United States Bankruptcy Court of Delaware. That court subsequently entered an order transferring venue to the Northern District of Texas, Dallas Division, on December 4, 2019. A Chapter 11 plan was confirmed by the bankruptcy court on February 22, 2021.

On January 22, 2021, shortly before its Chapter 11 plan was confirmed, the Debtor, as Plaintiff, brought this Adversary Proceeding against the Defendant, NexPoint Real Estate Partners, LLC (“NREP-Defendant”).

The Adversary Proceeding pertains to five promissory notes (collectively, the “Notes”) executed by NREP-Defendant in favor of the Debtor from 2013 through 2019. The Notes consist of a term note (the “Term Note”) with annual payments and four demand notes (the “Demand Notes”).

On December 3, 2020, the Debtor sent NREP-Defendant a letter demanding payment by December 11, 2020 on each of the Demand Notes, as allowed under the terms of the Demand Notes. The NREP-Defendant failed to make payment on any of the Demand Notes. On December 31, 2020, NREP-Defendant failed to make the annual payment due under the Term Note. On January 7, 2021, following NREP-Defendant’s failure to pay, the Debtor accelerated the Term

¹ Bankruptcy Case No. 19-34054.

Note, under its terms, and demanded full payment on \$6,145,466.84 outstanding and due under the Term Note.

Following NREP-Defendant's failure to pay on the Notes in response to the demand letters, the Debtor brought this action to collect on the Notes. The Debtor's Chapter 11 plan contemplates collection on the Notes (as well as several other notes of parties related to NREP-Defendant) as part of its funding to pay creditors.

Under the United States District Court for the Northern District of Texas' standing order of reference², proceedings arising in, or related to, a case under Title 11 are automatically referred to the bankruptcy court. NREP-Defendant submitted a *Motion for Withdrawal the Reference*³ (the "Motion") and *Brief in Support of Motion to Withdraw the Reference*⁴ (the "Brief in Support") seeking to have the reference withdrawn, such that this Adversary Proceeding would be adjudicated in the District Court. The bankruptcy court conducted a status conference concerning the Motion, pursuant to Local Bankruptcy Rule 5011-1, on July 8, 2021.

The bankruptcy court submits the following report and recommendation to the District Court, ultimately recommending that the Motion be granted, ***but only at such time as the bankruptcy court certifies to the District Court that the lawsuit is trial ready.*** The bankruptcy court further recommends that the District Court ***defer to the bankruptcy court the handling of all pretrial matters.***

² Misc. Order No. 33.

³ Adversary Case No. 21-03007, Dkt. 20.

⁴ Adversary Case No. 21-03007, Dkt. 21.

II. NATURE OF THE ADVERSARY PROCEEDING

a. The Complaint and Procedural History

The Debtor commenced this Adversary Proceeding by filing its *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate*⁵ on January 22, 2021. The Debtor's Complaint asserts two causes of action: (1) a breach of contract claim ("Count 1") and (2) a turnover action under 11 U.S.C. § 542(b) for the amounts owed on the Notes ("Count 2"). The principal amounts and execution dates for each of the four Demand Notes were: (i) \$100,000, executed November 27, 2013, (ii) \$2,500,000, executed October 12, 2017, (iii) \$750,000, executed October 15, 2018, and (iv) \$150,000, executed September 25, 2019. The principal amount of the Term Note was originally \$6,069,831 and it was executed on May 31, 2017. The Debtor now seeks combined monetary damages on the Notes totaling \$11,157,727.80, plus accrued but unpaid interest and cost of collection. Because the Debtor alleges the amount due on the Notes are property of its estate, it argues that turnover pursuant to 11 U.S.C. § 542(b) is appropriate.

After being served with summons on January 25, 2021, NREP-Defendant filed its *Original Answer*⁶ on March 3, 2021 and *First Amended Answer*⁷ on June 11, 2021.

NREP-Defendant filed a proof of claim in the Bankruptcy Case, Proof of Claim No. 146. The proof of claim related to NREP-Defendant's interest in SE Multifamily Holdings, LLC. On July 30, 2020, the Debtor filed its *First Omnibus Claims Objection*,⁸ which included an objection to NREP-Defendant's pending proof of claim. On October 19, 2020, NREP-Defendant filed *NREP's Response to Claim Objection*,⁹ asserting the SE Multifamily Holdings LLC company

⁵ Adversary Case No. 21-03007, Dkt. 1.

⁶ Adversary Case No. 21-03007, Dkt. 7.

⁷ Adversary Case No. 21-03007, Dkt. 34.

⁸ Bankruptcy Case No. 19-34054, Dkt. 906.

⁹ Bankruptcy Case No. 19-34054, Dkt. 1212.

agreement improperly allocates the ownership percentages of the members due to mutual mistake, lack of consideration, and/or failure of consideration and seeking to reform, rescind, and/or modify the company agreement. The NREP Proof of Claim has not yet been resolved, but any result finding in favor of NREP would result in modification of the company agreement, not a claim or setoff against the Debtor's estate. *Therefore, the pending proof of claim does not relate to the Notes.*

b. The Motion to Withdraw the Reference, Response Opposed, and Reply

On June 3, 2021, NREP-Defendant filed the Motion. As a result, the above-captioned civil action was created in the District Court. The Debtor never filed a responsive pleading to the Motion filed by the NREP-Defendant. The bankruptcy court held a status conference, as required by Local Bankruptcy Rule 5011-1, on July 8, 2021, to assist in the bankruptcy court's preparation of this Report and Recommendation.

i. The Movant's Position

NREP-Defendant argues there is cause shown for permissive withdrawal of the reference because: (1) the Texas Constitution guarantees a party to a contract a right to a jury trial; (2) the contract claim is a purely state law, non-core claim; (3) the turnover claim, under the Bankruptcy Code, is wholly derivative of the contract claim, as the amount to be turned over is based on the resolution of the contract claim; and (4) efficiency, uniformity and forum shopping factors all favor withdrawal.¹⁰

Further, NREP-Defendant contends it has made a demand for a jury trial and has not consented, expressly or impliedly, to the equitable jurisdiction of the bankruptcy court to enter final orders in the Adversary Proceeding or hold a jury trial. NREP-Defendant argues it has never

¹⁰ Adversary Case No. 21-03007, Dkt. 21 at 6-11.

filed a proof of claim related to the Notes, thus negating any argument it has consented to the bankruptcy court having jurisdiction over the litigation of the Notes.

Finally, NREP-Defendant alleges that permissive withdrawal is proper, because the turnover claim is being used as a “Trojan Horse” to attempt to make a non-core breach of contract claim become core.¹¹

As far as timing, NREP-Defendant requests that the District Court immediately withdraw the reference and hear all pre-trial matters until the parties are trial-ready.

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Permissive withdrawal of the reference is described in 28 U.S.C. § 157(d) as follows: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” The Bankruptcy Code does not define “cause shown,” but the United States Court of Appeal for the Fifth Circuit, interpreting the Supreme Court case of *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, has identified a number of factors for courts to consider in determining whether permissive withdrawal of the reference is appropriate: (1) whether the matter is core or noncore; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors’ and creditors’ resources; and (6) whether withdrawal would

¹¹ *Id.* at 8-9; see *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016).

expedite the bankruptcy process.¹² Courts in this District have placed an emphasis on the first two factors.¹³

As explained by the Supreme Court in *Stern v. Marshall*, Congress has divided bankruptcy *proceedings* (i.e., adversary proceedings or contested matter within a bankruptcy case)—over which there is bankruptcy subject matter jurisdiction—into three different categories: (a) those that “aris[e] under” Title 11; (b) those that “aris[e] in” a Title 11 case; and (c) those that are “related to” a case under Title 11.¹⁴ Further, those that arise under Title 11 or arise in a Title 11 case are defined as “core” matters¹⁵ and those that are merely “related to” a Title 11 case are defined as “noncore” matters. The significance of the “core”/“noncore” distinction is that bankruptcy courts may statutorily enter final judgments in “core” proceedings in a bankruptcy case, while in “noncore” proceedings, the bankruptcy courts instead may only (absent consent from all of the parties) submit proposed findings of fact and conclusions of law to the district court, for that court’s review and issuance of final judgment. This is the statutory framework collectively set forth in 28 U.S.C. § 1334 and 28 U.S.C. § 157. But while a proceeding may be “core” in nature, under 28 U.S.C. § 157(b)(2), and the bankruptcy court, therefore, has the *statutory* power to enter a final judgment on the claim under 28 U.S.C. § 157(b)(1), *Stern* instructs that any district court, in evaluating whether a bankruptcy court has the ability to issue final orders and judgments, must resolve not only: (a) whether the bankruptcy court has the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on a particular claim; but also (b) whether the conferring of that authority on an Article I bankruptcy court is *constitutional* (and this turns on whether “the action

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¹³ See *Mirant*, 337 B.R. at 115-122.

¹⁴ 28 U.S.C. § 1334(b); *Stern v. Marshall*, 564 U.S. 462, 473-474 (2011).

¹⁵ *Stern*, 564 U.S. at 473-474. Core proceedings include, but are not limited to, 16 different types of matters, including “counterclaims by [a debtor’s] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C).

at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process”).¹⁶

With respect to the claims asserted against NREP-Defendant, it might be argued that both counts asserted against it are *statutorily* core in nature.¹⁷ While Count 1 is a breach of contract claim for collection of amounts due under promissory notes—one of the simplest forms of a state law lawsuit—it might be argued that Count 1 is statutorily core under the catchall provision of 28 U.S.C. § 157(b)(2)(O), as the resolution of the claim would be “affecting the liquidation of the assets of the estate.” However, this position would not pass constitutional muster. The cause of action does not stem from the bankruptcy itself (*i.e.*, it stems from alleged defaults on pre-petition notes) and would not be resolved through the claims allowance process (*since no pending proof of claim exists related to the Notes*). In other words, the resolution of Count 1 cannot be inextricably intertwined with the resolution of NREP-Defendant’s pending proof of claim so as to confer constitutional authority on the bankruptcy court to enter a final judgment on the breach of contract claims.

Count 2, the turnover cause of action, is brought pursuant to 11 U.S.C. § 542(b) and is listed as statutorily core under 28 U.S.C. § 157(b)(2)(E). If Count 2 were freestanding and the debts due under the Notes were undisputed, it is unrefuted by NREP-Defendant that a turnover action under 11 U.S.C. § 542(b) would be both a statutory and constitutional core claim. *The issue is whether a turnover action to collect on disputed pre-petition promissory notes can be viewed as a core claim.* There is a split in authority on this issue. Authority exists that a turnover action is a core claim when collecting *matured* debts, as property of the estate, regardless of whether the

¹⁶ *Stern*, 564 U.S. at 499.

¹⁷ 28 U.S.C. § 157(b)(2)(E), (O).

indebtedness is *disputed*.¹⁸ In contrast, NREP-Defendant cites authority that the scope of turnover claims under the Bankruptcy Code should not be expanded to encompass debts in dispute that arose outside of bankruptcy, including authority from this court.¹⁹

This court views the turnover claim as derivative of the breach of contract claims. The breach of contract claims are clearly non-core, and the bankruptcy court lacks constitutional authority to confer jurisdiction over them (absent consent—which does not exist here). A turnover action under 11 U.S.C. § 542(b) cannot be tacked onto a complaint so as to confer authority in the bankruptcy court to adjudicate an otherwise non-core claim. To hold otherwise would run counter to the dictates of the Supreme Court in *Marathon*.

In summary, this court believes that the turnover claim in the Complaint, to collect on a disputed indebtedness under the Notes, “do[es] not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E),” absent a judgment or stipulation resolving the dispute as to the indebtedness.²⁰ Thus, the turnover claim, as brought, is not a core claim that the bankruptcy court can finally adjudicate, absent the consent of all parties.

¹⁸ *Shaia*, 476 B.R. at 230 (“To properly constitute a core proceeding under § 157(b)(2)(E), the debt must be ‘matured, payable on demand, or payable on order.’ ‘Matured’ refers to ‘debts that are presently payable, as opposed to those that are contingent and become payable only upon the occurrence of a certain act or event.’ . . . While the Defendants assert they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. . . . A cause of action is a turnover proceeding under § 542(b) of the Bankruptcy Code where it seeks collection rather than creation or liquidation of a matured debt.”); *see also In re Willington Convalescent Home, Inc.*, 850 F.2d at 52 n.2 (“The mere fact that Connecticut denies that it owes the matured debt for Willington’s services because of a recoupment right ‘does not take the trustee’s action outside the scope of section 542(b)’”).

¹⁹ *In re Se. Materials, Inc.*, 467 B.R. 337, 354 (Bankr. M.D.N.C. 2012) (The distinction is when “an adversary proceeding presents a bona fide dispute as to liability, the matter cannot be viewed as a turnover proceeding”); *In re Satelco, Inc.*, 58 B.R. 781, 789 (Bankr. N.D. Tex. 1986) (“[T]his Court holds that actions to collect accounts receivable based upon state law contract principles do not fall within the scope of turnover actions as contemplated by § 542 and § 157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability.”).

²⁰ *Satelco*, 58 B.R. at 789.

IV. JURY TRIAL RIGHTS AND DEMAND

Pursuant to 28 U.S.C. § 157(e), if a litigant has the right to a jury trial under applicable non-bankruptcy law, a bankruptcy court may conduct the jury trial only if: (a) the matters to be finally adjudicated fall within the scope of bankruptcy subject matter jurisdiction; (b) the district court of which the bankruptcy court is a unit authorizes the bankruptcy court to do so; and (c) all of the parties consent.²¹

Starting first with whether a right to a jury trial even exists, the Seventh Amendment, of course, provides a jury trial right in cases in which the value in controversy exceeds twenty dollars and the cause of action is to enforce statutory rights that are at least analogous to rights that were tried at law in the late 18th century English courts.²² Suits “at law” refers to “suits in which legal rights were to be ascertained and determined” as opposed to “those where equitable rights alone were recognized and equitable remedies were administered.”²³ This analysis requires two steps: (1) a comparison of the “statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity”; and (2) whether the remedy sought is “legal or equitable in nature . . . [t]he second stage of this analysis” being “more important than the first.”²⁴

It is well established that the act of filing a proof of claim can operate to deprive a creditor of a jury trial right, by subjecting a claim, that would otherwise sound only in law, to the equitable claims allowance process.²⁵ Thus, NREP-Defendant, by having a *pending* proof of claim, has consented to the bankruptcy court’s equitable jurisdiction and waived

²¹ “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.” 28 U.S.C. § 157(e) (West 2019).

²² See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708 (1999).

²³ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

²⁴ See *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera*, 492 U.S. at 42).

²⁵ See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990).

its right to a jury trial as to the subject matter of the *pending* proof of claim.²⁶ Without a pending claim related to the Notes, the breach of contract claim is precisely the kind of action that would sound in law rather than in equity. By not having a filed proof of claim related to the Notes, NREP-Defendant never subjected the Notes to the claims allowance process of the bankruptcy court and preserved its right to a jury trial on the Notes.²⁷ NREP-Defendant has also not consented to the bankruptcy court conducting a jury trial pursuant to 11 U.S.C. § 157(e).

In summary, NREP-Defendant's lack of waiver of its jury trial rights, expressly or impliedly, is further reason why the bankruptcy court does not believe it can finally adjudicate the claims in the Adversary Proceeding.

V. PENDING MATTERS

On July 8, 2021, the bankruptcy court held a status conference with regard to the Motion. At such time, the bankruptcy court approved, in part, *Defendant's Expedited Motion to Stay Pending the Resolution of Motion to Withdraw the Reference of Adversary Proceeding*.²⁸ In its oral ruling, the court granted the NREP-Defendant's request for a stay pending resolution of the Motion as to dispositive motions in the Adversary Proceeding, but did not grant a stay as to any discovery. Under the *Agreed Scheduling Order*,²⁹ fact discovery will conclude on July 26, 2021 and expert discovery will conclude on August 23, 2021. No dispositive motions have been filed at this time. At this point, the parties are not trial-ready.

²⁶ *Id.*

²⁷ *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (“[T]he successful withdrawal of a claim pursuant to Fed. R. Bankr. P. 3006 prior to the trustee's initiation of an adversary proceeding renders the withdrawn claim a legal nullity and leaves parties as if the claim had never been brought.”); *In re Goldblatt's Bargain Stores, Inc.*, No. 05 C 03840, 2005 WL 8179250, at *5 (N.D. Ill. Dec. 6, 2005) (claims withdrawn before adversary proceeding are as if never filed); *see generally, In re Manchester, Inc.*, No. 08-30703-11-BJH, 2008 WL 5273289, at *3-6 (Bankr. N.D. Tex. Dec. 19, 2008) (permissible to withdraw a claim to preserve jury trial right).

²⁸ Adversary Case No. 21-03007, Dkt. 27.

²⁹ Adversary Case No. 21-03007, Dkt. 10.

VI. RECOMMENDATION

In light of: (a) the noncore, related-to claims in the Complaint; (b) the lack of a proof of claim or any other claim related to the Notes asserted by NREP-Defendant; and (c) the lack of any other consent by NREP-Defendant to the equitable jurisdiction of the bankruptcy court related to the Notes, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.

With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

*****END OF REPORT AND RECOMMENDATION*****

EXHIBIT 45

Report and Recommendation entered by the Bankruptcy Court should be **ADOPTED** as the findings and conclusions of this Court.

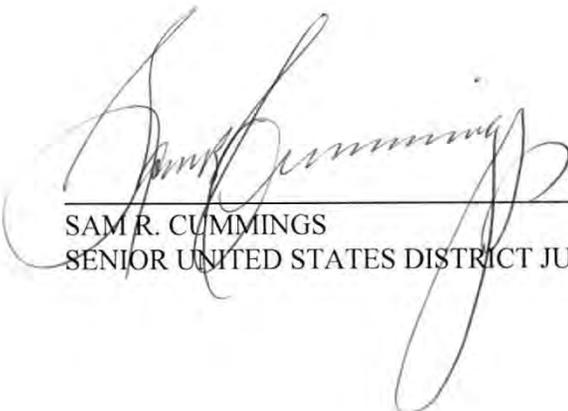
IT IS THEREFORE ORDERED that Defendant's Motion to Withdraw Reference shall be granted, but only at such time as the Bankruptcy Court certifies to this Court that the litigation is trial-ready.

IT IS FURTHER ORDERED that the Bankruptcy Court shall handle all pretrial matters, including discovery and the filing of reports and recommendations on dispositive motions, which shall in turn be considered by the undersigned Senior United States District Judge.

IT IS FURTHER ORDERED that this civil action be **STAYED** pending further Order of the Court.²

SO ORDERED.

Dated July 28, 2021.



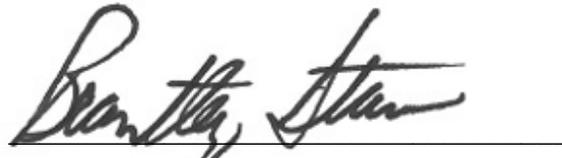
SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

² The stay imposed in this civil action shall be lifted upon the filing of a subsequent report and recommendation or at such time as the Bankruptcy Court certifies to this Court that the litigation is trial-ready.

EXHIBIT 46

Therefore, this Court **ACCEPTS** the recommendation. This case is hereby **REFERRED** for pretrial management to the United States Bankruptcy Court. When the Bankruptcy Court's concludes this case is ready for trial, that Court should notify this Court, and this Court will then withdraw the reference.

IT IS SO ORDERED this 14th day of September, 2021.

A handwritten signature in black ink, appearing to read "Brantley Starr", is written over a horizontal line.

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

EXHIBIT 47

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

IN RE:	§	
HIGHLAND CAPITAL MANAGEMENT	§	
L.P.,	§	
	§	Bankr. No. 19-34054-SGJ-11
Debtor.	§	(Adv. No. 21-03006)
	§	
	§	
-----	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:21-CV-1378-N
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC.,	§	
	§	
Defendant.	§	

ORDER ON MOTION TO WITHDRAW REFERENCE

Before the Court is the Report and Recommendation to the District Court on the Motion to Withdraw the Reference [1]. The Court hereby adopts the recommendation of the United States Bankruptcy Judge Stacey G. C. Jernigan, as follows: upon certification by the Bankruptcy Court that the parties are ready for trial, the Court will withdraw the reference. The Court refers all pretrial matters to the Bankruptcy Court.

Signed July 26, 2021.



 David C. Godbey
 United States District Judge

EXHIBIT 48

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLAND CAPITAL
MANAGEMENT LP,

Plaintiff,

v.

HCRE PARTNERS LLC

Defendant.

§
§
§
§
§
§
§
§
§

Civil Action No. 3:21-CV-01379-X

ORDER

This case involves a Chapter 11 bankruptcy and a related adversary proceeding. Under the United States District Court for the Northern District of Texas' standing order of reference,¹ proceedings arising in, or related to, a case under Title 11 are automatically referred to the Bankruptcy Court. HCRE Partners filed a Motion for to Withdraw the Reference. The Bankruptcy Court issued a Report and Recommendation [Doc. No. 3], dated July 15, 2021. HCRE Partners filed an objection. After reviewing the record in accordance with the standards of 28 U.S.C. § 157, the Court **ACCEPTS** the Bankruptcy Court's Report and Recommendation. The Court will grant the motion upon certification from the Bankruptcy Court that the case is ready for trial, and the Court further refers all pre-trial matters to the Bankruptcy Court.

¹ Misc. Order No. 33.

IT IS SO ORDERED this 17th day of August, 2021.

A handwritten signature in black ink, appearing to read "Brantley Starr". The signature is written in a cursive style with a large initial "B".

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

EXHIBIT 49



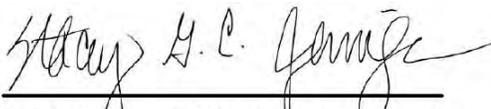
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 6, 2021


United States Bankruptcy Judge

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
<u>Reorganized Debtor.</u>	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	Adversary No.: 21-03003-sgj
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

**ORDER APPROVING STIPULATION GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

Upon consideration of the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [Docket No. 78] (the "Stipulation")¹ entered into between Highland Capital

¹ Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Stipulation.

Management, L.P., the reorganized debtor² (“Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and James Dondero (“Dondero”, and together with Highland, the “Parties”), it is **HEREBY ORDERED THAT**:

1. The Stipulation, a copy of which is attached hereto as **Exhibit A**, is **APPROVED**.
2. The Stipulation supersedes any prior stipulation or scheduling order governing the Adversary Proceeding.
3. The Parties shall abide by the following pretrial schedule (the “Joint Pretrial Schedule”) pursuant to the Stipulation:
 - Dondero will have until August 30, 2021 to answer or otherwise respond to the First Amended Complaint.
 - The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
 - The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.
4. Discovery taken in this case is hereby consolidated with discovery taken in the following adversary proceedings, and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below so that each witness will

² On February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the “Plan”). The Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. See *Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 2700].

only need to be deposited once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005;
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

5. The Joint Pretrial Schedule set forth in this Order shall only be modified in writing signed by the Parties or upon entry of an order of the Court entered upon notice to the Parties.

6. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###

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EXHIBIT A

Deborah Deitsch-Perez
Michael P. Aigen
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Facsimile: (214) 560-2203
*Counsel for Defendant James Dondero
and Nancy Dondero*

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03003
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

**STIPULATION AND AGREED ORDER GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

This stipulation and agreed order (the “Stipulation”) is entered into between Highland Capital Management, L.P. (the “Debtor”) and James Dondero (“Dondero”). The Debtor and Dondero are collectively referred to herein as the “Parties.”

RECITALS

WHEREAS, on April 15, 2021, Dondero filed a Motion to Withdraw the Reference.

WHEREAS, on July 7, 2021, the Bankruptcy Court filed its *Report and Recommendation to District Court Proposing that it (A) Grant Defendant's Motion to Withdraw the Reference at*

Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court [Docket No. 67] (the "Report").

WHEREAS, the Debtor has indicated that it intends to file a First Amended Complaint, asserting additional claims against Dondero, as well as claims against new defendants, Nancy Dondero and The Dugaboy Investment Trust.

WHEREAS, the Parties intend to complete fact and expert discovery in this adversary proceeding as governed by this Stipulation.

STIPULATION

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE PARTIES HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. This Stipulation supersedes any prior stipulation or scheduling order governing the above-referenced adversary proceeding.

2. The Parties agree to the following deadlines regarding discovery and other pre-trial deadlines:

- The Parties agree that the Debtor will file and Dondero will not oppose a Motion for Leave to File First Amended Complaint by August 17, 2021, a copy of which has previously been provided by the Debtor to Dondero. Counsel for Dondero will accept service of the First Amended Complaint on behalf of Dondero and the additional defendants named in the First Amended Complaint.
- Dondero will have until August 30, 2021, to answer or otherwise respond to the First Amended Complaint.
- The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
- The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
- Fact depositions will take place between October 1 and October 22, 2021.

- Expert designations and disclosures of all opinions and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.

3. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below, so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005;
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

IT IS SO STIPULATED.

Dated: August 17, 2021

CONSENTED AND AGREED TO BY:

/s/ Michael P. Aigen

Deborah Deitsch-Perez
Texas State Bar No. 24036072
Michael P. Aigen
Texas State Bar No. 24012196
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**ATTORNEYS FOR DEFENDANT
JAMES DONDERO AND NANCY
DONDERO**

/s/ John A. Morris

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**ATTORNEYS FOR DEBTOR
HIGHLAND CAPITAL MANAGEMENT,
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/s/ Douglas S. Draper

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**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Michael P. Aigen

Michael P. Aigen

EXHIBIT 50

Management, L.P., the reorganized debtor² (“Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and NexPoint Advisors, L.P. (“NexPoint”, and together with Highland, the “Parties”), it is **HEREBY ORDERED THAT**:

1. The Stipulation, a copy of which is attached hereto as **Exhibit A**, is **APPROVED**.
2. The Stipulation supersedes any prior stipulation or scheduling order governing the Adversary Proceeding.
3. The Parties shall abide by the following pretrial schedule (the “Joint Pretrial Schedule”) pursuant to the Stipulation:
 - NexPoint will have until August 30, 2021 to answer or otherwise respond to the First Amended Complaint.
 - The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
 - The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.
4. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings, and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below so

² On February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the “Plan”). The Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. See *Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 2700].

that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

5. The Joint Pretrial Schedule set forth in this Order shall only be modified in writing signed by the Parties or upon entry of an order of the Court entered upon notice to the Parties.

6. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###

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EXHIBIT A

Davor Rukavina, Esq.
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Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P.	§	
	§	
Defendant.	§	

**STIPULATION AND AGREED ORDER GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

This stipulation and agreed order (the “Stipulation”) is entered into between Highland Capital Management, L.P. (the “Debtor”) and NexPoint Advisors, L.P. (“NexPoint”). The Debtor and NexPoint are collectively referred to herein as the “Parties.”

RECITALS

WHEREAS, on **April 13, 2021**, NexPoint filed a Motion to Withdraw the Reference.

WHEREAS, on **July 8, 2021**, the Bankruptcy Court filed its *Report and Recommendation to District Court Proposing that it (A) Grant Defendant's Motion to Withdraw*

the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court [Docket No. 40] (the "Report").

WHEREAS, the Debtor has indicated that it intends to file a First Amended Complaint, asserting additional claims against NexPoint, as well as claims against new defendants, Nancy Dondero and The Dugaboy Investment Trust.

WHEREAS, the Parties intend to complete fact and expert discovery in this adversary proceeding as governed by this Stipulation.

STIPULATION

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE PARTIES HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. This Stipulation supersedes any prior stipulation or scheduling order governing the above-referenced adversary proceeding.

2. The Parties agree to the following deadlines regarding discovery and other pre-trial deadlines:

- The Parties agree that the Debtor will file and NexPoint will not oppose a Motion for Leave to File First Amended Complaint by August 17, 2021, a copy of which has previously been provided by the Debtor to NexPoint. Counsel for NexPoint will accept service of the First Amended Complaint on behalf of NexPoint and the additional defendants named in the First Amended Complaint.
- NexPoint will have until August 30, 2021, to answer or otherwise respond to the First Amended Complaint.
- The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
- The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
- Fact depositions will take place between October 1 and October 22, 2021.

- Expert designations and disclosures of all opinions and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.

3. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below, so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

IT IS SO STIPULATED.

Dated: August 17, 2021

CONSENTED AND AGREED TO BY:

/s/ Davor Rukavina

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
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**ATTORNEYS FOR DEFENDANT
NEXPOINT ADVISORS, L.P.**

/s/ Michael P. Aigen

Deborah Deitsch-Perez
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/s/ John A. Morris

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**ATTORNEYS FOR DEBTOR
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/s/ Douglas S. Draper

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**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Julian P. Vasek

Julian P. Vasek

EXHIBIT 51



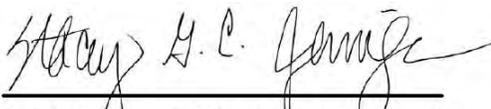
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 6, 2021


United States Bankruptcy Judge

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

In re: § Case No. 19-34054-SGJ-11
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § Chapter 11
§
Reorganized Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff, §

v. §

HIGHLAND CAPITAL MANAGEMENT §
SERVICES, INC., §
§
Defendant. §

Adversary No.: 21-03006-sgj

**ORDER APPROVING STIPULATION AND AGREED ORDER GOVERNING
DISCOVERY AND OTHER PRE-TRIAL ISSUES**

Upon consideration of the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [Docket No. 67] (the "Stipulation")¹ entered into between Highland Capital

¹ Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Stipulation.

Management, L.P., the reorganized debtor² (“Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and Highland Capital Management Services, Inc. (“HCMS”, and together with Highland, the “Parties”), it is **HEREBY ORDERED THAT**:

1. The Stipulation, a copy of which is attached hereto as **Exhibit A**, is **APPROVED**.
2. The Stipulation supersedes any prior stipulation or scheduling order governing the Adversary Proceeding.
3. The Parties shall abide by the following pretrial schedule (the “Joint Pretrial Schedule”) pursuant to the Stipulation:
 - HCMS will have until August 30, 2021 to answer or otherwise respond to the First Amended Complaint.
 - The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
 - The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.
4. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings, and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below so

² On February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the “Plan”). The Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. See *Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 2700].

that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

5. The Joint Pretrial Schedule set forth in this Order shall only be modified in writing signed by the Parties or upon entry of an order of the Court entered upon notice to the Parties.

6. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###

Case 21-03006-sgj Doc 75 Filed 09/07/21 Entered 09/07/21 12:44:33 Page 4 of 9

EXHIBIT A

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*Counsel for Defendant Highland Capital
Management Services, Inc. and Nancy Dondero*

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. §
§ **Adversary No.: 21-03006-sgj**
§
HIGHLAND CAPITAL MANAGEMENT §
SERVICES, INC., §
§
Defendant. §

**STIPULATION AND AGREED ORDER GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

This stipulation and agreed order (the “Stipulation”) is entered into between Highland Capital Management, L.P. (the “Debtor”) and Highland Capital Management Services, Inc. (“HCMS”). The Debtor and HCMS are collectively referred to herein as the “Parties.”

RECITALS

WHEREAS, on **June 3, 2021**, HCMS filed a Motion to Withdraw the Reference.

WHEREAS, on **July 14, 2021**, the Bankruptcy Court filed its *Report and Recommendation to District Court Proposing that it (A) Grant Defendant's Motion to Withdraw*

the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court [Docket No. 47] (the "Report").

WHEREAS, the Debtor has indicated that it intends to file a First Amended Complaint, asserting additional claims against HCMS, as well as claims against new defendants, Nancy Dondero and The Dugaboy Investment Trust.

WHEREAS, the Parties intend to complete fact and expert discovery in this adversary proceeding as governed by this Stipulation.

STIPULATION

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE PARTIES HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. This Stipulation supersedes any prior stipulation or scheduling order governing the above-referenced adversary proceeding.

2. The Parties agree to the following deadlines regarding discovery and other pre-trial deadlines:

- The Parties agree that the Debtor will file and HCMS will not oppose a Motion for Leave to File First Amended Complaint by August 17, 2021, a copy of which has previously been provided by the Debtor to HCMS. Counsel for HCMS will accept service of the First Amended Complaint on behalf of HCMS and the additional defendants named in the First Amended Complaint.
- HCMS will have until August 30, 2021, to answer or otherwise respond to the First Amended Complaint.
- The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
- The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
- Fact depositions will take place between October 1 and October 22, 2021.

- Expert designations and disclosures of all opinions and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.

3. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below, so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

IT IS SO STIPULATED.

Dated: August 17, 2021

CONSENTED AND AGREED TO BY:

/s/ Michael P. Aigen

Deborah Deitsch-Perez
Texas State Bar No. 24036072
Michael P. Aigen
Texas State Bar No. 24012196
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**ATTORNEYS FOR DEFENDANT
HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC. AND NANCY
DONDERO**

/s/ John A. Morris

John A. Morris
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**ATTORNEYS FOR DEBTOR
HIGHLAND CAPITAL MANAGEMENT,
L.P.**

/s/ Douglas S. Draper

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**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Michael P. Aigen

Michael P. Aigen

EXHIBIT 52



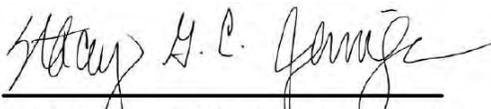
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 6, 2021


United States Bankruptcy Judge

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

In re: § Case No. 19-34054-SGJ-11
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § Chapter 11
§
Reorganized Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff, §

v. §

HCRE PARTNERS, LLC (n/k/a NEXPOINT §
REAL ESTATE PARTNERS, LLC), §
§
Defendant. §

Adversary No.: 21-03007-sgj

**ORDER APPROVING STIPULATION AND AGREED ORDER GOVERNING
DISCOVERY AND OTHER PRE-TRIAL ISSUES**

Upon consideration of the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [Docket No. 62] (the "Stipulation")¹ entered into between Highland Capital

¹ Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Stipulation.

Management, L.P., the reorganized debtor² (“Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“NREP”, and together with Highland, the “Parties”), it is **HEREBY ORDERED THAT:**

1. The Stipulation, a copy of which is attached hereto as **Exhibit A**, is **APPROVED**.
2. The Stipulation supersedes any prior stipulation or scheduling order governing the Adversary Proceeding.
3. The Parties shall abide by the following pretrial schedule (the “Joint Pretrial Schedule”) pursuant to the Stipulation:
 - NREP will have until August 30, 2021 to answer or otherwise respond to the First Amended Complaint.
 - The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.
 - The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.
4. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings, and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below so

² On February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the “Plan”). The Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. See *Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 2700].

that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005; and
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006.

5. The Joint Pretrial Schedule set forth in this Order shall only be modified in writing signed by the Parties or upon entry of an order of the Court entered upon notice to the Parties.

6. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###

Case 21-03007-sgj Doc 70 Filed 09/07/21 Entered 09/07/21 12:46:40 Page 4 of 9

EXHIBIT A

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*Counsel for Defendant HCRE Partners, LLC
(n/k/a NexPoint Real Estate Partners, LLC)
and Nancy Dondero*

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. § **Adversary No.: 21-03007-sgj**
§
HCRE PARTNERS, LLC (n/k/a NEXPOINT §
REAL ESTATE PARTNERS, LLC), §
§
Defendant. §

**STIPULATION AND AGREED ORDER GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

This stipulation and agreed order (the “Stipulation”) is entered into between Highland Capital Management, L.P. (the “Debtor”) and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“NREP”). The Debtor and NREP are collectively referred to herein as the “Parties.”

RECITALS

WHEREAS, on **June 3, 2021**, NREP filed a Motion to Withdraw the Reference.

WHEREAS, on **July 14, 2021**, the Bankruptcy Court filed its *Report and Recommendation to District Court Proposing that it (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court [Docket No. 44]* (the "Report").

WHEREAS, the Debtor has indicated that it intends to file a First Amended Complaint, asserting additional claims against NREP, as well as claims against new defendants, Nancy Dondero and The Dugaboy Investment Trust.

WHEREAS, the Parties intend to complete fact and expert discovery in this adversary proceeding as governed by this Stipulation.

STIPULATION

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE PARTIES HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. This Stipulation supersedes any prior stipulation or scheduling order governing the above-referenced adversary proceeding.

2. The Parties agree to the following deadlines regarding discovery and other pre-trial deadlines:

- The Parties agree that the Debtor will file and NREP will not oppose a Motion for Leave to File First Amended Complaint by August 17, 2021, a copy of which has previously been provided by the Debtor to NREP. Counsel for NREP will accept service of the First Amended Complaint on behalf of NREP and the additional defendants named in the First Amended Complaint.
- NREP will have until August 30, 2021, to answer or otherwise respond to the First Amended Complaint.
- The Parties will serve written discovery demands (limited to new claims and allegations in the First Amended Complaint) by September 3, 2021.

- The Parties will respond to discovery requests by September 27, 2021 and will also be substantially complete with document production by September 27, 2021.
- Fact depositions will take place between October 1 and October 22, 2021.
- Expert designations and disclosures of all opinions and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.

3. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below, so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Pro. No. 21-03004;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005; and
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006.

IT IS SO STIPULATED.

Dated: August 17, 2021

CONSENTED AND AGREED TO BY:

/s/ Michael P. Aigen

Deborah Deitsch-Perez
Texas State Bar No. 24036072
Michael P. Aigen
Texas State Bar No. 24012196
STINSON LLP
3102 Oak Lawn Avenue, Suite 777
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Email: michael.aigen@stinson.com

**ATTORNEYS FOR DEFENDANT
NEXPOINT REAL ESTATE
PARTNERS, LLC AND NANCY
DONDERO**

/s/ John A. Morris

John A. Morris
NY Bar No. 266326
(*pro hac vice*)
PACHULSKI STANG ZIEHL & JONES LLP
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**ATTORNEYS FOR DEBTOR
HIGHLAND CAPITAL MANAGEMENT,
L.P.**

/s/ Douglas S. Draper

Douglas S. Draper
LA Bar No. 5073
(*pro hac vice*)
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Email: ddraper@hellerdraper.com

**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Michael P. Aigen

Michael P. Aigen

EXHIBIT 53



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 6, 2021


United States Bankruptcy Judge

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

In re: § Case No. 19-34054-SGJ-11
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § Chapter 11
§
Reorganized Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff, §

v. §

HIGHLAND CAPITAL MANAGEMENT §
FUND ADVISORS, L.P. §
§
Defendant. §

Adversary No.: 21-03004-sgj

**ORDER APPROVING STIPULATION AND AGREED ORDER GOVERNING
DISCOVERY AND OTHER PRE-TRIAL ISSUES**

Upon consideration of the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [Docket No. 65] (the "Stipulation")¹ entered into between Highland Capital

¹ Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Stipulation.

Management, L.P., the reorganized debtor² (“Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and Highland Capital Management Fund Advisors, L.P. (“HCMFA”, and together with Highland, the “Parties”), it is **HEREBY ORDERED THAT**:

1. The Stipulation, a copy of which is attached hereto as **Exhibit A**, is **APPROVED**.
2. The Stipulation supersedes any prior stipulation or scheduling order governing the Adversary Proceeding.
3. The Parties shall abide by the following pretrial schedule (the “Joint Pretrial Schedule”) pursuant to the Stipulation:
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 19, 2021.
4. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings, and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:
 - *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
 - *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005;

² On February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the “Plan”). The Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. See *Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 2700].

- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006; and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

5. The Joint Pretrial Schedule set forth in this Order shall only be modified in writing signed by the Parties or upon entry of an order of the Court entered upon notice to the Parties.

6. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###

EXHIBIT A

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
MUNSCH HARDT KOPF & HARR, P.C.
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*Counsel for Defendant Highland Capital
Management Fund Advisors, L.P.*

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03004-sgj
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.	§	
	§	
Defendant.	§	

**STIPULATION AND AGREED ORDER GOVERNING DISCOVERY
AND OTHER PRE-TRIAL ISSUES**

This stipulation and agreed order (the “Stipulation”) is entered into between Highland Capital Management, L.P. (the “Debtor”) and Highland Capital Management Fund Advisors, L.P. (“HCMFA”). The Debtor and HCMFA are collectively referred to herein as the “Parties.”

RECITALS

WHEREAS, on **April 13, 2021**, HCMFA filed a Motion to Withdraw the Reference.

WHEREAS, on **July 8, 2021**, the Bankruptcy Court filed its *Report and Recommendation to District Court Proposing that it (A) Grant Defendant's Motion to Withdraw the Reference at Such Time as Bankruptcy Court Certifies that Action is Trial Ready; and (B) Defer Pretrial Matters to Bankruptcy Court [Docket No. 50]* (the "Report").

WHEREAS, the Parties intend to complete fact and expert discovery in this adversary proceeding as governed by this Stipulation.

STIPULATION

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE PARTIES HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. This Stipulation supersedes any prior stipulation or scheduling order governing the above-referenced adversary proceeding.
2. The Parties agree to the following deadlines regarding discovery and other pre-trial deadlines:
 - Fact depositions will take place between October 1 and October 22, 2021.
 - Expert designations and disclosures of all opinions and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 19, 2021.
3. The Parties agree that discovery taken in this case will be consolidated with discovery taken in the following adversary proceedings and all discovery in each of the adversary proceedings will be treated as if it was taken in all of the adversary proceedings listed below, so that each witness will only need to be deposed once and documents produced in any of the proceedings are usable as if received in every other proceeding:

- *Highland Capital Management, L.P. v. James D. Dondero*, Adv. Pro. No. 21-03003;
- *Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, Adv. Pro. No. 21-03005;
- *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Pro. No. 21-03006 and
- *Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Pro. No. 21-03007.

IT IS SO STIPULATED.

Dated: August 27, 2021

CONSENTED AND AGREED TO BY:

/s/ Davor Rukavina

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
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**ATTORNEYS FOR DEFENDANT
HIGHLAND CAPITAL MANAGEMENT
FUND ADVISORS, L.P.**

/s/ John A. Morris

John A. Morris
NY Bar No. 266326
(*pro hac vice*)
PACHULSKI STANG ZIEHL & JONES LLP
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Los Angeles, CA 90067
Telephone: (310) 277-6910
Email: jmorris@pszjlaw.com

**ATTORNEYS FOR DEBTOR
HIGHLAND CAPITAL MANAGEMENT,
L.P.**

CERTIFICATE OF SERVICE

I certify that on August 27, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Julian P. Vasek

Julian P. Vasek

EXHIBIT 54



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 23, 2021

United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

JAMES DONDERO,

Defendant.

§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§ Adversary Proceeding No.
§
§ 21-03003-sgj
§
§
§

**ORDER GRANTING DEBTOR'S UNOPPOSED MOTION FOR LEAVE
TO SERVE AND FILE AMENDED COMPLAINT**

Before the Court is the *Debtor's Unopposed Motion for Leave to Serve and File Amended Complaint* [Docket No. 73] (the "Motion"), filed by Highland Capital Management L.P, the debtor

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

and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), requesting leave to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* (the “Amended Complaint”), attached to the Motion as **Exhibit B**. Having considered the (i) Motion and the arguments set forth therein, (ii) the Amended Complaint annexed to the Motion, and (iii) the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues*, attached to the Motion as **Exhibit C**; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.
2. The Debtor is deemed to have served the Amended Complaint on the defendant on July 13, 2021, the Service Date (as defined in the Motion).
3. The Debtor is hereby granted leave to file its Amended Complaint.
4. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

EXHIBIT 55

and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), requesting leave to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* (the “Amended Complaint”), attached to the Motion as **Exhibit B**. Having considered (i) the Motion and the arguments set forth therein, (ii) the Amended Complaint annexed to the Motion, and (iii) the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues*, attached to the Motion as **Exhibit C**; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.
2. The Debtor is deemed to have served the Amended Complaint on the defendant on July 13, 2021, the Service Date (as defined in the Motion).
3. The Debtor is hereby granted leave to file its Amended Complaint.
4. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

EXHIBIT 56



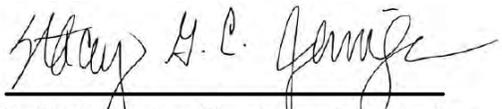
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 23, 2021


United States Bankruptcy Judge

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

In re:
HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

vs.
HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC.,

Defendant.

§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§ Adversary Proceeding No.
§
§ 21-03006-sgj
§
§
§

**ORDER GRANTING DEBTOR'S UNOPPOSED MOTION FOR LEAVE
TO SERVE AND FILE AMENDED COMPLAINT**

Before the Court is the *Debtor's Unopposed Motion for Leave to Serve and File Amended*

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

Complaint [Docket No. 60] (the “Motion”), filed by Highland Capital Management L.P, the debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), requesting leave to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* (the “Amended Complaint”), attached to the Motion as **Exhibit B**. Having considered the (i) Motion and the arguments set forth therein, (ii) the Amended Complaint annexed to the Motion, and (iii) the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues*, attached to the Motion as **Exhibit C**; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.
2. The Debtor is deemed to have served the Amended Complaint on the defendant on July 13, 2021, the Service Date (as defined in the Motion).
3. The Debtor is hereby granted leave to file its Amended Complaint.
4. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

EXHIBIT 57



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 23, 2021


United States Bankruptcy Judge

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

In re:
HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

§
§ Adversary Proceeding No.
§

vs.
HCRE PARTNERS, LLC (N/K/A NEXPOINT
REAL ESTATE PARTNERS, LLC),

Defendant.

§
§ 21-03007-sgj
§
§
§

**ORDER GRANTING DEBTOR'S UNOPPOSED MOTION FOR LEAVE
TO SERVE AND FILE AMENDED COMPLAINT**

Before the Court is the *Debtor's Unopposed Motion for Leave to Serve and File Amended*

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

Complaint [Docket No. 55] (the “Motion”), filed by Highland Capital Management L.P, the debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), requesting leave to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* (the “Amended Complaint”), attached to the Motion as **Exhibit B**. Having considered (i) the Motion and the arguments set forth therein, (ii) the Amended Complaint annexed to the Motion, and (iii) the *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues*, attached to the Motion as **Exhibit C**; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.
2. The Debtor is deemed to have served the Amended Complaint on the defendant on July 13, 2021, the Service Date (as defined in the Motion).
3. The Debtor is hereby granted leave to file its Amended Complaint.
4. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

EXHIBIT 58

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
(II) TURNOVER OF PROPERTY, (III) FRAUDULENT TRANSFER, AND (IV)
BREACH OF FIDUCIARY DUTY**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”), by its undersigned counsel, as and for its amended complaint (the “Complaint”) against defendants James Dondero (“Mr. Dondero”), Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy,” and together with Mr. Dondero and Nancy Dondero, “Defendants”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Defendants in connection with Mr. Dondero’s defaults under three promissory notes executed by Mr. Dondero in favor of the Debtor in the aggregate original principal amount of \$8,825,000, and payable upon the Debtor’s demand. Despite due demand, Mr. Dondero has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. After amending his answer and his sworn responses to interrogatories, Mr. Dondero now contends that the Debtor orally agreed to relieve him of his obligations under the notes upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). Mr. Dondero further contends that he entered into the Alleged Agreement with his sister, Nancy Dondero, as trustee of Dugaboy, acting on behalf of the Debtor. At the time Mr. Dondero entered into the Alleged Agreement, he controlled the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the notes.

4. Nevertheless, the Debtor amends its Complaint for the purpose of adding certain claims and naming additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against Mr. Dondero for breach of his obligations under the notes and for turnover, the Debtor adds alternative claims (a) against Mr. Dondero for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. As remedies, the Debtor seeks (a) damages from Mr. Dondero in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the notes), for Mr. Dondero's breach of his obligations under the Notes, (b) turnover by Mr. Dondero to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, Mr. Dondero pursuant to the Notes; (d) declaratory relief, and (e) damages arising from the Defendants' breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. This adversary proceeding arises in and relates to the Debtor’s case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Court”) under chapter 11 of the Bankruptcy Code.

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor’s President and Chief Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled the Debtor.

12. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero’s family investment trusts for which is he a lifetime beneficiary.

13. Upon information and belief, Nancy Dondero is Mr. Dondero’s sister, and the trustee of Dugaboy.

CASE BACKGROUND

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

15. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund (“Redeemer”), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, “Acis”).

16. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors’ Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

17. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

18. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The Dondero Notes

19. Mr. Dondero, in his personal capacity, is the maker under a series of promissory notes in favor of the Debtor.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

20. Specifically, on February 2, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$3,825,000 (“Dondero’s First Note”). A true and correct copy of Dondero’s First Note is attached hereto as **Exhibit 1**.

21. On August 1, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Second Note”). A true and correct copy of Dondero’s Second Note is attached hereto as **Exhibit 2**.

22. On August 13, 2018, Mr. Dondero executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“Dondero’s Third Note” and collectively, with Dondero’s First Note and Dondero’s Second Note, the “Notes”). A true and correct copy of Dondero’s Third Note is attached hereto as **Exhibit 3**.

23. Section 2 of each Note provides: “**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

24. Section 4 of each Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

25. Section 6 of each Note provides:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

B. Mr. Dondero Defaults Under Each Note

26. By letter dated December 3, 2020, the Debtor made demand on Mr. Dondero for payment under the Notes by December 11, 2020 (the “Demand Letter”). A true and correct copy of the Demand Letter is attached hereto as Exhibit 4. The Demand Letter provided:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$9,004,013.07, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

27. Despite the Debtor’s demand, Mr. Dondero did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020, or at any time thereafter.

28. As of December 11, 2020, there was an outstanding principal amount of \$3,687,269.71 on Dondero’s First Note and accrued but unpaid interest in the amount of \$21,003.70, resulting in a total outstanding amount as of that date of \$3,708,273.41.

29. As of December 11, 2020, there was an outstanding principal balance of \$2,619,929.42 on Dondero’s Second Note and accrued but unpaid interest in the amount of \$27,950.70, resulting in a total outstanding amount as of that date of \$2,647,880.12.

30. As of December 11, 2020, there was an outstanding principal balance of \$2,622,425.61 on Dondero’s Third Note and accrued but unpaid interest in the amount of \$25,433.94, resulting in a total outstanding amount as of that date of \$2,647,859.55.

31. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Notes was \$9,004,013.07.

32. Pursuant to Section 4 of each Note, each Note is in default, and is currently due and payable.

C. The Debtor Files the Original Complaint

33. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for Mr. Dondero's breach of his obligations under the Notes and (ii) turnover by Mr. Dondero for the outstanding amounts under the Notes, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

D. Mr. Dondero's Affirmative Defenses

34. On March 16, 2021, Mr. Dondero filed his *Original Answer* [Docket No. 6] (the "Original Answer"). In his Original Answer, Mr. Dondero asserted four affirmative defenses: (i) the Debtor's claims should be barred because it was previously agreed by the Debtor that the Debtor would not collect on the Notes, (ii) waiver, (iii) estoppel, and (iv) failure of consideration. *See id.* ¶¶ 40-43.

35. On April 6, 2021, Mr. Dondero filed his *Amended Answer* [Docket No. 16] (the "Amended Answer"), asserting three additional affirmative defenses: (i) the Debtor previously agreed that it would not collect on the Notes "upon fulfillment of conditions subsequent" (*i.e.*, the Alleged Agreement) *id.* ¶ 40, (ii) The Debtor's claims are barred, in whole or in part, due to setoff, *id.* ¶ 41, and (iii) the Notes are "ambiguous," *id.* ¶ 45.

36. According to Mr. Dondero, the Alleged Agreement was orally entered into in January or February 2019, and was not memorialized in any documentation.

37. According to Mr. Dondero, he entered into the Alleged Agreement with his sister, Nancy Dondero, acting in her capacity as the Trustee of Dugaboy, which purportedly held the majority of the Debtor's Class A limited partnership interests.

38. Mr. Dondero controlled the Debtor at the time he entered into the Alleged Agreement.

39. Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.

40. According to Mr. Dondero, he discussed the Alleged Agreement with Nancy Dondero, but (a) no one else participated in the discussions surrounding the execution or authorization of the Alleged Agreement, and (b) the Alleged Agreement was not subject to any negotiation.

41. Upon information and belief, the Debtor's books and records do not reflect the Alleged Agreement.

E. Dugaboy Lacked Authority to Act on Behalf of the Debtor

42. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the "Limited Partnership Agreement"), and attached hereto as **Exhibit 5**, Dugaboy was not authorized to enter into the Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as "Partnership" is defined in the Limited Partnership Agreement).

43. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 5, § 4.2(b).

44. No provision in the Limited Partnership Agreement authorizes any of the Partnership's limited partners to bind the Partnership.

45. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor.

FIRST CLAIM FOR RELIEF
(Against Mr. Dondero)
(Breach of Contract)

46. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

47. Each Note is a binding and enforceable contract.

48. Mr. Dondero breached each Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

49. Pursuant to each Note, the Debtor is entitled to damages from Mr. Dondero in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for Mr. Dondero's breach of his obligations under each of the Notes.

50. As a direct and proximate cause of Mr. Dondero's breach of each Note, the Debtor has suffered damages in the total amount of at least \$9,004,013.07, as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Against Mr. Dondero)
(Turnover Pursuant to 11 U.S.C. § 542(b))

51. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

52. Mr. Dondero owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until

the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for Mr. Dondero's breach of his obligations under each of the Notes.

53. Each Note is property of the Debtor's estate and the amounts due under each Note is matured and payable upon demand.

54. Mr. Dondero has not paid the amounts due under each Note to the Debtor.

55. The Debtor has made demand for the turnover of the amounts due under each Note.

56. As of the date of filing of this Complaint, Mr. Dondero has not turned over to the Debtor all or any of the amounts due under each of the Notes.

57. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

THIRD CLAIM FOR RELIEF

(Against Mr. Dondero)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

58. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

59. The Debtor made the transfers in the aggregate amount of \$8,825,000 in exchange for the Alleged Agreement within two years of the Petition Date.

60. Mr. Dondero entered into the Alleged Agreement with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

(a) The transfers were made to, or for the benefit of, Mr. Dondero, an insider of the Debtor.

- (b) Mr. Dondero entered into the Alleged Agreement with his sister, Nancy Dondero.
- (c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.
- (d) The Debtor's books and record do not reflect the Alleged Agreement.
- (e) The Alleged Agreement was not subject to negotiation.
- (f) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

61. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt Mr. Dondero incurred under the Notes demonstrates a scheme of fraud.

62. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from Mr. Dondero.

63. Accordingly, the Debtor is entitled to a judgement: (i) avoiding Alleged Agreement and the transfers thereunder, and (ii) recovering from Mr. Dondero the amount of \$8,825,000.

FOURTH CLAIM FOR RELIEF

(Against Mr. Dondero)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

64. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

65. The Debtor made the transfers in the aggregate amount of \$8,825,000 in exchange for the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

66. Mr. Dondero entered into the Alleged Agreement with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

(g) The transfers were made to, or for the benefit of, Mr. Dondero, an insider of the Debtor.

(h) Mr. Dondero entered into the Alleged Agreement with his sister, Nancy Dondero.

(i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.

(j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.

(k) The Alleged Agreement was not subject to negotiation.

(l) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

67. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from Mr. Dondero.

68. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfers thereunder, and (ii) recovering from Mr. Dondero the amount of \$8,825,000.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

69. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

70. A bona fide, actual, present dispute exists between the Debtor and Dugaboy concerning whether Dugaboy was authorized to entered into the Alleged Agreement on the Debtor's behalf.

71. A judgment declaring the parties' respective rights and obligations will resolve their dispute..

72. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement,
- (b) Dugaboy was not authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership,
- (c) Dugaboy otherwise had no right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy)
(Breach of Fiduciary Duty)

73. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

74. If Dugaboy, as a limited partner, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy would owe the Debtor a fiduciary duty.

75. If Dugaboy had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy breached its fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

76. Accordingly, the Debtor is entitled to recover from Dugaboy (a) actual damages that the Debtor suffered as a result of its breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

77. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

78. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

79. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

80. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

81. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero's breaches of fiduciary duties, and (b) for punitive and exemplary damages.

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);
- (ii) On its Second Claim for Relief, ordering turnover by Mr. Dondero to the Debtor of an amount equal to (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);
- (iii) On its Third Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder and recovering from Mr. Dondero the amount of \$8,825,000 pursuant to section 548 of the Bankruptcy Code;
- (iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder and recovering from Mr. Dondero the amount of \$8,825,000 pursuant to section Tex. Bus. & C. Code § 24.005(a)(1);
- (v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business,

transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) Dugaboy was not authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) Dugaboy otherwise had no right or authority to enter into the Alleged Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;

(vi) On its Sixth Claim for Relief, actual damages from Dugaboy, in an amount to be determined at trial, that Debtor suffered as a result of Dugaboy's breach of fiduciary duty, and for punitive and exemplary damages;

(vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered as a result of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages; and

Such other and further relief as this Court deems just and proper.

Dated: As of July 13, 2021

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EXHIBIT 1

PROMISSORY NOTE

\$3,825,000

February 2, 2018

FOR VALUE RECEIVED, JAMES DONDERO (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of THREE MILLION, EIGHT HUNDRED AND TWENTY-FIVE THOUSAND and 00/100 Dollars (\$3,825,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term “*applicable federal rate*” (2.66%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Tax Loan. This Note is paid to the Maker to help satisfy any current tax obligations of a former partner or current partner.

5. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

6. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

7. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other

amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

8. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

9. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

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EXHIBIT 2

PROMISSORY NOTE

\$2,500,000

August 1, 2018

FOR VALUE RECEIVED, JAMES DONDERO ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term "*applicable federal rate*" (2.95%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

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EXHIBIT 3

PROMISSORY NOTE

\$2,500,000

August 13, 2018

FOR VALUE RECEIVED, JAMES DONDERO ("*Maker*") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT LP ("*Payee*"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "*Note*"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term "*applicable federal rate*" (2.95%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any; and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



JAMES DONDERO

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EXHIBIT 4

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

James Dondero
 c/o Highland Capital Management, L.P.
 300 Crescent Court, Suite 700
 Dallas, Texas 75201

Re: Demand on Promissory Notes:

Dear Mr. Dondero,

You entered into the following promissory notes (collectively, the “Notes”) in favor of Highland Capital Management, L.P. (“Payee”):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
2/2/18	\$3,825,000	\$3,687,269.71	\$21,003.70	\$3,708,273.41
8/1/18	\$2,500,000	\$2,619,929.42	\$27,950.70	\$2,647,880.12
8/13/18	\$2,500,000	\$2,622,425.61	\$25,433.94	\$2,647,859.55
TOTALS	\$16,725,000	\$8,929,624.74	\$74,388.33	\$9,004,013.07

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$9,004,013.07, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain your obligation.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
 Highland Capital Management, L.P.
 Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
D. Michael Lynn

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 5

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation ("*Strand*"), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“**Class B Limited Partner**” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“**Class B Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“**Class B NAV Ratio Trigger Period**” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“**Class C Limited Partner**” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“**Class C Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“**Class C NAV Ratio Trigger Period**” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“**Code**” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“**Contribution Note**” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“**Default Loan**” has the meaning set forth in Section 3.1(c)(i).

“**Defaulting Partner**” has the meaning set forth in Section 3.1(c).

“**Delaware Act**” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“**Effective Date**” means the date first recited above.

“**Fiscal Year**” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("*Capital Account*") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however*, any action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

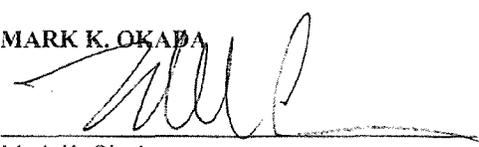
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

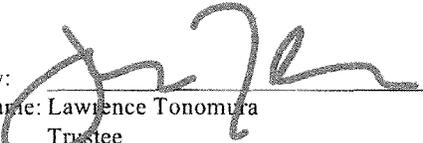
By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

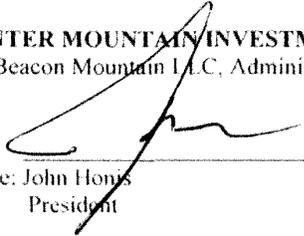
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain LLC, Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.		DEFENDANTS James Dondero, Nancy Dondero, and The Dugaboy Investment Trust
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100		ATTORNEYS (If Known) Stinson LLP (for James Dondero and Nancy Dondero); Heller, Draper & Horn, L.L.C. (for The Dugaboy Investment Trust)
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee		PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Turnover Pursuant to 11 USC 542(b); Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 548(a)(1)(A) and 550; Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 544(b) and 550 and Tex. Bus. & C. Code 24.005(a)(1); Declaratory Relief; Breach of Fiduciary Duty; Aiding & Abetting Breach of Fiduciary Duty		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)		FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input checked="" type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law		<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
<input type="checkbox"/> Check if a jury trial is demanded in complaint		Demand \$ Damages in an amount to be determined at trial
Other Relief Sought Turnover of amounts due under note, avoidance of transfers to defendants, declaratory relief, punitive and exemplary damages, costs, attorneys' fees		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE August 27, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 59

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
(II) TURNOVER OF PROPERTY, (III) FRAUDULENT TRANSFER, AND (IV)
BREACH OF FIDUCIARY DUTY**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”) by its undersigned counsel, as and for its amended complaint (the “Complaint”) against defendants NexPoint Advisors, L.P. (“NPA”), James Dondero (“Mr. Dondero”), Nancy Dondero (“Ms. Dondero”), and The Dugaboy Investment Trust (“Dugaboy”) and together with NPA, Mr. Dondero, and Ms. Dondero, the “Defendants”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Defendants in connection with NPA’s default under a promissory note executed by NPA in favor of the Debtor in the original principal amount of \$30,746,812.33, and payable in annual installments. NPA has failed to pay amounts when due under the Note (as defined below), the Note is in default, and the amounts due under the Note have been accelerated pursuant to the terms of the Note.

2. In paragraph 42 of NPA’s *First Amended Answer* [Docket No. 34-3], NPA contends that the Debtor orally agreed to relieve it of the obligations under the notes upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). NPA further contends that the Alleged Agreement was entered into between James Dondero, acting on behalf of NPA, and his sister, Nancy Dondero, as representative of a majority of the Class A shareholders of the Plaintiff, including Dugaboy (the “Representative”), acting on behalf of the Debtor. At the time Mr.

Dondero entered into the Alleged Agreement on behalf of NPA, he controlled both NPA and the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Note.

4. Nevertheless, the Debtor amends its Complaint to add certain claims and name additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against NPA for breach of its obligations under the Note and for turnover, the Debtor adds alternative claims (a) against NPA for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. As remedies, the Debtor seeks (a) damages from NPA in an amount equal to (i) the outstanding principal due under the Note (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the Note), for NPA's breach of its obligations under the Note, (b) turnover by NPA to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, NPA pursuant to the Note; (d) declaratory relief, and (e) damages arising from the Defendants' breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas, and organized under the laws of the state of Delaware.

12. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor's President and Chief Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled NPA; Mr. Dondero also controlled the Debtor until January 9, 2020.

13. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero's family investment trusts for which is he a lifetime beneficiary.

14. Upon information and belief, Nancy Dondero is an individual residing in the state of Florida and who is Mr. Dondero's sister, and a trustee of Dugaboy.

CASE BACKGROUND

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

16. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a) Redeemer Committee of Highland Crusader Fund ("Redeemer"), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

17. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors' Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

19. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

² All docket numbers refer to the main docket for the Debtor's Case maintained by this Court.

STATEMENT OF FACTS

A. The NPA Note

20. NPA is the maker under a promissory note in favor of the Debtor.

21. Specifically, on May 31, 2017, NPA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$30,746, 812.33 (the "Note"). A true and correct copy of the Note is attached hereto as Exhibit 1.

22. Section 2 of the Note provides: "Payment of Principal and Interest.

Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "Annual Installment") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "Maturity Date").

23. Section 3 of the Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

24. Section 4 of the Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

25. Section 6 of the Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. NPA's Default Under the Note

26. NPA failed to make the payment due under the Note on December 31, 2020 in the amount of \$1,406,111.92.

27. By letter dated January 7, 2021, the Debtor made demand on NPA for immediate payment under the Note (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 2**. The Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Demand Letter (emphasis in the original).

28. On January 14, 2021, in an apparent attempt to cure its default, NPA paid the Debtor the \$1,406,111.92 that was due on December 31, 2020 (the "Partial Payment").

29. The Note does not contain a cure provision. Therefore, the Partial Payment did not cure NPA's default. Accordingly, on January 15, 2021, the Debtor sent NPA a follow-up letter to its Demand Letter (the "Second Demand Letter"), a true and correct copy of which is attached hereto as **Exhibit 3**, stating:

[T]he Partial Payment will be applied as payment against the amounts due under the Note in accordance with Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note).

Second Demand Letter (emphasis in original).

30. Despite the Debtor's demands, NPA did not pay the amount demanded by the Debtor on January 7, 2021, or at any time thereafter.

31. As of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03

32. Pursuant to Section 4 of the Note, the Note is in default, and is currently due and payable.

C. The Debtor Files the Original Complaint

33. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for NPA's breach of its obligations under the Note and (ii) turnover by NPA for the outstanding amounts under the Note, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

D. NPA's Affirmative Defenses

34. On March 1, 2021, NPA filed *Defendant's Original Answer* [Docket No. 6] (the "Original Answer"). In its Original Answer, NPA asserted three affirmative defenses: (i) the claims are barred because the Plaintiff caused NPA to default, (ii) the claims are barred because the Plaintiff caused NPA to delay in making payment, and (iii) waiver and estoppel. *See id.* ¶¶39-41.

35. On June 9, 2021, NPA filed *Defendant's First Amended Answer* [Docket No. 35-3] (the "Amended Answer"), that asserted a new affirmative defense; namely, that the

Debtor previously agreed that it would not collect on the Notes “upon fulfillment of conditions subsequent” (*i.e.*, the Alleged Agreement) *id.* ¶42.

36. According to NPA, the Alleged Agreement was orally entered into “sometime between December of the year each note was made and February of the following year.”

37. According to NPA, Mr. Dondero, acting on its behalf, entered into the Alleged Agreement with his sister, Nancy Dondero, acting as the Representative.

38. Mr. Dondero controlled both NPA and the Debtor at the time he entered into the Alleged Agreement on behalf of NPA.

39. Upon information and belief, the Debtor’s books and records do not reflect the Alleged Agreement.

E. Dugaboy Lacked Authority to Act on Behalf of the Debtor

40. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the “Limited Partnership Agreement”), and attached hereto as **Exhibit 4**, Dugaboy was not authorized to enter into the Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as “Partnership” is defined in the Limited Partnership Agreement).

41. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 4, § 4.2(b).

42. No provision in the Limited Partnership Agreement authorizes any of the Partnership’s limited partners to bind the Partnership.

43. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor

FIRST CLAIM FOR RELIEF
(Against NPA)

(For Breach of Contract)

44. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

45. The Note is a binding and enforceable contract.

46. NPA breached the Note by failing to pay all amounts due to the Debtor upon NPA's default and acceleration.

47. Pursuant to the Note, the Debtor is entitled to damages from NPA in an amount equal to (i) the aggregate outstanding principal due under the Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for NPA's breach of its obligations under the Note.

48. As a direct and proximate cause of NPA's breach of the Note, the Debtor has suffered damages in the amount of at least \$23,071,195.03, as of January 15, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Against NPA)

(Turnover by NPA Pursuant to 11 U.S.C. § 542(b))

49. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

50. NPA owes the Debtor an amount equal to (i) the aggregate outstanding principal due under the Note, plus (ii) all accrued and unpaid interest thereon until the date of

payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for NPA's breach of its obligations under the Note.

51. The Note is property of the Debtor's estate that is matured and payable upon default and acceleration.

52. NPA has not paid the amount due under the Note to the Debtor.

53. The Debtor has made demand for the turnover of the amount due under the Note.

54. As of the date of filing of this Complaint, NPA has not turned over the amount due under the Note.

55. The Debtor is entitled to the amount due under the Note.

THIRD CLAIM FOR RELIEF

(Against NPA)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Debtor made the transfer pursuant to the Alleged Agreement within two years of the Petition Date.

58. Mr. Dondero entered into the Alleged Agreement on behalf of NPA with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

(a) The transfer was made to, or for the benefit of, NPA, an insider of the Debtor.

(b) Mr. Dondero entered into the Alleged Agreement on behalf of NPA with his sister, Nancy Dondero.

(c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.

- (d) The Debtor's books and record do not reflect the Alleged Agreement.
- (e) The Alleged Agreement was not subject to negotiation.
- (f) The value of the consideration received by the Debtor for the transfer was not reasonably equivalent in value.

59. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt NPA incurred under the Note demonstrates a scheme of fraud.

60. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfer made pursuant to the Alleged Agreement from NPA.

61. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer made thereunder, and (ii) recovering from NPA an amount equal to all obligations remaining under the Note.

FOURTH CLAIM FOR RELIEF
(Against NPA)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

63. The Debtor made the transfers pursuant to the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

64. Mr. Dondero entered into the Alleged Agreement on behalf of NPA with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

- (g) The transfer was made to, or for the benefit of, NPA, an insider of the Debtor.

- (h) Mr. Dondero entered into the Alleged Agreement on behalf of NPA with his sister, Nancy Dondero.
- (i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.
- (j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.
- (k) The Alleged Agreement was not subject to negotiation.
- (l) The value of the consideration received by the Debtor for the transfer was not reasonably equivalent in value.

65. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from NPA.

66. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer made thereunder, and (ii) recovering from NPA an amount equal to all obligations remaining under the Notes.

FIFTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

68. A bona fide, actual, present dispute exists between the Debtor, on the one hand, and Dugaboy and Ms. Dondero on the other hand, concerning whether Dugaboy and/or Ms. Dondero, acting as the Representative, were authorized to enter into the Alleged Agreement on the Debtor's behalf.

69. A judgment declaring the parties' respective rights and obligations will resolve their dispute.

70. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement,
- (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership,
- (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(Breach of Fiduciary Duty)

71. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

72. If Dugaboy, as a limited partner, or Ms. Dondero, as Representative, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero would owe the Debtor a fiduciary duty.

73. If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

74. Accordingly, the Debtor is entitled to recover from Dugaboy and Ms. Dondero (a) actual damages that the Debtor suffered as a result of their breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

76. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

77. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

78. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

79. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero’s breaches of fiduciary duties, and (b) for punitive and exemplary damages

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to

the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by NPA to the Debtor of an amount equal to (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(iii) On its Third Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement arising from actual fraudulent transfer under section 548 of the Bankruptcy Code;

(iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under Tex. Bus. & C. Code § 24.005(a)(1);

(v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged

Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;

(vi) On its Sixth Claim for Relief, actual damages from Dugaboy and Ms. Dondero, in an amount to be determined at trial, that Debtor suffered as a result of their breach of fiduciary duty, and for punitive and exemplary damages;

(vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered as a result of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages and

(iii) Such other and further relief as this Court deems just and proper.

Dated: As of July 13, 2021

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

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EXHIBIT 1

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By:  _____

Name:

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

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EXHIBIT 2

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P, entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 3

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 15, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Partial Payment on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P. (“Maker”), entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”). A copy of the Note is attached hereto as **Appendix A**.

On January 7, 2021, Payee notified you that because of Maker’s failure to make the payment due on December 31, 2020 (the “Default”), the Note was in default and that all principal, interest, and any other amounts due on the Note were immediately due and payable. The amount due and payable on the Note as of January 8, 2021, was \$24,471,804.98; however, interest continues to accrue under the Note.

On January 14, 2021, Payee received a wire from Maker in the amount of \$1,406,111.92 (the “Partial Payment”). To reiterate, the amount due under the Note as of January 8, 2021, was \$24,471,804.98. The Partial Payment will be applied as payment against the amounts due under the Note pursuant to Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note). Payment of such amount is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix B**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved, including the right to recover Payee’s expenses incurred in collecting the Note. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter
A. Lee Hogewood III

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Appendix A

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By:  _____

Name:

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

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Appendix B

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 4

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation ("*Strand*"), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“*Additional Capital Contribution*” has the meaning set forth in Section 3.1(b) of this Agreement.

“*Adjusted Capital Account Deficit*” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“*Affiliate*” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term “*control*” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“*Agreement*” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“*Business Day*” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“*Capital Account*” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“*Capital Contribution*” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“*Certificate of Limited Partnership*” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“*Class A Limited Partners*” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“*Class A Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“*Class B Limited Partner*” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“*Class B Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“*Class B NAV Ratio Trigger Period*” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“*Class C Limited Partner*” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“*Class C Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“*Class C NAV Ratio Trigger Period*” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“*Code*” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“*Contribution Note*” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“*Default Loan*” has the meaning set forth in Section 3.1(c)(i).

“*Defaulting Partner*” has the meaning set forth in Section 3.1(c).

“*Delaware Act*” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“*Effective Date*” means the date first recited above.

“*Fiscal Year*” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“**Partner**” means a General Partner or a Limited Partner.

“**Partner Nonrecourse Debt**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“**Partner Nonrecourse Deductions**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“**Partner Nonrecourse Debt Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“**Partnership**” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“**Partnership Capital**” means, as of any relevant date, the net book value of the Partnership’s assets.

“**Partnership Interest**” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“**Partnership Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“**Percentage Interest**” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“**Person**” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“**Priority Distributions**” has the meaning set forth in [Section 3.9\(b\)](#).

“**Profits**” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“**Profits Interest Partner**” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“**Purchase Notes**” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("*Capital Account*") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assess or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(c) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however*, any action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

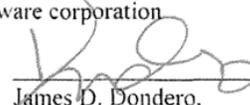
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Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

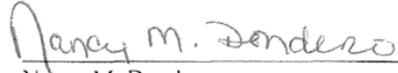
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

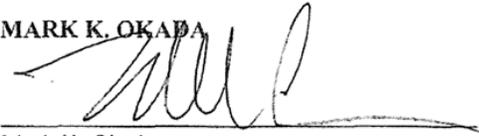
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

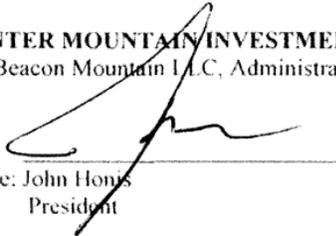
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain L.L.C., Administrator

By:  _____

Name: John Honis

Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	Percentage Interest	
	By Class	Effective %
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class __ Limited Partner holding a __% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class __ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.		DEFENDANTS NexPoint Advisors, L.P., James Dondero, Nancy Dondero, and The Dugaboy Investment Trust
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100		ATTORNEYS (If Known) Munsch Hardt Kopf & Harr, P.C. (for NexPoint); Stinson LLP (for Nancy Dondero); Heller, Draper, & Horn, L.L.C. (for The Dugaboy Investment Trust)
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee		PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Turnover Pursuant to 11 USC 542(b); Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 548(a)(1)(A) and 550; Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 544(b) and 550 and Tex. Bus. & C. Code 24.005(a)(1); Declaratory Relief; Breach of Fiduciary Duty; Aiding & Abetting Breach of Fiduciary Duty		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)		FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input checked="" type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law		<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
<input type="checkbox"/> Check if a jury trial is demanded in complaint		Demand \$ Damages in an amount to be determined at trial
Other Relief Sought Turnover of amounts due under note, avoidance of transfers to defendants, declaratory relief, punitive and exemplary damages, costs, attorneys' fees		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE August 27, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 60

PACHULSKI STANG ZIEHL & JONES LLP
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 Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
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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:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03006
	§	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC, JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST	§	
	§	
Defendants.	§	

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

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
(II) TURNOVER OF PROPERTY, (III) FRAUDULENT TRANSFER, AND (IV)
BREACH OF FIDUCIARY DUTY**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”), by its undersigned counsel, as and for its amended complaint (the “Complaint”) against defendants Highland Capital Management Services, Inc. (“HCMS”), James Dondero (“Mr. Dondero”), Nancy Dondero (“Ms. Dondero”), and The Dugaboy Investment Trust (“Dugaboy” and together with HCMS, Mr. Dondero, and Ms. Dondero, the “Defendants”) alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Defendants in connection with HCMS’s defaults under (i) four demand notes, in the aggregate principal amount of \$900,000, and payable upon the Debtor’s demand, and (ii) one term note, in the aggregate principal amount of \$20,247,628.02, and payable in the event of default, all executed by HCMS in favor of the Debtor. HCMS has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. In paragraph 56 of HCMS’s *First Amended Answer to Plaintiff’s Complaint* [Docket No. 34], HCMS contends that the Debtor orally agreed to relieve it of the obligations under the Notes (as defined below) upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). HCMS further contends that the Alleged Agreement was entered into between James Dondero, acting on behalf of HCMS, and his sister, Nancy Dondero, as representative of a majority of the Class A shareholders of the Plaintiff, including Dugaboy (the “Representative”),

acting on behalf of the Debtor. At the time Mr. Dondero entered into the Alleged Agreement on behalf of HCMS, he controlled both HCMS and the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Notes.

4. Nevertheless, the Debtor amends its Complaint to add certain claims and name additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against HCMS for breach of its obligations under the Notes and for turnover, the Debtor adds alternative claims (a) against HCMS for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. As remedies, the Debtor seeks (a) damages from HCMS in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the notes), for HCMS's breach of its obligations under the Notes, (b) turnover by HCMS to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, HCMS pursuant to the Notes; (d) declaratory relief, and (e) damages arising from the Defendants' breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. Upon information and belief, HCMS is a company with offices located in Dallas, Texas, and is incorporated in the state of Delaware.

12. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor's President and Chief Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled HCRE; Mr. Dondero also controlled the Debtor until January 9, 2020.

13. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero's family investment trusts for which is he a lifetime beneficiary.

14. Upon information and belief, Nancy Dondero is an individual residing in the state of Florida and who is Mr. Dondero's sister, and a trustee of Dugaboy.

CASE BACKGROUND

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

16. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a) Redeemer Committee of Highland Crusader Fund ("Redeemer"), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

17. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors' Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

19. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

STATEMENT OF FACTS

A. The HCMS Demand Notes

20. HCMS is the maker under a series of demand notes in favor of the Debtor.

21. Specifically, on March 28, 2018, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$150,000 (“HCMS’s First Demand Note”). A true and correct copy of HCMS’s First Demand Note is attached hereto as **Exhibit 1**.

22. On June 25, 2018, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$200,000 (“HCMS’s Second Demand Note”). A true and correct copy of HCMS’s Second Demand Note is attached hereto as **Exhibit 2**.

23. On May 29, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$400,000 (“HCMS’s Third Demand Note”). A true and correct copy of HCMS’s Third Demand Note is attached hereto as **Exhibit 3**.

24. On June 26, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$150,000 (“HCMS’s Fourth Demand Note,” and collectively, with HCMS’s First Demand Note, HCMS’s Second Demand Note, and HCMS’s Third Demand Note, the “Demand Notes”). A true and correct copy of HCMS’s Fourth Demand Note is attached hereto as **Exhibit 4**.

25. Section 2 of the Demand Notes provide: “**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

26. Section 4 of the Demand Notes provide:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and

the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

27. Section 6 of the Demand Notes provide:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. HCMS's Defaults Under Each Demand Note

28. By letter dated December 3, 2020, the Debtor made demand on HCMS for payment under the Demand Notes by December 11, 2020 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 5**. The Demand Letter provided:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$947,519.43, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

29. Despite the Debtor's demand, HCMS did not pay all or any portion of the amounts demanded by the Debtor on December 11, 2020.

30. As of December 11, 2020, there was an outstanding principal amount of \$158,776.59 on HCMS's First Demand Note and accrued but unpaid interest in the amount of \$3,257.32, resulting in a total outstanding amount as of that date of \$162,033.91.

31. As of December 11, 2020, there was an outstanding principal balance of \$212,403.37 on HCMS's Second Demand Note and accrued but unpaid interest in the amount of \$2,999.54, resulting in a total outstanding amount as of that date of \$215,402.81.

32. As of December 11, 2020, there was an outstanding principal balance of \$409,586.19 on HCMS's Third Demand Note and accrued but unpaid interest in the amount of \$5,256.62, resulting in a total outstanding amount as of that date of \$414,842.81.

33. As of December 11, 2020, there was an outstanding principal balance of \$153,564.74 on HCMS's Fourth Demand Note and accrued but unpaid interest in the amount of \$1,675.16, resulting in a total outstanding amount as of that date of \$155,239.90.

34. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Demand Notes was \$947,519.43. Pursuant to Section 4 of each Demand Note, each Note is in default, and is currently due and payable.

C. The HCMS Term Note

35. HCMS is the maker under a term note in favor of the Debtor.

36. Specifically, on May 31, 2017, HCMS executed a term note in favor of the Debtor, as payee, in the original principal amount of \$20,247,628.02 (the "Term Note," and together with the Demand Notes, the "Notes"). A true and correct copy of the Term Note is attached hereto as **Exhibit 6**.

37. Section 2 of the Term Note provides: "**Payment of Principal and Interest**. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

38. Section 3 of the Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

39. Section 4 of the Term Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

40. Section 6 of the Term Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

D. HCMS's Default Under the Term Note

41. HCMS failed to make the payment due under the Term Note on December 31, 2020.

42. By letter dated January 7, 2021, the Debtor made demand on HCMS for immediate payment under the Term Note (the "Second Demand Letter"). A true and correct copy of the Second Demand Letter is attached hereto as Exhibit 7. The Second Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,757,248.95; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Second Demand Letter (emphasis in the original).

43. As of January 8, 2021, the total outstanding principal and accrued but unpaid interest under the Term Note was \$6,757,248.95.

44. Pursuant to Section 4 of the Term Note, the Note is in default, and is currently due and payable.

E. The Debtor Files the Original Complaint

45. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for HCMS's breach of its obligations under the Notes and (ii) turnover by HCMS for the outstanding amounts under the Notes, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

F. HCMS's Affirmative Defenses

46. On March 13, 2021, HCMS filed *Highland Capital Management Services, Inc.'s Answer to Plaintiff's Complaint* [Docket No. 6] (the "Original Answer"). In its Original Answer, HCMS asserted four affirmative defenses: (i) the claims are barred in whole or in part under the doctrines of justification or repudiation, (ii) waiver, (iii) estoppel, and (iv) offset and/or setoff (the "Setoff Defense"). *See id.* ¶¶ 53-56.

47. On June 11, 2021, HCMS filed its *First Amended Answer to Plaintiff's Complaint* [Docket No. 34] (the "Amended Answer"), that omitted the Setoff Defense but asserted two affirmative defenses: (i) the Debtor previously agreed that it would not collect on the Notes

“upon fulfillment of conditions subsequent” (*i.e.*, the Alleged Agreement) *id.* ¶ 56, and (ii) the Notes are “ambiguous,” *id.* ¶ 57.

48. According to HCMS, the Alleged Agreement was orally entered into “sometime between December of the year each note was made and February of the following year.”

49. According to HCMS, Mr. Dondero, acting on its behalf, entered into the Alleged Agreement with his sister, Nancy Dondero, acting as the Representative.

50. Mr. Dondero controlled the Debtor at the time he entered into the Alleged Agreement on behalf of HCMS.

51. Upon information and belief, the Debtor’s books and records do not reflect the Alleged Agreement.

G. Dugaboy Lacked Authority to Act on Behalf of the Debtor

52. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the “Limited Partnership Agreement”), and attached hereto as **Exhibit 8**, Dugaboy was not authorized to enter into the Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as “Partnership” is defined in the Limited Partnership Agreement).

53. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 8, § 4.2(b).

54. No provision in the Limited Partnership Agreement authorizes any of the Partnership’s limited partners to bind the Partnership.

55. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor.

FIRST CLAIM FOR RELIEF

(Against HCMS)

(For Breach of Contract)

56. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Notes are binding and enforceable contracts.

58. HCMS breached each Demand Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

59. HCMS breached the Term Note by failing to pay all amounts due to the Debtor upon HCMS's default and acceleration.

60. Pursuant to each Note, the Debtor is entitled to damages from HCMS in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCMS's breach of its obligations under each of the Demand Notes.

61. As a direct and proximate cause of HCMS's breach of each Demand Note, the Debtor has suffered damages in the amount of at least \$947,519.43, as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

62. As a direct and proximate cause of HCMS's breach of the Term Note, the Debtor has suffered damages in the amount of at least \$6,757,248.95, as of January 8, 2021, plus

an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF

(Against HCMS)

(Turnover by HCMS Pursuant to 11 U.S.C. § 542(b))

63. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

64. HCMS owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each of the Notes, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCMS's breach of its obligations under each of the Notes

65. Each Demand Note is property of the Debtor's estate and the amounts due under each Demand Note is matured and payable upon demand.

66. The Term Note is property of the Debtor's estate and the amounts due under the Term Note is matured and payable upon default and acceleration.

67. The Debtor has made demand for turnover of the amounts due under each of the Notes

68. As of the date of filing this Complaint, HCMS has not turned over to the Debtor all or any of the amounts due under each of the Notes.

69. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

THIRD CLAIM FOR RELIEF
(Against HCMS)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

70. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

71. The Debtor made the transfers pursuant to the Alleged Agreement within two years of the Petition Date.

72. HCMS entered into the Alleged Agreement with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

- (a) The transfers were made to, or for the benefit of, HCMS, an insider of the Debtor.
- (b) Mr. Dondero entered into the Alleged Agreement on behalf of HCMS with his sister, Nancy Dondero.
- (c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.
- (d) The Debtor's books and record do not reflect the Alleged Agreement.
- (e) The Alleged Agreement was not subject to negotiation.
- (f) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

73. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt HCMS incurred under the Notes demonstrates a scheme of fraud.

74. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCMS.

75. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfers thereunder, and (ii) recovering from HCMS an amount equal to all obligations remaining under the Notes.

FOURTH CLAIM FOR RELIEF
(Against HCMS)
(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

76. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

77. The Debtor made the transfers pursuant to the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

78. Mr. Dondero entered into the Alleged Agreement on behalf of HCMS with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

- (g) The transfers were made to, or for the benefit of, HCMS, an insider of the Debtor.
- (h) Mr. Dondero entered into the Alleged Agreement on behalf of HCMS with his sister, Nancy Dondero.
- (i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.
- (j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.
- (k) The Alleged Agreement was not subject to negotiation.
- (l) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

79. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCMS.

80. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfers thereunder, and (ii) recovering from HCMS an amount equal to all obligations remaining under the Notes.

FIFTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

81. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

82. A bona fide, actual, present dispute exists between the Debtor, on the one hand, and Dugaboy and Ms. Dondero on the other hand, concerning whether Dugaboy and/or Ms. Dondero, acting as the Representative, were authorized to enter into the Alleged Agreement on the Debtor's behalf.

83. A judgment declaring the parties' respective rights and obligations will resolve their dispute.

84. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement,

- (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership,
- (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(Breach of Fiduciary Duty)

85. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

86. If Dugaboy, as a limited partner, or Ms. Dondero, as Representative, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero would owe the Debtor a fiduciary duty.

87. If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

88. Accordingly, the Debtor is entitled to recover from Dugaboy and Ms. Dondero (a) actual damages that the Debtor suffered as a result of their breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

89. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

90. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

91. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

92. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

93. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero’s breaches of fiduciary duties, and (b) for punitive and exemplary damages.

WHEREFORE, the Debtor prays for judgment as follows:

(i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor’s cost of collection (including all court costs and reasonable attorneys’ fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by HCMS to the Debtor of an amount equal to (a) the aggregate principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor’s cost of collection (including all court costs and reasonable attorneys’ fees and expenses);

- (iii) On its Third Claim for Relief, avoidance of the Alleged Agreements and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under section 548 of the Bankruptcy Code;
- (iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under Tex. Bus. & C. Code § 24.005(a)(1);
- (v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;
- (vi) On its Sixth Claim for Relief, actual damages from Dugaboy and Ms. Dondero, in an amount to be determined at trial, that Debtor suffered as a result of their breach of fiduciary duty, and for punitive and exemplary damages;
- (vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered as a result

of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages; and

(iii) Such other and further relief as this Court deems just and proper.

Dated: As of July 13, 2021.

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
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-and-

/s/ Zachery Z. Annable

HAYWARD PLLC
Melissa S. Hayward
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Zachery Z. Annable
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ZAnnable@HaywardFirm.com
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Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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EXHIBIT 1

PROMISSORY NOTE

\$150,000.00

March 28, 2018

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT SERVICES, INC. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of ONE HUNDRED AND FIFTY THOUSAND and 00/100 Dollars (\$150,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term “*applicable federal rate*” (2.88 %) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC.

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EXHIBIT 2

PROMISSORY NOTE

\$200,000.00

June 25, 2018

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT SERVICES, INC. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of TWO HUNDRED THOUSAND and 00/100 Dollars (\$200,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the long-term “*applicable federal rate*” (3.05 %) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC.

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EXHIBIT 3

PROMISSORY NOTE

\$400,000

May 29, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT SERVICES, INC. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of FOUR HUNDRED THOUSAND and 00/100 Dollars (\$400,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term “*applicable federal rate*” (2.39%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:

A handwritten signature in blue ink, appearing to read "Frank Waterhouse", is written over a horizontal line.

FRANK WATERHOUSE

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EXHIBIT 4

PROMISSORY NOTE

\$150,000

June 26, 2019

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT SERVICES, INC. (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of ONE HUNDRED AND FIFTY THOUSAND and 00/100 Dollars (\$150,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to the short-term “*applicable federal rate*” (2.37%) in effect on the date hereof for loans of such maturity as determined by Section 1274(d) of the Internal Revenue Code, per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



FRANK WATERHOUSE

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EXHIBIT 5

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

Highland Capital Management Services, Inc.
 c/o Highland Capital Management, L.P.
 300 Crescent Court, Suite 700
 Dallas, Texas 75201
 Attention: Frank Waterhouse, CFO

Re: Demand on Promissory Notes:

Dear Mr. Waterhouse,

Highland Capital Management Services, Inc. (“Maker”) entered into the following promissory notes (collectively, the “Notes”) in favor of Highland Capital Management, L.P. (“Payee”):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
3/28/18	\$150,000	\$158,776.59	\$3,257.32	\$162,033.91
6/25/18	\$200,000	\$212,403.27	\$2,999.54	\$215,402.81
5/29/19	\$400,000	\$409,586.19	\$5,256.62	\$414,842.81
6/26/19	\$150,000	\$153,564.74	\$1,675.16	\$155,239.90
TOTALS	\$900,000	\$934,330.79	\$13,188.64	\$947,519.43

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$947,519.43, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
 Highland Capital Management, L.P.
 Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 6

PROMISSORY NOTE

\$20,247,628.02

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from Highland Capital Management Services, Inc., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, HIGHLAND CAPITAL MANAGEMENT SERVICES, INC. ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of TWENTY MILLION, TWO HUNDRED FORTY SEVEN THOUSAND, SIX HUNDRED TWENTY EIGHT AND 02/100 DOLLARS (\$20,247,628.02), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of two and seventy-five hundredths percent (2.75%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No

failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC.

By: 
Name: _____
Title:

EXHIBIT A
PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
5/29/15	\$500,000	2.30%	\$523,095
10/1/15	\$350,000	2.58%	\$315,500
10/2/15	\$310,000	2.58%	\$323,301
10/27/15	\$200,000	2.58%	\$208,228
10/28/15	\$200,000	2.58%	\$208,214
10/30/15	\$100,000	2.58%	\$104,093
11/23/15	\$100,000	2.57%	\$103,908
11/24/15	\$250,000	2.57%	\$259,752
2/10/16	\$2,000,000	2.62%	\$ 83,390
2/11/16	\$250,000	2.62%	\$258,524
4/5/16	\$6,000,000	2.25%	\$6,155,712
5/4/16	\$2,700,000	2.24%	\$2,764,954
7/1/16	\$30,000	2.18%	\$30,598
8/5/16	\$525,000	2.18%	\$534,375
8/22/16	\$250,000	2.18%	\$254,465
9/22/16	\$185,000	2.18%	\$187,773
12/12/16	\$7,700,000	2.26%	\$7,781,050
3/31/17	\$150,000	2.78%	\$150,697
	\$21,800,000		\$20,247,628.02

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EXHIBIT 7

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

Highland Capital Management Services, Inc.
c/o Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76012
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, Highland Capital Management Services, Inc. entered into that certain promissory note in the original principal amount of \$20,247,628.02 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,757,248.95; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
D. Michael Lynn

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 8

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation ("*Strand*"), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“**Class B Limited Partner**” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“**Class B Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“**Class B NAV Ratio Trigger Period**” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“**Class C Limited Partner**” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“**Class C Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“**Class C NAV Ratio Trigger Period**” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“**Code**” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“**Contribution Note**” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“**Default Loan**” has the meaning set forth in Section 3.1(c)(i).

“**Defaulting Partner**” has the meaning set forth in Section 3.1(c).

“**Delaware Act**” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“**Effective Date**” means the date first recited above.

“**Fiscal Year**” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“**Partner**” means a General Partner or a Limited Partner.

“**Partner Nonrecourse Debt**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“**Partner Nonrecourse Deductions**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“**Partner Nonrecourse Debt Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“**Partnership**” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“**Partnership Capital**” means, as of any relevant date, the net book value of the Partnership’s assets.

“**Partnership Interest**” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“**Partnership Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“**Percentage Interest**” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“**Person**” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“**Priority Distributions**” has the meaning set forth in Section 3.9(b).

“**Profits**” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“**Profits Interest Partner**” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“**Purchase Notes**” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("*Capital Account*") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however*, any action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

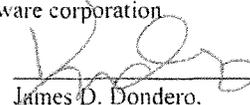
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

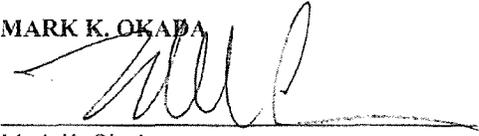
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA



Mark K. Okada

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

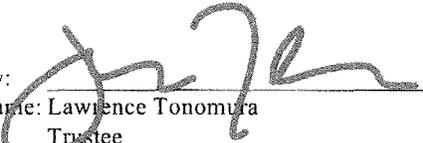
By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

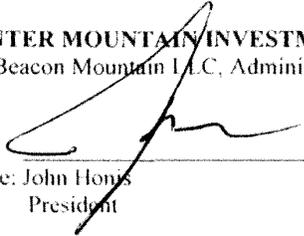
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain LLC, Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.	DEFENDANTS Highland Capital Management Services, Inc., James Dondero, Nancy Dondero, and The Dugaboy Investment Trust	
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100	ATTORNEYS (If Known) Stinson LLP (for Highland Capital Management Services, Inc. and Nancy Dondero); Heller, Draper & Horn, L.L.C. (for The Dugaboy Investment Trust)	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Turnover Pursuant to 11 USC 542(b); Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 548(a)(1)(A) and 550; Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 544(b) and 550 and Tex. Bus. & C. Code 24.005(a)(1); Declaratory Relief; Breach of Fiduciary Duty; Aiding & Abetting Breach of Fiduciary Duty		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <p style="text-align: center;">(continued next column)</p>	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input checked="" type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ Damages in an amount to be determined at trial	
Other Relief Sought Turnover of amounts due under note, avoidance of transfers to defendants, declaratory relief, punitive and exemplary damages, costs, attorneys' fees		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE August 27, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 61

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
(II) TURNOVER OF PROPERTY, (III) FRAUDULENT TRANSFER, AND (IV)
BREACH OF FIDUCIARY DUTY**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”), by its undersigned counsel, as and for its amended complaint (the “Complaint”) against defendants HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“HCRE”), James Dondero (“Mr. Dondero”), Nancy Dondero (“Ms. Dondero”), and The Dugaboy Investment Trust (“Dugaboy” and together with HCRE, Mr. Dondero, and Ms. Dondero, the “Defendants”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Defendants in connection with HCRE’s defaults under (i) four demand notes, in the aggregate principal amount of \$4,250,000, and payable upon the Debtor’s demand, and (ii) one term note, in the aggregate principal amount of \$6,059,831.51, payable in the event of default, all executed by HCRE in favor of the Debtor. HCRE has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. In paragraph 58 of HCRE’s *First Amended Answer to Plaintiff’s Complaint* [Docket No. 34], HCMS contends that the Debtor orally agreed to relieve it of the obligations under the Notes (as defined below) upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). HCRE further contends that the Alleged Agreement was entered into between James Dondero and his sister, Nancy Dondero, as representative of a majority of the Class A

shareholders of the Plaintiff, including Dugaboy (the “Representative”), acting on behalf of the Debtor. At the time Mr. Dondero entered into the Alleged Agreement on behalf of HCRE, he controlled both HCRE and the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Notes.

4. Nevertheless, the Debtor amends its Complaint to add certain claims and name additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against HCMS for breach of its obligations under the Notes and for turnover, the Debtor adds alternative claims (a) against HCMS for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. As remedies, the Debtor seeks (a) damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor’s costs of collection (including all court costs and reasonable attorneys’ fees and expenses, as provided for in the notes), for HCRE’s breach of its obligations under the Notes, and (b) turnover by HCRE to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, HCRE pursuant to the Notes; (d) declaratory relief, and (e) damages arising from the Defendants’ breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. Upon information and belief, HCRE is a limited liability company with offices located in Dallas, Texas, and is organized under the laws of the state of Delaware.

12. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor's President and Chief Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled HCRE; Mr. Dondero also controlled the Debtor until January 9, 2020.

13. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero's family investment trusts for which is he a lifetime beneficiary.

14. Upon information and belief, Nancy Dondero is an individual residing in the state of Florida and who is Mr. Dondero's sister, and a trustee of Dugaboy.

CASE BACKGROUND

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

16. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a) Redeemer Committee of Highland Crusader Fund ("Redeemer"), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

17. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors' Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

19. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

STATEMENT OF FACTS

A. The HCRE Demand Notes

20. HCRE is the maker under a series of demand notes in favor of the Debtor.

21. Specifically, on November 27, 2013, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$100,000 (“HCRE’s First Demand Note”). A true and correct copy of HCRE’s First Demand Note is attached hereto as Exhibit 1.

22. On October 12, 2017, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“HCRE’s Second Demand Note”). A true and correct copy of HCRE’s Second Demand Note is attached hereto as Exhibit 2.

23. On October 15, 2018, 2017, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$750,000 (“HCRE’s Third Demand Note”). A true and correct copy of HCRE’s Third Demand Note is attached hereto as Exhibit 3.

24. On September 25, 2019, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$900,000 (“HCRE’s Fourth Demand Note,” and collectively, with HCRE’s First Demand Note, HCRE’s Second Demand Note, and HCRE’s Third Demand Note, the “Demand Notes”). A true and correct copy of HCRE’s Fourth Demand Note is attached hereto as Exhibit 4.

25. Section 2 of the Demand Notes provide: “**Payment of Principal and Interest**. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

26. Section 4 of the Demand Notes provide:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice

of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

27. Section 6 of the Demand Notes provide:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. HCRE's Defaults Under Each Demand Note

28. By letter dated December 3, 2020, the Debtor made demand on HCRE for payment of the Demand Note Repayment Amount by December 11, 2020 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 5**. The Demand Letter provides:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$5,012,260.96, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

29. Despite the Debtor's demand, HCRE did not pay all or any portion of the amount demanded by the Debtor on December 11, 2020, or at any time thereafter.

30. As of December 11, 2020, there was an outstanding principal amount of \$171,542 on HCRE's First Demand Note and accrued but unpaid interest in the amount of \$526.10, resulting in a total outstanding amount as of that date of \$172,068.10.

31. As of December 11, 2020, there was an outstanding principal balance of \$3,149,919.12 on HCRE's Second Demand Note and accrued but unpaid interest in the amount of \$41,423.60, resulting in a total outstanding amount as of that date of \$3,191,342.72.

32. As of December 11, 2020, there was an outstanding principal balance of \$874,977.53 on HCRE's Third Demand Note and accrued but unpaid interest in the amount of \$10,931.23, resulting in a total outstanding amount as of that date of \$885,908.76.

33. As of December 11, 2020, there was an outstanding principal balance of \$750,279.14 on HCRE's Fourth Demand Note and accrued but unpaid interest in the amount of \$12,662.24, resulting in a total outstanding amount as of that date of \$762,941.38.

34. Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Demand Notes was \$5,012,260.96.

35. Pursuant to Section 4 of each Note, each Note is in default, and is currently due and payable.

C. The HCRE Term Note

36. HCRE is the maker under a term note in favor of the Debtor.

37. Specifically, on May 31, 2017, HCRE executed a term note in favor of the Debtor, as payee, in the original principal amount of \$6,059,831 (the "Term Note," and together with the Demand Notes, the "Notes"). A true and correct copy of the Term Note is attached hereto as **Exhibit 6**.

38. Section 2 of the Term Note provides: "**Payment of Principal and Interest**. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of

this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the “**Maturity Date**”).

39. Section 3 of the Term Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

40. Section 4 of the Term Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

41. Section 6 of the Term Note provides:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

D. HCRE’s Default Under the Term Note

42. HCRE failed to make the payment due under the Term Note on December 31, 2020.

43. By letter dated January 7, 2021, the Debtor made demand on HCRE for immediate payment under the Term Note (the “**Second Demand Letter**”). A true and correct copy of the Second Demand Letter is attached hereto as **Exhibit 7**. The Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84; however, interest continues to accrue under the Note.

The Term Note is in default, and payment is due immediately.

Second Demand Letter (emphasis in the original).

44. Despite the Debtor's demands, HCRE did not pay the amount demanded by the debtor on January 7, 2021, or at any time thereafter.

45. As of January 8, 2021, the total outstanding principal and accrued but unpaid interest under the Term Note was 6,145,466.84.

46. Pursuant to Section 4 of the Term Note, the Note is in default, and is currently due and payable.

E. The Debtor Files the Original Complaint

47. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for HCRE's breach of its obligations under the Notes and (ii) turnover by HCRE for the outstanding amounts under the Notes, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

F. HCRE's Affirmative Defenses

48. On March 13, 2021, HCMS filed *Highland Capital Management Services, Inc.'s Answer to Plaintiff's Complaint* [Docket No. 6] (the "Original Answer"). In its Original Answer, HCMS asserted four affirmative defenses: (i) the claims are barred in whole or in part under the doctrines of justification or repudiation, (ii) waiver, (iii) estoppel, and (iv) offset and/or setoff (the "Setoff Defense"). *See id.* ¶¶ 55-58.

49. On June 11, 2021, HCRE filed its *First Amended Answer to Plaintiff's Complaint* [Docket No. 34] (the "Amended Answer"), that omitted the Setoff Defense but asserted two affirmative defenses: (i) the Debtor previously agreed that it would not collect on the Notes "upon fulfillment of conditions subsequent" (*i.e.*, the Alleged Agreement) *id.* ¶ 58, and (ii) the Notes are "ambiguous," *id.* ¶ 59.

50. According to HCRE, the Alleged Agreement was orally entered into "sometime between December of the year each note was made and February of the following year."

51. According to HCRE, Mr. Dondero, acting on its behalf, entered into the Alleged Agreement with his sister, Nancy Dondero, acting as the Representative.

52. Mr. Dondero controlled the Debtor at the time he entered into the Alleged Agreement on behalf of HCRE.

53. Upon information and belief, the Debtor's books and records do not reflect the Alleged Agreement.

G. Dugaboy Lacked Authority to Act on Behalf of the Debtor

54. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the "Limited Partnership Agreement"), and attached hereto as **Exhibit 8**, Dugaboy was not authorized to enter into the Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as "Partnership" is defined in the Limited Partnership Agreement).

55. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 8, § 4.2(b).

56. No provision in the Limited Partnership Agreement authorizes any of the Partnership's limited partners to bind the Partnership.

57. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor.

FIRST CLAIM FOR RELIEF
(Against HCRE)

(For Breach of Contract)

58. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

59. Each Note is a binding and enforceable contract.

60. HCRE breached each Demand Note by failing to pay all amounts due to the Debtor upon the Debtor's demand.

61. HCRE breached the Term Note by failing to pay all amounts due to the Debtor upon HCRE's default and acceleration.

62. Pursuant to each Note, the Debtor is entitled to damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCRE's breach of its obligations under each of the Notes.

63. As a direct and proximate cause of HCRE's breach of each Demand Note, the Debtor has suffered damages in the amount of at least \$5,012,260.96, as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

64. As a direct and proximate cause of HCRE's breach of the Term Note, the Debtor has suffered damages in the amount of at least \$6,145,466.84, as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Against HCRE)
(Turnover by HCRE Pursuant to 11 U.S.C. § 542(b))

65. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

66. HCRE owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each of the Notes, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCRE's breach of its obligations under each of the Notes

67. Each Demand Note is property of the Debtor's estate and the amounts due under each Demand Note is matured and payable upon demand.

68. The Term Note is property of the Debtor's estate and the amounts due under the Term Note is matured and payable upon default and acceleration.

69. The Debtor has made demand for turnover of the amounts due under each of the Notes.

70. As of the date of filing this Complaint, HCRE has not turned over to the Debtor all or any of the amounts due under each of the Notes.

71. The Debtor is entitled to the turnover of all amounts due under each of the Notes.

THIRD CLAIM FOR RELIEF

(Against HCRE)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

72. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

73. The Debtor made the transfers pursuant to the Alleged Agreement within two years of the Petition Date.

74. Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

- (a) The transfers were made to, or for the benefit of, HCRE, an insider of the Debtor.
- (b) Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with his sister, Nancy Dondero.
- (c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.
- (d) The Debtor's books and record do not reflect the Alleged Agreement.
- (e) The Alleged Agreement was not subject to negotiation.
- (f) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

75. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt HCRE incurred under the Notes demonstrates a scheme of fraud.

76. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCRE.

77. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer thereunder, and (ii) recovering from HCRE an amount equal to all obligations remaining under the Notes.

FOURTH CLAIM FOR RELIEF
(Against HCRE)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

78. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

79. The Debtor made the transfers pursuant to the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

80. Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

- (g) The transfers were made to, or for the benefit of, HCRE, an insider of the Debtor.
- (h) Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with his sister, Nancy Dondero.
- (i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.
- (j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.
- (k) The Alleged Agreement was not subject to negotiation.
- (l) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

81. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCRE.

82. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer thereunder, and (ii) recovering from HCRE an amount equal to all obligations remaining under the Notes.

FIFTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

83. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

84. A bona fide, actual, present dispute exists between the Debtor, on the one hand, and Dugaboy and Ms. Dondero on the other hand, concerning whether Dugaboy and/or Ms. Dondero, acting as the Representative, were authorized to enter into the Alleged Agreement on the Debtor's behalf.

85. A judgment declaring the parties' respective rights and obligations will resolve their dispute.

86. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement,

- (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership,
- (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(Breach of Fiduciary Duty)

87. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

88. If Dugaboy, as a limited partner, or Ms. Dondero, as Representative, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero would owe the Debtor a fiduciary duty.

89. If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

90. Accordingly, the Debtor is entitled to recover from Dugaboy and Ms. Dondero (a) actual damages that the Debtor suffered as a result of their breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

91. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

92. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

93. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

94. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

95. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero’s breaches of fiduciary duties, and (b) for punitive and exemplary damages.

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor’s cost of collection (including all court costs and reasonable attorneys’ fees and expenses);
- (ii) On its Second Claim for Relief, ordering turnover by HCRE to the Debtor of an amount equal to (a) the aggregate principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor’s cost of collection (including all court costs and reasonable attorneys’ fees and expenses);

- (iii) On its Third Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement arising from actual fraudulent transfer under section 548 of the Bankruptcy Code;
- (iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under Tex. Bus. & C. Code § 24.005(a)(1);
- (v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;
- (vi) On its Sixth Claim for Relief, actual damages from Dugaboy and Ms. Dondero, in an amount to be determined at trial, that Debtor suffered as a result of their breach of fiduciary duty, and for punitive and exemplary damages;
- (vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered

as a result of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages; and

(iii) Such other and further relief as this Court deems just and proper.

Dated: As of July 13, 2021.

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
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ikharasch@pszjlaw.com
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hwinograd@pszjlaw.com

-and-

/s/ Zachery Z. Annable

HAYWARD PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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EXHIBIT 1

PROMISSORY NOTE

\$100,000

November 27, 2013

FOR VALUE RECEIVED, HCRE PARTNERS, LLC (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of ONE HUNDRED THOUSAND and 00/100 Dollars (\$100,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

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EXHIBIT 2

PROMISSORY NOTE

\$2,500,000

October 12, 2017

FOR VALUE RECEIVED, HCRE PARTNERS, LLC ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of TWO MILLION, FIVE HUNDRED THOUSAND and 00/100 Dollars (\$2,500,000.00), together with interest, on the terms set forth below (the "**Note**"). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

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EXHIBIT 3

PROMISSORY NOTE

\$750,000

October 15, 2018

FOR VALUE RECEIVED, HCRE PARTNERS, LLC (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of SEVEN HUNDRED FIFTY THOUSAND and 00/100 Dollars (\$750,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

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EXHIBIT 4

PROMISSORY NOTE

\$900,000

September 25, 2019

FOR VALUE RECEIVED, HCRE PARTNERS, LLC (“*Maker*”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, LP. (“*Payee*”), in legal and lawful tender of the United States of America, the principal sum of NINE HUNDRED THOUSAND and 00/100 Dollars (\$900,000.00), together with interest, on the terms set forth below (the “*Note*”). All sums hereunder are payable to Payee at 300 Crescent Court, Dallas, TX 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at a rate equal to 8.00% per annum from the date hereof until maturity, compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable on demand of the Payee.

2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or

performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

MAKER:



HCRE PARTNERS, LLC

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EXHIBIT 5

HIGHLAND CAPITAL MANAGEMENT, L.P.

December 3, 2020

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)
c/o NexPoint Advisors, LP
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Notes:

Dear Mr. Dondero,

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“Maker”) entered into the following promissory notes (collectively, the “Notes”) in favor of Highland Capital Management, L.P. (“Payee”):

Date Issued	Original Principal Amount	Outstanding Principal Amount (12/11/20)	Accrued But Unpaid Interest (12/11/20)	Total Amount Outstanding (12/11/20)
11/27/13	\$100,000	\$171,542.00	\$526.10	\$172,068.10
10/12/17	\$2,500,000	\$3,149,919.12	\$41,423.60	\$3,191,342.72
10/15/18	\$750,000	\$874,977.53	\$10,931.23	\$885,908.76
9/25/19	\$900,000	\$750,279.14	\$12,662.24	\$762,941.38
TOTALS	\$4,250,000	\$4,946,717.79	\$65,543.17	\$5,012,260.96

As set forth in Section 2 of each of the Notes, accrued interest and principal is due and payable upon the demand of Payee. By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$5,012,260.96, which represents all accrued and unpaid interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Payments on the Notes must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Notes or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Notes will continue to accrue until the Notes are paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 6

PROMISSORY NOTE

\$6,059,831.51

May 31, 2017

THIS PROMISSORY NOTE (this "**Note**") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from HCRE Partners, LLC, as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "**Prior Notes**"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, HCREA PARTNERS, LLC ("**Maker**") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("**Payee**"), in legal and lawful tender of the United States of America, the principal sum of SIX MILLION, FIFTY NINE THOUSAND, EIGHT HUNDRED THIRTY ONE AND 51/100 DOLLARS (\$6,059,831.51), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of eight percent (8.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "**Annual Installment**") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "**Maturity Date**").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

HCRE PARTNERS, LLC

By: 

Name: James Dondero

Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
1/9/14	\$100,000.00	8.00%	\$108,000.00
1/29/14	\$600,000.00	8.00%	\$648,000.00
3/10/14	\$2,000,000.00	8.00%	\$2,009,643.84
3/28/14	\$50,000.00	8.00%	\$54,000.00
1/26/15	\$1,500,000.00	8.00%	\$1,545,356.16
4/2/15	\$1,500,000.00	8.00%	\$1,545,356
	\$5,750,000.00		\$6,059,831.51

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EXHIBIT 7

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)
c/o NexPoint Advisors, LP
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“Maker”) entered into that certain promissory note in the original principal amount of \$6,059,831.51 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

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Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

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EXHIBIT 8

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation ("*Strand*"), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“*Additional Capital Contribution*” has the meaning set forth in Section 3.1(b) of this Agreement.

“*Adjusted Capital Account Deficit*” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“*Affiliate*” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term “*control*” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“*Agreement*” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“*Business Day*” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“*Capital Account*” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“*Capital Contribution*” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“*Certificate of Limited Partnership*” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“*Class A Limited Partners*” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“*Class A Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“*Class B Limited Partner*” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“*Class B Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“*Class B NAV Ratio Trigger Period*” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“*Class C Limited Partner*” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“*Class C Limited Partnership Interest*” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“*Class C NAV Ratio Trigger Period*” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“*Code*” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“*Contribution Note*” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“*Default Loan*” has the meaning set forth in Section 3.1(c)(i).

“*Defaulting Partner*” has the meaning set forth in Section 3.1(c).

“*Delaware Act*” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“*Effective Date*” means the date first recited above.

“*Fiscal Year*” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“**Partner**” means a General Partner or a Limited Partner.

“**Partner Nonrecourse Debt**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“**Partner Nonrecourse Deductions**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“**Partner Nonrecourse Debt Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“**Partnership**” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“**Partnership Capital**” means, as of any relevant date, the net book value of the Partnership’s assets.

“**Partnership Interest**” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“**Partnership Minimum Gain**” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“**Percentage Interest**” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“**Person**” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“**Priority Distributions**” has the meaning set forth in Section 3.9(b).

“**Profits**” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“**Profits Interest Partner**” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“**Purchase Notes**” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; *provided, however*, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); *provided, further* this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assess or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(c) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however*, any action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

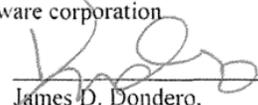
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

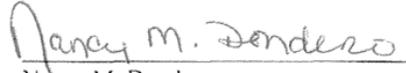
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

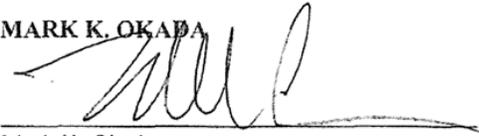
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

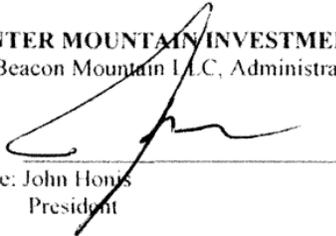
By: _____
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain L.L.C, Administrator

By:  _____

Name: John Honis

Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class __ Limited Partner holding a __% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class __ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.		DEFENDANTS HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), James Dondero, Nancy Dondero, and The Dugaboy Investment Trust
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100		ATTORNEYS (If Known) Stinson LLP (for NexPoint Real Estate Partners, LLC and Nancy Dondero); Heller, Draper & Horn, L.L.C. (for The Dugaboy Investment Trust)
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee		PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Turnover Pursuant to 11 USC 542(b); Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 548(a)(1)(A) and 550; Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 544(b) and 550 and Tex. Bus. & C. Code 24.005(a)(1); Declaratory Relief; Breach of Fiduciary Duty; Aiding & Abetting Breach of Fiduciary Duty		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)		FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input checked="" type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law		<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
<input type="checkbox"/> Check if a jury trial is demanded in complaint		Demand \$ Damages in an amount to be determined at trial
Other Relief Sought Turnover of amounts due under note, avoidance of transfers to defendants, declaratory relief, punitive and exemplary damages, costs, attorneys' fees		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE August 27, 2021	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 62

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:

§

Case No. 19-34054-SGJ-11

HIGHLAND CAPITAL MANAGEMENT, L.P.,

§

Chapter 11

Debtor.

§

§

§

§

HIGHLAND CAPITAL MANAGEMENT, L.P.,

§

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§

§

Plaintiff.

v.

§

§

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§

§

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§

§

**JAMES DONDERO, NANCY DONDERO,
AND THE DUGABOY INVESTMENT TRUST**

Adversary No.: 21-03003

Defendants.

DEFENDANT JAMES DONDERO’S ANSWER TO AMENDED COMPLAINT

Defendant James Dondero ("James Dondero"), defendant in the above-styled and numbered adversary proceeding (the "Adversary Proceeding") filed by Highland Capital Management, L.P. (the "Plaintiff"), hereby files this Answer (the "Answer") responding to the



Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Amended Answer, it is denied.

In filing this Answer, Defendant James Dondero does not waive any rights to compel arbitration, as set forth in Defendants’ Motion to Compel Arbitration [Adv. Dkt. 80], filed on September 1, 2021.¹

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff’s objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant James Dondero admits that he amended his answer and served sworn responses to interrogatories and that these documents speak for themselves. To the extent paragraph 2 alleges other facts, Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 2 of the Amended Complaint and therefore denies the same.

3. Defendant James Dondero denies the allegations in paragraph 3 of the Amended Complaint.

¹ *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff’s complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

4. Paragraph 4 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant James Dondero admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant James Dondero admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant James Dondero denies that a breach of contract claim is core. Defendant James Dondero denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. Defendant James Dondero admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. Defendant James Dondero does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in paragraph 8 not expressly admitted are denied.

9. Subject to the Defendants' Motion to Compel Arbitration, Defendant James Dondero admits paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant James Dondero admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant James Dondero admits the first and second sentences of the allegations in paragraph 11 of the Amended Complaint. The third sentence of paragraph 11 asserts a legal conclusion to which no response is required. To the extent a response is required or appropriate, Defendant James Dondero admits that he was the President of the Debtor's General Partner, Strand Advisors, Inc. and the Debtor's CEO until his resignation on January 9, 2020. Defendant James Dondero denies any remaining allegations contained in paragraph 11.

12. Defendant James Dondero admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant James Dondero admits that Nancy Dondero is his sister and admits that she is a trustee of Dugaboy. Any allegations in paragraph 13 not expressly admitted are denied.

CASE BACKGROUND

14. Defendant James Dondero admits the allegations in paragraph 14 of the Amended Complaint.

15. Defendant James Dondero admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant James Dondero admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant James Dondero admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant James Dondero admits the allegations in paragraph 18 of the Amended Complaint.

STATEMENT OF FACTS

19. Defendant James Dondero admits that he has executed promissory notes under which the Debtor is the payee. Any allegations in paragraph 19 not expressly admitted are denied.

20. Defendant James Dondero admits that he executed a note as alleged in the first sentence of paragraph 20 of the Amended Complaint. Defendant James Dondero admits that the attached document appears to be a copy of the referenced note.

21. Defendant James Dondero admits that he executed a note as alleged in the first sentence of paragraph 21 of the Amended Complaint. Defendant James Dondero admits that the attached document appears to be a copy of the referenced note.

22. Defendant James Dondero admits that he executed a note as alleged in the first sentence of paragraph 22 of the Amended Complaint. Defendant James Dondero admits that the attached document appears to be a copy of the referenced note.

23. Defendant James Dondero admits that Section 2 of each note attached to the Amended Complaint contains the provision quoted in paragraph 23 of the Amended Complaint.

24. Defendant James Dondero denies the allegations in paragraph 24 of the Amended Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

25. Defendant James Dondero denies the allegations in paragraph 25 of the Amended Complaint. It appears that the provisions of each Note differ. Accordingly, the allegations made in this paragraph are denied.

26. In response to paragraph 26 of the Amended Complaint, Defendant James Dondero admits that Exhibit 4 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 26 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. Defendant James Dondero otherwise admits paragraph 27 of the Complaint.

28. Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant James Dondero denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant James Dondero admits that the Debtor filed the Original Complaint in this action on January 22, 2021 as alleged in the first sentence of paragraph 33 of the Amended Complaint. Defendant James Dondero denies he is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant James Dondero admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant James Dondero admits the allegations in paragraph 35 of the Amended Complaint.

36. In response to the allegations in paragraph 36 of the Amended Complaint, Defendant James Dondero admits that the Alleged Agreement was orally entered into in January or February 2019 or thereabouts. To the extent not expressly admitted, paragraph 36 of the Amended Complaint is denied.

37. Defendant James Dondero admits the allegations in paragraph 37 of the Amended Complaint.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no response is required. To the extent a response is required or appropriate, Defendant James Dondero admits that he was the President of the Debtor's General Partner, Stand Advisors, Inc. and the Debtor's CEO until his resignation on January 9, 2020. To the extent not expressly admitted, paragraph 38 of the Amended Complaint is denied.

39. In response to paragraph 39 of the Amended Complaint, Defendant James Dondero informed the Debtor's CFO that the loans were potentially forgivable and testified that he doesn't remember if he told the Debtor's CFO about the Alleged Agreement. Subject to the

foregoing, Defendant James Dondero otherwise admits the allegations in paragraph 39 of the Amended Complaint.

40. In response to paragraph 40 of the Amended Complaint, Defendant James Dondero admits that he discussed the Alleged Agreement with Nancy Dondero and that no one else participated in the discussions surrounding the execution or authorization of the Alleged Agreement. To the extent not expressly admitted, paragraph 40 of the Amended Complaint is denied.

41. Defendant James Dondero lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 41 of the Amended Complaint and therefore denies same.

42. Defendant James Dondero denies the allegations in paragraph 42 of the Amended Complaint.

43. Defendant James Dondero admits the allegations in paragraph 43 of the Amended Complaint.

44. Paragraph 44 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FIRST CLAIM FOR RELIEF
(Against James Dondero)
(Breach of Contract)

46. Paragraph 46 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

49. Paragraph 49 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SECOND CLAIM FOR RELIEF
(Against James Dondero)
(Turnover Pursuant to 11 U.S.C. § 542(b))

51. Paragraph 51 of the Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant James Dondero admits that the Plaintiff transmitted the Demand Letter, and that document speaks for itself. To the extent paragraph 55 alleges other facts, Defendant James Dondero lacks knowledge or information sufficient to form

a belief about the truth of the allegations in paragraph 55 of the Amended Complaint and therefore denies the same.

56. Paragraph 56 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

THIRD CLAIM FOR RELIEF
(Against James Dondero)
(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 548(a)(1)(A) and 550)

58. Paragraph 58 of the Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and therefore it is denied.

62. Paragraph 62 of the Amended Complaint states a legal conclusion that does not require a response and therefore it is denied.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and therefore it is denied.

FOURTH CLAIM FOR RELIEF

(Against James Dondero)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

64. Paragraph 64 of the Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

67. Paragraph 67 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

68. Paragraph 68 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy)

(For Declaratory Relief: --11 U.S.C. § 105(a) and Fed. R. Bankr. P 7001)

69. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

70. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

71. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

72. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy)
(Breach of Fiduciary Duty)

73. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

74. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

75. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

76. This claim is only asserted against Defendant The Dugaboy Investment Trust. Therefore, Defendant James Dondero is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

77. Defendant James Dondero is moving to dismiss this claim. Therefore, he is not required to respond to this claim at this time.

78. Defendant James Dondero is moving to dismiss this claim. Therefore, he is not required to respond to this claim at this time.

79. Defendant James Dondero is moving to dismiss this claim. Therefore, he is not required to respond to this claim at this time.

80. Defendant James Dondero is moving to dismiss this claim. Therefore, he is not required to respond to this claim at this time.

81. Defendant James Dondero is moving to dismiss this claim. Therefore, he is not required to respond to this claim at this time.

Defendant James Dondero denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), and (vii).

AFFIRMATIVE DEFENSES

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

83. Defendant James Dondero further asserts that Plaintiff's claims are barred, in whole or in part, due to waiver.

84. Defendant James Dondero further asserts that Plaintiff's claims are barred, in whole or in part, due to estoppel.

85. Defendant James Dondero further asserts that Note is ambiguous.

86. Defendant James Dondero further asserts that Plaintiff's claims may be barred, in whole or in part, due to failure of consideration.

87. Defendant James Dondero further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because at all relevant times Defendant James Dondero acted in good faith.

88. Defendant James Dondero further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the alleged fraudulent transfer (*i.e.*, the "Alleged Agreement") was taken in good faith and for reasonably equivalent value.

89. Defendant James Dondero further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because there was no intent to hinder, delay, or defraud any creditors of the Debtor by entering into the "Alleged Agreement."

90. Defendant James Dondero further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the Debtor was solvent at the time the "Alleged Agreement" was made.

91. Defendant James Dondero further asserts that Plaintiff's claims must be resolved in arbitration.

JURY DEMAND

92. Except to the extent compelled to arbitration, Defendant James Dondero demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

93. Defendant James Dondero does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant James Dondero respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take

nothing on the Amended Complaint and provide Defendant James Dondero such other relief to which he is entitled.

Dated: September 1, 2021

Respectfully submitted,

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

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Michael P. Aigen

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ATTORNEYS FOR DEFENDANT

JAMES DONDERO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

EXHIBIT 63

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Counsel for Defendant NexPoint Advisors, L.P.

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

In re: § Case No. 19-34054-SGJ-11
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § Chapter 11
§
Debtor. §

§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. § Adversary No.: 21-03005-sgj
§
NEXPOINT ADVISORS, L.P., JAMES §
DONDERO, NANCY DONDERO, AND §
DUGABOY INVESTMENT TRUST, §
§
Defendants. §

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 note expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF
(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF

(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

EXHIBIT 64

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*Counsel for Defendant Highland Capital
Management Services, Inc.*

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §

v. §
§ **Adversary No.: 21-03006-sgj**
§
HIGHLAND CAPITAL MANAGEMENT §
SERVICES, INC., JAMES DONDERO, §
NANCY DONDERO, AND THE DUGABOY §
INVESTMENT TRUST, §
Defendants. §

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.'S
ANSWER TO AMENDED COMPLAINT**

Defendant Highland Capital Management Services, Inc. ("HCMS"), defendant in the above-styled and numbered adversary proceeding (the "Adversary Proceeding") filed by Highland Capital Management, L.P. (the "Plaintiff"), hereby files this Answer (the "Answer") responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 68] (the "Amended

Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Amended Answer, it is denied.

In filing this Answer, Defendant HCMS does not waive any rights to compel arbitration, as set forth in Defendants’ Motion to Compel Arbitration [Adv. Dkt. 70], filed on September 1, 2021.¹

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff’s objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant HCMS admits that HCMS’ First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant HCMS denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff’s objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

¹ *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff’s complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

JURISDICTION AND VENUE

6. Defendant HCMS admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant HCMS admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant HCMS denies that a breach of contract claim is core. Defendant HCMS denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. Defendant HCMS admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. Defendant HCMS does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in paragraph 8 not expressly admitted are denied.

9. Subject to the Defendants' Motion to Compel Arbitration, Defendant HCMS admits paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant HCMS admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant HCMS admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant HCMS admits that Defendant James Dondero was the President of the Debtor's General Partner, Strand Advisors, Inc. and the Debtor's CEO until his resignation on

January 9, 2020. The third sentence of paragraph 12 asserts a legal conclusion to which no response is required. Defendant HCMS denies any remaining allegations contained in paragraph 12.

13. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant HCMS admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant HCMS admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant HCMS admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant HCMS admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant HCMS admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant HCMS admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 not expressly admitted are denied.

21. Defendant HCMS admits that it signed the document attached to the Complaint as Exhibit 1. Defendant HCMS denies any allegations in paragraph 21 that are not expressly admitted.

22. Defendant HCMS admits that it signed the document attached to the Complaint as Exhibit 2. Defendant HCMS denies any allegations in paragraph 22 that are not expressly admitted.

23. Defendant HCMS denies that it signed the document attached to the Complaint as Exhibit 3. Defendant HCMS denies any allegations in paragraph 23 that are not expressly admitted.

24. Defendant HCMS denies that it signed the document attached to the Complaint as Exhibit 4. Defendant HCMS denies any allegations in paragraph 24 that are not expressly admitted.

25. Defendant HCMS admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Complaint in paragraph 25.

26. Defendant HCMS admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Complaint in paragraph 26.

27. Defendant HCMS admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 to the Complaint in paragraph 27.

28. Defendant HCMS admits that Plaintiff sent it a copy of Exhibit 5. Defendant HCMS admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of

paragraph 28. Defendant HCMS denies any allegations in paragraph 28 that are not expressly admitted.

29. To the extent paragraph 29 asserts a legal conclusion, no response is required, and it is denied. Defendant HCMS otherwise admits the allegations in paragraph 29.

30. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30 of the Amended Complaint and therefore denies the same.

31. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 32 of the Amended Complaint and therefore denies the same.

33. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 33 of the Amended Complaint and therefore denies the same.

34. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 34 of the Amended Complaint and therefore denies the same. Defendant HCMS denies the allegations in the second sentence of paragraph 34 of the Amended Complaint.

35. Defendant HCMS admits that it has executed at least one promissory note under which Debtor is the payee. Defendant HCMS denies any allegations in paragraph 35 that are not expressly admitted.

36. Defendant HCMS admits that it signed the document attached to the Amended Complaint as Exhibit 6. Defendant HCMS denies any allegations in paragraph 29 that are not expressly admitted.

37. Defendant HCMS admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Amended Complaint in paragraph 37. Defendant HCMS denies any allegations in paragraph 37 that are not expressly admitted.

38. Defendant HCMS admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Amended Complaint in paragraph 38. Defendant HCMS denies any allegations in paragraph 37 that are not expressly admitted.

39. Defendant HCMS admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Amended Complaint in paragraph 39. Defendant HCMS denies any allegations in paragraph 37 that are not expressly admitted.

40. Defendant HCMS admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Amended Complaint in paragraph 40. Defendant HCMS denies any allegations in paragraph 37 that are not expressly admitted.

41. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. Defendant HCMS otherwise denies paragraph 41 of the Amended Complaint.

42. Defendant HCMS admits that Plaintiff sent it a copy of Exhibit 7. Defendant HCMS admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of paragraph 42 of the Amended Complaint. Defendant HCMS denies any allegations in paragraph 42 that are not expressly admitted.

43. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 43 of the Amended Complaint and therefore denies the same.

44. Defendant HCMS denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant HCMS admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 45 of the Amended Complaint. Defendant HCMS denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 45 of the Amended Complaint is denied.

46. Defendant HCMS admits the allegations in paragraph 46 of the Amended Complaint.

47. Defendant HCMS admits the allegations in paragraph 47 of the Amended Complaint.

48. In response to the allegations in paragraph 48 of the Amended Complaint, Defendant HCMS admits that HCMS' First Amended Answer speaks for itself. To the extent paragraph 48 contradicts the First Amended Answer, it is denied.

49. Defendant HCMS admits that HCMS' First Amended Answer speaks for itself. To the extent paragraph 49 contradicts the First Amended Answer, it is denied.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

51. Defendant HCMS lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 51 of the Amended Complaint and therefore denies the same.

52. Defendant HCMS denies the allegations in paragraph 52 of the Amended Complaint.

53. Defendant HCMS admits that Exhibit 8 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 53 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 53 of the Amended Complaint is denied.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against HCMS)
(for Breach of Contract)**

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

61. Defendant HCMS denies paragraph 61 of the Amended Complaint.

62. Defendant HCMS denies paragraph 62 of the Amended Complaint.

SECOND CLAIM FOR RELIEF
(against HCMS)
(Turnover by HCMS Pursuant to 11 U.S.C. § 542(b))

63. Paragraph 63 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

67. Defendant HCMS admits that Plaintiff transmitted Exhibits 5 and 7 to the Amended Complaint.

68. Paragraph 68 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

69. Defendant HCMS denies paragraph 69 of the Amended Complaint.

THIRD CLAIM FOR RELIEF
(Against HCMS)
(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

70. Paragraph 70 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

71. Paragraph 71 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

72. Paragraph 72 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

73. Paragraph 73 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

74. Paragraph 74 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

75. Paragraph 75 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FOURTH CLAIM FOR RELIEF

(Against HCMS)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

76. Paragraph 76 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

77. Paragraph 77 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

78. Paragraph 78 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

79. Paragraph 79 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

80. Paragraph 80 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FIFTH CLAIM FOR RELIEF

**(Against Dugaboy Investment Trust and Nancy Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)**

81. Paragraph 81 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

82. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

83. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

84. Paragraph 84 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF

**(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)**

85. Paragraph 85 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

86. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

87. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

88. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

89. Paragraph 89 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

90. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

91. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

92. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

93. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant HCMS is not required to respond to this claim.

Defendant HCMS denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

94. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

95. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

96. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

97. Plaintiff's claims are barred in whole or in part because prior to the demands for payment Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority

of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant HCMS believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

98. Defendant HCMS further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because at all relevant times Defendant HCMS acted in good faith.

99. Defendant HCMS further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the alleged fraudulent transfer (*i.e.*, the "Alleged Agreement") was taken in good faith and for reasonably equivalent value.

100. Defendant HCMS further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because there was no intent to hinder, delay, or defraud any creditors of the Debtor by entering into the "Alleged Agreement."

101. Defendant HCMS further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the Debtor was solvent at the time the "Alleged Agreement" was made.

102. Defendant HCMS further asserts that each Note is ambiguous as a whole based on the signatory and/or references to unspecified related agreements.

JURY DEMAND

103. Except to the extent compelled to arbitration, Defendant HCMS demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

104. Defendant HCMS does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant HCMS respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant HCMS such other relief to which it is entitled.

Dated: September 1, 2021

Respectfully submitted,

/s/ Deborah Deitsch-Perez

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**ATTORNEYS FOR DEFENDANT
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MANAGEMENT SERVICES, INC.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

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*Counsel for Defendant HCRE Partners, LLC
(n/k/a NexPoint Real Estate Partners, LLC)*

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. § **Adversary No.: 21-03007-sgj**
§
HCRE PARTNERS, LLC (n/k/a NEXPOINT §
REAL ESTATE PARTNERS, LLC), JAMES §
DONDERO, NANCY DONDERO, AND THE §
DUGABOY INVESTMENT TRUST §
§
Defendants. §

**DEFENDANT HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE
PARTNERS, LLC)’S ANSWER TO AMENDED COMPLAINT**

Defendant HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“NREP”), defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 63] (the

“Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Amended Answer, it is denied.

In filing this Answer, Defendant NREP does not waive any rights to compel arbitration, as set forth in Defendants’ Motion to Compel Arbitration [Adv. Dkt. 65], filed on September 1, 2021.¹

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff’s objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NREP admits that NREP’s First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NREP denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff’s objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

¹ *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff’s complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NREP admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NREP admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NREP denies that a breach of contract claim is core. Defendant NREP denies that a § 542(b) turnover proceeding is the appropriate mechanism to collect a contested debt. Defendant NREP admits that a § 542(b) turnover proceeding is statutorily core but denies that it is Constitutionally core under *Stern v. Marshall*. Defendant NREP does not consent to the Bankruptcy Court entering final orders or judgment in this Adversary Proceeding. Any allegations in paragraph 8 not expressly admitted are denied.

9. Subject to the Defendants' Motion to Compel Arbitration, Defendant NREP admits paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NREP admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NREP admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NREP admits that Defendant James Dondero was the President of the Debtor's General Partner, Strand Advisors, Inc. and the Debtor's CEO until his resignation on January 9, 2020. The third sentence of paragraph 12 asserts a legal conclusion to which no response is required. Defendant NREP denies any remaining allegations contained in paragraph 12.

13. Defendant NREP lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NREP lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NREP admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NREP admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NREP admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NREP admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NREP admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NREP admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 note expressly admitted are denied.

21. Defendant NREP admits that it signed the document attached to the Amended Complaint as Exhibit 1. Defendant NREP denies any allegations in paragraph 21 that are not expressly admitted.

22. Defendant NREP admits that it signed the document attached to the Amended Complaint as Exhibit 2. Defendant NREP denies any allegations in paragraph 22 that are not expressly admitted.

23. Defendant NREP admits that it signed the document attached to the Amended Complaint as Exhibit 3. Defendant NREP denies any allegations in paragraph 23 that are not expressly admitted.

24. Defendant NREP admits that it signed the document attached to the Amended Complaint as Exhibit 4. Defendant NREP denies any allegations in paragraph 24 that are not expressly admitted.

25. Defendant NREP admits that Plaintiff correctly transcribed Section 2 of Exhibits 1-4 to the Amended Complaint in paragraph 25.

26. Defendant NREP admits that Plaintiff correctly transcribed Section 4 of Exhibits 1-4 to the Amended Complaint in paragraph 26.

27. Defendant NREP admits that Plaintiff correctly transcribed Section 6 of Exhibits 1-4 to the Amended Complaint in paragraph 27.

28. Defendant NREP admits that Plaintiff sent it a copy of Exhibit 5. Defendant NREP admits that Plaintiff correctly transcribed an excerpt of Exhibit 5 in the third sentence of paragraph 28. Defendant NREP denies any allegations in paragraph 28 that are not expressly admitted.

29. To the extent paragraph 29 asserts a legal conclusion, no response is required, and it is denied. Defendant otherwise admits the allegations in paragraph 29.

30. Defendant NREP lacks sufficient information or knowledge to admit or deny the allegations in paragraph 30 and, therefore, denies them.

31. Defendant NREP lacks sufficient information or knowledge to admit or deny the allegations in paragraph 31 and, therefore, denies them.

32. Defendant NREP lacks sufficient information or knowledge to admit or deny the allegations in paragraph 32 and, therefore, denies them.

33. Defendant NREP lacks sufficient information or knowledge to admit or deny the allegations in paragraph 33 and, therefore, denies them.

34. Defendant NREP lacks sufficient information or knowledge to admit or deny the allegations in paragraph 34 and, therefore, denies them.

35. Defendant NREP denies the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NREP admits that it has executed at least one promissory note under which Debtor is the payee. Defendant NREP denies any allegations in paragraph 36 that are not expressly admitted.

37. Defendant NREP admits that it signed the document attached to the Complaint as Exhibit 6. Defendant NREP denies any allegations in paragraph 37 that are not expressly admitted.

38. Defendant NREP admits that Plaintiff correctly transcribed Section 2 of Exhibit 6 to the Amended Complaint in paragraph 38. Defendant NREP denies any allegations in paragraph 38 that are not expressly admitted.

39. Defendant NREP admits that Plaintiff correctly transcribed Section 3 of Exhibit 6 to the Amended Complaint in paragraph 39. Defendant NREP denies any allegations in paragraph 39 that are not expressly admitted.

40. Defendant NREP admits that Plaintiff correctly transcribed Section 4 of Exhibit 6 to the Amended Complaint in paragraph 40. Defendant NREP denies any allegations in paragraph 40 that are not expressly admitted.

41. Defendant NREP admits that Plaintiff correctly transcribed Section 6 of Exhibit 6 to the Amended Complaint in paragraph 41. Defendant NREP denies any allegations in paragraph 41 that are not expressly admitted.

42. To the extent paragraph 42 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant NREP otherwise denies paragraph 42 of the Amended Complaint.

43. Defendant NREP admits that Plaintiff sent it a copy of Exhibit 7. Defendant NREP admits that Plaintiff correctly transcribed an excerpt of Exhibit 7 in the third sentence of paragraph 43 of the Amended Complaint. Defendant NREP denies any allegations in paragraph 43 that are not expressly admitted.

44. To the extent paragraph 44 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. Defendant NREP otherwise admits paragraph 44 of the Amended Complaint.

45. Defendant NREP is without sufficient information or knowledge to admit or deny the allegations in paragraph 45 of the Amended Complaint and, therefore, denies them.

46. Defendant NREP denies paragraph 46 of the Amended Complaint.

47. Defendant NREP admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 47 of the Amended Complaint. Defendant NREP denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 47 of the Amended Complaint is denied.

48. Defendant NREP admits the allegations in paragraph 48 of the Amended Complaint.

49. Defendant NREP admits that NREP's First Amended Answer speaks for itself. To the extent paragraph 49 contradicts the First Amended Answer, it is denied.

50. In response to the allegations in paragraph 48 of the Amended Complaint, Defendant NREP admits that NREP's First Amended Answer speaks for itself. To the extent paragraph 50 contradicts the First Amended Answer, it is denied.

51. Defendant NREP admits that NREP's First Amended Answer speaks for itself. To the extent paragraph 51 contradicts the First Amended Answer, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

53. Defendant NREP lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 53 of the Amended Complaint and therefore denies the same.

54. Defendant NREP admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent

paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 54 of the Amended Complaint is denied.

55. Defendant NREP admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 54 of the Amended Complaint is denied.

56. Paragraph 56 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NREP)
(for Breach of Contract)**

58. Paragraph 58 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

62. Paragraph 62 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

63. Defendant NREP denies paragraph 63 of the Amended Complaint.

64. Defendant NREP denies paragraph 64 of the Amended Complaint.

SECOND CLAIM FOR RELIEF
(against NREP)
(Turnover by NREP Pursuant to 11 U.S.C. § 542(b))

65. Paragraph 65 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

67. Paragraph 67 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

68. Paragraph 68 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

69. Defendant NREP admits that Plaintiff transmitted Exhibits 5 and 7 to the Amended Complaint. Defendant NREP lacks sufficient information or knowledge to admit or deny the remaining allegations in paragraph 69 of the Amended Complaint and, therefore, denies them.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied Defendant

71. Defendant NREP denies paragraph 71 of the Amended Complaint.

THIRD CLAIM FOR RELIEF
(Against NREP)

(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

72. Paragraph 72 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

73. Paragraph 73 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

74. Paragraph 74 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

75. Paragraph 75 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

76. Paragraph 76 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

77. Paragraph 77 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FOURTH CLAIM FOR RELIEF
(Against NREP)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

78. Paragraph 78 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

79. Paragraph 79 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

80. Paragraph 80 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

81. Paragraph 81 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

82. Paragraph 82 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

83. Paragraph 83 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

84. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

85. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

86. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)

(Breach of Fiduciary Duty)

87. Paragraph 87 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

88. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

89. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

90. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

91. Paragraph 91 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

92. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

93. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

94. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

95. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NREP is not required to respond to this claim.

Defendant NREP denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

96. Plaintiff's claims are barred in whole or in part by the doctrine of justification and/or repudiation.

97. Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

98. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

99. Plaintiff's claims are barred in whole or in part because prior to the demands for payment, Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NREP believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

100. Defendant NREP further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because at all relevant times Defendant NREP acted in good faith.

101. Defendant NREP further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the alleged fraudulent transfer (*i.e.*, the "Alleged Agreement") was taken in good faith and for reasonably equivalent value.

102. Defendant NREP further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because there was no intent to hinder, delay, or defraud any creditors of the Debtor by entering into the "Alleged Agreement."

103. Defendant NREP further asserts that Plaintiff's fraudulent transfer claims should be barred, in whole or in part, because the Debtor was solvent at the time the "Alleged Agreement" was made.

104. Defendant NREP further asserts that each Note is ambiguous as a whole based on references to unspecified related agreements.

JURY DEMAND

105. Except to the extent compelled to arbitration, Defendant NREP demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

106. Defendant NREP does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NREP respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NREP such other relief to which it is entitled.

Dated: September 1, 2021

Respectfully submitted,

/s/ Deborah Deitsch-Perez

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HCRE PARTNERS, LLC (n/k/a
NEXPOINT REAL ESTATE
PARTNERS, LLC)**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

EXHIBIT 66

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ATTORNEYS FOR NANCY DONDERO

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	
	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO, NANCY DONDERO,	§	
AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	
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MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James D. Dondero, Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy”) (the “Defendants”) move this Court for an order to stay this adversary proceeding and refer the parties to arbitration, and in further support state the following:

I. STATEMENT OF FACTS

1. On December 24, 2015, Mr. Dondero, on behalf of Strand Advisors, Inc., and Nancy Dondero, on behalf of Dugaboy, executed the Fourth Amended and Restated Agreement (the “LPA”) of Limited Partnership of Highland Capital Management, L.P. (“HCM”).¹ Section 6.14 of the LPA provides for Mandatory Arbitration in the event of a legal dispute between the parties arising from the agreement (“Arbitration Provision”). Section 6.14 specifically states:

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas.

The Arbitration Provision specifically governs the discovery process for arbitration, the authority of the arbitrators, and the costs of arbitration.²

¹ The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. Declaration of Michael P Aigen dated August 30, 2021 (“Aigen Dec.”) at Ex. 1. The signatories to it are: (1) General Partner, Strand Advisors, Inc., a Delaware corporation by James D. Dondero, President; (2) Limited Partner, The Dugaboy Investment Trust by Nancy M. Dondero, its Trustee; (3) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #1 by Lawrence Tonomura, its Trustee; (4) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #2 by Lawrence Tonomura, its Trustee; (5) Limited Partner, Mark K. Okada; and (6) Limited Partner, Hunter Mountain Investment Trust by John Honis, the President of Beacon Mountain 1 LC, Administrator.

² See LPA Section 6.14, which states:

2. In 2018, Mr. Dondero executed three promissory notes (“Notes”) in favor of the Debtor. The authority to execute promissory notes in favor of the Debtor arises from Article 4 of the LPA because a General Partner has full authority to conduct the business, which includes lending and borrowing money and executing promissory notes. Article 4 states:

In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation:

....

(ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations);

....

(vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.1;

....

(vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations.

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. . . . Each party shall bear its own attorney’s fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement.

3. In addition, the LPA provides authority for partners to lend money to their Affiliates.

Section 4(e) specifically provides:

The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine: provided, however, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

In addition, Section 3.9(f) of the LPA allows for the partnership to make tax loans to the Founding Partners:

The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

4. Debtor demanded payment on the Notes and subsequently filed an adversary proceedings seeking collection, described further below. One of the affirmative defenses asserted in the adversary proceedings is that Debtor is not entitled to demand payment because, prior to the demands for payment, HCM had agreed that it would not collect the Notes, and that they would be treated as compensation to the Debtor's founder and then-CEO Jim Dondero, if any of certain conditions subsequent were met.³ Debtor refers to the agreement as the "Alleged Agreement." The condition subsequent was the sale of any of HCM's interests in certain portfolio companies (Cornerstone, Trussway and/or MGM) for a greater amount than their cost.⁴

³ See *Defendant James Dondero's Amended Answer* [Ad. No. 21-0300, Dkt. No. 16 at 6 ¶ 40].

⁴ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition of James Dondero Transcript at 212:18-25; 213:1-17.

5. Under Section 4.1(k) of the LPA, the “salaries or other compensation, if any, of the officers and agents of the Partnership [were to] be fixed from time to time by the General Partner.” Additionally, under the LPA, Dugaboy had explicit authorization to approve compensation for Jim Dondero and entities he was affiliated with, and thus bind the Partnership through, LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The General Partner and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“*Majority Interest*’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“*Class A Limited Partners*’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.⁵

The Class A shareholders included Strand Advisors, The Dugaboy Investment Trust, Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark and Pamela Okada Family Trust – Exempt Trust #2.⁶ Dugaboy alone comprised 75% of the Class A shareholders,⁷

Nancy Dondero was the Family Trustee of the Dugaboy Trust,⁸ and had the power to act for Dugaboy in this regard.⁹

After the Notes were entered into, Mr. Dondero asked Dugaboy (via Ms. Dondero) to approve an agreement that the Notes would be forgiven as compensation to Mr. Dondero upon the favorable sale of any or all of the portfolio company interests by HCM, and she did.¹⁰

⁵ Aigen Dec. Ex. 1, LPA at Exhibit A thereof). Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests.

⁶ Aigen Dec. Ex. 1, LPA at Exhibit A thereof.

⁷ *See id.*

⁸ Aigen Dec. Ex. 3, *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

⁹ Aigen Dec. Ex. 4, *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

¹⁰ Aigen Dec Ex. 2, Remote Deposition of James Dondero Transcript at 176-178.

The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“‘*Affiliate*’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘*control*’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“‘*Person*’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Mr. Dondero was an Affiliate of Strand under the LPA’s definition. Thus, Mr. Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

6. On January 22, 2021, Highland Capital Management, L.P. (“Debtor” or “Plaintiff” when describing post-petition actions and HCM when describing pre-petition actions) commenced Adversary Proceeding No. 21-03003 against Mr. Dondero, asserting a state law, non-core breach of contract claim (“Count I”) and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the Notes (“Count II”).

7. Mr. Dondero answered the adversary complaint, asserting, inter alia, that Debtor’s claims should be barred, because prior to the demand for payment HCM agreed it would not collect on the Notes upon fulfillment of conditions subsequent,¹¹ based upon what the Debtor refers to as the “Alleged Agreement.”

8. On August 23, 2021, the Court entered an order permitting Debtor to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV)*

¹¹ *Defendant James Dondero’s Amended Answer* [Ad. No. 21-03003, Dkt. No. 16].

Breach of Fiduciary Duty (“Amended Complaint”) asserting additional claims for relief including: Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550 against Mr. Dondero (“Count III”); Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1) against Mr. Dondero (“Count IV”); Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy (“Count V”); Breach of Fiduciary Duty against Dugaboy (“Count VI”); and Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero (“Count VII”). Debtor seeks avoidance of the Alleged Agreement, declaratory relief, and damages. The Parties agreed that the Defendants would answer or otherwise move against the Amended Complaints on or before September 1, 2021.¹² The new claims, under Counts V, VI, and VII are non-core contract claims that arise from the LPA, containing a broad arbitration provision. Further, the Defendants each have critical affirmative defenses for the claims for declaratory relief, breach of fiduciary, and aiding and abetting breach of fiduciary duty, that are rooted in non-core state contract law that also arise from the LPA.

9. Although Debtor alleges that it “believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the notes,”¹³ there is no doubt that adjudication of the existence and enforceability of the Alleged Agreement affects all of Debtor’s claims under Counts V, VI, and VII for declaratory relief, breach of fiduciary duty and breach of fiduciary duty. These claims

¹² See *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* attached as Exhibit C to *Debtor’s Unopposed Motion for Leave to Serve and File Amended Complaint* [Adv. No. 21-03003, Dkt. No. 73-2 at Exhibit C] stipulating to August 30, 2021 which has been extended to September 1, 2021 by the parties via email communication.

¹³ *Amended Complaint* [Adv. No. 21-03003, Dkt. No. 79 at ¶ 3].

pertain to loans made by the Debtor to its Affiliates and compensation for the Debtor's CEO, all of which are governed by the LPA.¹⁴

10. Defendants request the Court order the parties to arbitration on Counts V, VI, and VII, as provided by the pre-petition LPA entered into by the parties, and stay the adversary proceeding pending arbitration.

II. STANDARD OF REVIEW

11. When deciding whether to grant a motion to compel arbitration, the Fifth Circuit has established a two-step analysis for determining whether parties must arbitrate a particular claim or set of claims under the FAA: (A) there must be an enforceable agreement to arbitrate; and (B) the claims must be arbitrable. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted) (stating "First we must ask if the party has agreed to arbitrate the dispute. . . If so, we then ask if any federal statute or policy renders the claims non-arbitrable."); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) ("A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement."). Once a party seeking to compel arbitration establishes the asserted claims fall within a valid arbitration agreement, the burden shifts, and the party seeking to avoid arbitration must prove an affirmative defense to the provision's enforcement, such as waiver. *Venture Cotton Coop.*, 435 S.W.3d at 227.

12. In applying the first portion of the two-step analysis, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) ("This determination is generally made on the basis of 'ordinary state-law principles that govern the formation of contracts.'" (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). The second part of determining

¹⁴ *See generally* Aigen Dec. Ex. 1, LPA Article 4 and Section 3.10.

whether the parties have agreed to arbitrate—the question of whether the dispute comes within the scope of the agreement—is answered by applying the federal substantive law of arbitrability.” *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009) (citations omitted).

13. Under both Texas and Federal law, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983); *see also Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)). In addition, the Supreme Court has declared that the Federal Arbitration Act, “is a strong congressional declaration of a liberal policy favoring arbitration.” *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 849 (N.D. Tex. 2014) (collecting cases) (“if a valid agreement to arbitrate does exist, the court must observe the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration.”).

III. ARGUMENT

14. This Court should compel arbitration as to Counts V, VI, and VII of the Amended Adversary Complaint because: (1) The claims under Counts V, VI, and VII comprise disputes involving legal rights or remedies arising from the LPA and are governed by an enforceable, and broadly worded, arbitration provision; (2) Counts V, VI, and VII assert noncore claims, and in the Fifth Circuit courts do not have discretion to refuse to compel the arbitration of matters not involving “core” bankruptcy proceedings and should compel arbitration of even core claims if they are not integral to the bankruptcy; and (3) federal and state policy strongly favors arbitration.

15. The Federal Arbitration Act (“FAA”) requires district courts to direct parties to arbitrate issues covered by a valid arbitration agreement. 9 U.S.C. §§ 3, 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “Federal policy strongly favors enforcing

arbitration agreements.” *Dean Witter Reynolds*, 470 U.S. at 217; *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24. When a party moves to compel arbitration, the FAA requires district courts to order arbitration of arbitrable claims. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (In re Sedco, Inc.)*, 767 F.2d 1140, 1147 (5th Cir. 1985). Because of the strong presumption in favor of arbitration, “a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.” *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724–25 (S.D. Tex. 2013), *aff’d*, 559 F. App’x 417 (5th Cir. 2014) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)); *see also Grant v. Houser*, 469 Fed. Appx. 310, 315 (5th Cir. 2012) (noting the strong presumption in favor of arbitration).

16. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Henry*, 551 S.W.3d at 115 (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d at 174). The Fifth Circuit resolves doubts concerning the scope of matter covered by an arbitration provision in favor of referring arbitration. The court states:

We emphasize that our sole responsibility is to determine whether this dispute is governed by an arbitration clause, not to determine the merits of the dispute. *See Snap-On Tools Corp., v. Mason*, 18 F.3d 1261, 1267 (5th Cir.1994). “We resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration. . . . [A]rbitration should not be denied ‘unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’” *Neal*, 918 F.2d at 37 (internal citations omitted). *See also AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 643, 650 (1986).

Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

A. **This Dispute is Governed by An Enforceable Arbitration Provision Reaching All Legal Rights Arising From the LPA.**

17. Debtor's claims asserted in Counts V, VI, and VII arise under the LPA, which contains an enforceable and broadly worded arbitration provision. The U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, has already interpreted arbitration provisions with identical scope language (and near-identical scope language) to the Arbitration Provision under the LPA, to be valid and binding. *See In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 549-50 (Bankr. N.D. Tex. 2019).¹⁵ Importantly, the court made clear that "it would seem to be beyond peradventure that [the arbitration clause] was, at one time, enforceable between the parties, *with regard to any disputes that arose regarding the agreements.*" *Id.* at 552 (emphasis added); *see also id.* at 557 (emphasis added) ("there were valid arbitration agreements *that applied to all disputes* arising out of the [agreements at issue]."). Accordingly, the court concluded that all claims at issue, including claims for declaratory judgment, fell within the scope of the relevant arbitration clauses. *See id.* at 558.

18. The Arbitration Provision here also covers any "unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from this Agreement.*" LPA, Section 6.14 (emphasis added). Such broad language is sufficient to reach collateral matters, including the oral agreement between the parties which involves legal rights arising from LPA.¹⁶ *Buell Door Co.*

¹⁵ The Court's decision provides the relevant arbitration clause language. The arbitration clause at Section 16(f) of the Sub-Advisory Agreement states:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from* this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .

In re Acis Cap. Mgmt., L.P., 600 B.R. at 550 (emphasis added).

¹⁶ It is important to note that the particular language "arising from" is significant in determining that the Arbitration Provision here is broad. The Fifth Circuit and Texas District Courts have specifically determined

v. Architectural Sys., Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, at *6 (N.D. Tex. Aug. 20, 2002) (concluding that the phrase “arising out of” and similar language constitute “broad” arbitration clauses); *see also Elkjer*, 8 F. Supp. at 855 (concluding that the arbitration clause which uses the phrase “arising under or in connection with this [Partnership] Agreement,” is “broad [and] capable of expansive reach” to include statutory claims). “Broad arbitration clauses are not limited to claims which literally ‘arise under [a] contract,’ but rather embrace all disputes between the parties **having a significant relationship** to the contract regardless of their label.” *Id.* at *4 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir. 1998) (emphasis added) (internal citations omitted)).

19. In the Fifth Circuit, a “broadly construed arbitration provision may encompass claims arising under a separate agreement.” *See, e.g., Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 393–94 (5th Cir. 2002) (holding that an arbitration provision, which covered “any and all claims. . . arising out of or relating to” an agreement, applied to claims arising under a separate agreement); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 38 (5th Cir. 1990) (holding that an arbitration provision encompassing “any and all disputes between [the parties] . . . reach[ed] all aspects of the parties’ relationship,” including claims arising under a separate agreement); *see also I.D.E.A. Corp. v. WC & R Ints., Inc.*, 545 F. Supp. 2d 600, 606 (W.D. Tex. 2008) (noting a broad arbitration provision

that only the phrase “arising under” indicates a narrow arbitration clause, rather than broad. This Court has held:

upon reviewing the above referenced Fifth Circuit cases, the court concludes that the phrase “arising out of” and similar language constitute “broad” arbitration clauses. *Accord Morphis v. Federal Home Loan Mortgage Corp.*, No. 3:02-CV-0210-P, 2002 WL 1461930, *3–4 (N.D. Tex. July 3, 2002) (provision that “any and all disputes between [the parties],” with no limiting clause constituted a broad clause). On the other hand, the phrase “arising under” indicates a “narrow” arbitration clause. *See Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (the term “arising under” is relatively narrow) (citation omitted).

Buell Door Co., 2002 WL 1968223, at *6. Here, the “arising from” language of the Arbitration Provision is similar to “arising of out” and is therefore broad.

may encompass claims arising under a separate agreement). Accordingly, the Arbitration Provision covers the claims regardless if they arise under the LPA or the separate Notes because the authority to enter into the Notes arises from the LPA which reaches all aspects of the parties' relationship.

20. Here, the LPA choice of law provision, Section 6.1, provides the "Agreement shall be construed in accordance with and governed by the laws of the state of Delaware. . . ." As a result, Delaware state contract law determines whether the LPA includes a valid agreement to arbitrate. Delaware arbitration law mirrors federal law in that "public policy of Delaware favors arbitration." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (citations omitted). Even Debtor's rejection of the LPA does not absolve Debtor of its obligation to arbitrate. It is well established that the "rejection of a contract, or even breach of it, will not void an arbitration clause. . . . Any different conclusion would allow a party to avoid arbitration at will simply by breaching [or rejecting] the contract." *Madison Foods v. Fleming Cos., Inc. (In re Fleming Cos, Inc.)*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005) (citations omitted).

21. Moreover, any question about the scope of the arbitration agreement, including the arbitrability of any particular claim, is for the arbitrator. Under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . , so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). The Fifth Circuit provides an in-depth explanation of who decides what issues when a contract includes an arbitration provision. *See Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

22. Incorporating rules from an arbitration service provider that themselves delegate the question of arbitrability to the arbitrator clearly and unmistakably expresses the parties' intent to leave the question of arbitrability to the arbitrator. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). Here, the Arbitration Provision provides that the "arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award." The rules of the American Arbitration Association provide that the arbitrator is to decide questions of arbitrability. AAA Commercial Arbitration Rule 7(a). Because the parties' arbitration delegates decision-making to the arbitrators, where the parties entered an agreement to arbitrate, questions of scope and arbitrability should be left to the arbitrator.

B. The Claims Asserted In Counts V, VI, and VII Are Arbitrable Because they Are Non-Core and Arise Under the LPA.

23. Under the LPA, the Court must compel arbitration on Counts V, VI, and VII of the Amended Complaint, because all of the claims are non-core claims arising from the rights and obligations under the LPA. Bankruptcy courts have no discretion to refuse to compel the arbitration of non-core matters. *See, e.g., Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *7 (S.D. Tex. Dec. 18, 2015) (citation omitted) (quoting "it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings"). More specifically, under Fifth Circuit precedent, a bankruptcy court only has discretion to refuse to compel arbitration of an arbitrable claim where: (1) "the proceeding derives exclusively from the provisions of the bankruptcy code;" and (2) "arbitration of the proceeding would conflict with the purposes of [the bankruptcy code]." *See Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 242 (Bankr. N.D. Tex. 2010). "Importantly, however, *'a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core'*

bankruptcy proceedings under 28 U.S.C. § 157(b).” *In re Cain*, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (emphasis added) (citation omitted) (stating “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings.”); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. at 560 (in the *Acis* case—unlike here—the claims at issue were “an integral part of determining . . . proofs of claim,” resulting in the court denying the motion to compel arbitration).

24. For claims that are “derivative of the pre-petition legal or equitable rights possessed by a debtor” it is beyond dispute that “it is ‘universally accepted’ that such issues are arbitrable.” *In re Cain*, 585 B.R. at 137 (citing *Nat’l Gypsum Co.*, 118 F.3d at 1066, 1069). In other words, for non-core proceedings, a court “must give effect to the terms of any applicable arbitration clauses.” *In re Daisytek, Inc.*, 323 B.R. 180, 188 (N.D. Tex. 2005).

1. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count V Because Debtor’s Proposed Declaratory Relief Claim Is A Non-Core Claim Arising From The LPA.**

25. Debtor’s declaratory relief claim simply seeks declarations concerning the extent of limited partner (including Dugaboy’s) authority under the LPA, including authority to enter into the Alleged Agreement on behalf of the Partnership.¹⁷ This is a legal dispute arising from LPA, a pre-petition contract, thus coming within the Arbitration Provision and governed by state contract law. Courts generally agree that claims for declaratory judgment which could also exist outside of bankruptcy are non-core proceedings.¹⁸ *See, e.g., In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La.

¹⁷ *See Amended Complaint* [Adv. No. 21-03003, Dkt. No. 79 at ¶¶ 69–72].

¹⁸ *See also In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 222–23 (C.D. Cal. 2014)(“That court found a trustee’s claim for declaratory relief as to the ownership of similar tax refunds non-core because it was a “dispute between private parties” and arose out of a pre-bankruptcy tax sharing agreement governed by state contract law); *see also In re SFD @ Hollywood, LLC*, 414 B.R. 794, 797 (Bankr. S.D. Fla. 2009)(“This proceeding [for declaratory judgment] could also exist outside of bankruptcy. Accordingly, this is a non-core proceeding in which the Court cannot enter a final order, absent consent of the district court and the parties.”); *see also Sunterra Corp. v. Perini Bldg. Co.*, No. 204CV00784MCEEFB, 2008 WL 11512082, at *4 (E.D. Cal. June 12, 2008)(“The new causes of action--strict liability, negligence, breach of contract, professional negligence, and declaratory relief--would also exist independently of bankruptcy laws and are similarly “non-core” proceedings.”).

2007)(“That the doctors’ claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims.”)

26. Therefore, the Court lacks discretion to refuse to compel arbitration on Count V asserting Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 260 (5th Cir. 1996) (district court did not abuse discretion in refusing to consider plaintiffs’ request for declaratory relief where order granting defendant’s motion to compel arbitration disposed of same issues raised in declaratory judgment action); *see also Austin Cap. Mgmt., Ltd. v. Bd. of Trustees of Texas Iron Workers’ Pension Fund*, No. A-09-CA-351 LY, 2009 WL 10699390, at *8 (W.D. Tex. July 30, 2009) (finding action seeking declaratory relief arbitrable); *see also Info. Sys. Audit & Control Ass’n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017) (stating that permitting a party to obtain declaratory relief from a court when there is a valid arbitration agreement is “essentially the same relief as that otherwise reserved for the arbitrator. It would make little sense to include such an expansive loophole in what is otherwise a sweeping arbitration provision.”).

2. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count VI And VII Because Debtor’s Proposed Claims Asserting Breach Of Fiduciary Duty And Aiding And Abetting Breach Of Fiduciary Duty Are Non-Core Claims Arising From The LPA.**

27. Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero for entering into the Alleged Agreement, must be arbitrated because they are non-core claims that arise under the LPA. It is well established that state law claims, such as breach of fiduciary duty and aiding and abetting breach of fiduciary duty, are non-core claims. *See, e.g., In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017) (“Courts within the Fifth Circuit have consistently found that post-confirmation suits by plan trustees based on state law claims are only within the ‘related to’ (and not ‘core’) bankruptcy jurisdiction of a federal court.”); *see also Brickley for CryptoMetrics, Inc.*

Creditors' Tr. v. ScanTech Identification Beams Sys., LLC, 566 B.R. 815, 829–30 (W.D. Tex. 2017) (stating post-confirmation claims for breach of fiduciary duty and state law claims are “related to” claims); *see also Mirant Corp. v. The S. Co.*, 337 B.R. 107, 120 (N.D. Tex. 2006).

28. The breach of fiduciary duty claims under Count VI and aiding and abetting breach of fiduciary duty under Count VII are—and by their own terms—premised on Dugaboy’s authority to bind the Debtor under the LPA.¹⁹ The Debtor challenges whether the LPA affords the right to Dugaboy to approve such compensation, thus, any evaluation of the breach of fiduciary duty-related claims must first entail an analysis of the LPA, making construction of the LPA – the agreement containing the arbitration clause, a predicate to the analysis of the breach of fiduciary duty claims. Thus, Counts VI and VII involve unresolved legal disputes between the parties—including the Debtor and Mr. Dondero, Nancy Dondero, and Dugaboy, who are all parties and/or officers/directors/partners/employees/agents/affiliates/representatives of a General or Limited Partner—concerning legal duties to the Partnership that would not exist outside of the LPA.

29. The Fifth Circuit makes clear that where, as here, the breach of fiduciary duty (or aiding and abetting fiduciary duty) claim is interwoven with the partnership agreement containing an arbitration clause, the fiduciary claims will be subject to arbitration. *See Coffman v. Provost * Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 732 (E.D. Tex. 2001), *aff’d sub nom. Coffman v. Provost Umphrey LLP*, 33 Fed. Appx. 705 (5th Cir. 2002) (“Even if it is conceivable that Plaintiff could maintain a claim for breach of fiduciary duty without the Partnership Agreements, that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause .

¹⁹ *See Amended Complaint* [Adv. No. 21-03003, Dkt. No. 79 at ¶ 75] (“If Dugaboy had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy breached its fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.”); *id.* ¶¶ 78–79 (the Donderos “were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and the Donderos “aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.”)

. . . the Partnership Agreements will determine whether a fiduciary duty was breached—whether that duty arises from the common law or from the contract itself. . . . For these reasons, the court finds Plaintiff’s breach of fiduciary duty claim to be subject to arbitration.”); *see also Omni Pinnacle, LLC v. ECC Operating Services, Inc.*, 255 F. App’x 24, 25-26 (5th Cir. 2007) (internal quotation marks omitted) (“A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”).

30. Because breach of fiduciary duty and aiding and abetting breach of fiduciary duty are non-core state-law claims that could exist outside of bankruptcy, the reviewing court lacks discretion to refuse enforcement of an otherwise-applicable arbitration agreement as to these claims. *See In re McCollum*, 621 B.R. 655, 659 (Bankr. N.D. Miss. 2020) (finding that breaching its fiduciary duty “is a state law contract claim which arose prepetition, could exist outside the bankruptcy case, and is tangential to the bankruptcy case. It does not invoke a substantive right created by bankruptcy law and is a non-core claim.”); *In re Gaughf*, 19-50947-KMS, 2020 WL 1271595, at *4 (Bankr. S.D. Miss. Mar. 12, 2020) (“Aiding and Abetting Count is non-core.”). Additionally, claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty do not reference the Bankruptcy Code or any right conferred by the Code. *See In re McCollum*, 621 B.R. at 659. Therefore, the Court lacks discretion to refuse to compel arbitration on Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero.

31. That Nancy Dondero is not personally a party to the LPA does not impair her right to enforce the arbitration agreement it contains. Debtor alleges misconduct by her and a signatory to the LPA relating to fiduciary duties Debtor alleges arise out of the LPA. There are two circumstances under which a nonsignatory can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims

against the nonsignatory; or (2) when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). Both circumstances are implicated by Debtor’s allegations against Nancy Dondero.

32. First, non-signatories are entitled to invoke an arbitration agreement when the claim against the non-signatory arises from the contract with an arbitration provision. *See, e.g., Bidas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)) (“[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a nonsignatory.”); *see also Amegy Bank Nat. Ass’n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 450–51 (S.D. Tex. 2012) (citing *Grigson*, 210 F.3d at 527). Because Debtor charges Nancy Dondero with breaching fiduciary duties (and aiding and abetting breaches of such duties) that arise out of the LPA, she falls precisely within the ambit of cases like *Bidas*, and *Grigson* and *Amegy*.

33. Second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract—here the allegations are made against Nancy Dondero (a non-signatory) and Dugaboy (a signatory) to the LPA—the non-signatory may compel arbitration on the claims. *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming that “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.”); *see also Grigson*, 210 F.3d at 526 (“a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff”).

C. **The Court Should Stay All Claims Pending Arbitration.**

34. The claims that the Court refers to arbitration must be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. See *In re Gandy*, 299 F.3d 489, 494–95 (5th Cir. 2002) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (“A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement”). Further, bankruptcy courts generally do not have discretion to decline to stay, pending arbitration, proceedings involving non-core matters. *Id.* at 495. Accordingly, the Court should stay each of the Debtor’s claims against Defendants pending arbitration.

35. Should the Court not refer arbitration on every claim, in the alternative, the Court should stay the entire adversary proceeding pending arbitration. Permitting any claims to continue herein, while some or all claims are subject to arbitration would be unnecessarily expensive and duplicative. The Court has the inherent power to grant a discretionary stay of a proceeding pending arbitration when there are issues common to the arbitration and the court proceeding and those issues may be decided by the arbitrator. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (stating that the power to stay proceedings is incidental to power “inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); see also *In re Divine Ripe, L.L.C.*, 538 B.R. 300, 309 (Bankr. S.D. Tex. 2015) (same).

IV. **CONCLUSION**

WHEREFORE, for the reasons above, Defendants respectfully request that this Court compel arbitration on Counts V, VI, and VII, and order a stay of the proceedings pending arbitration.

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez

EXHIBIT 67

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
 TRUST**

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO, NANCY DONDERO,	§	
AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	



APPENDIX IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James Dondero, Nancy Dondero and The Dugaboy Investment Trust file this Appendix in Support of their Motion to Compel Arbitration and Stay Litigation and request the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Motion to Compel Arbitration and Stay Litigation, dated September 1, 2021	App. 1-3
1	Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.	App. 4-40
2	Excerpts from the Transcript of the Remote Deposition of James Dondero on May 28, 2021, Adversary Proceeding No. 21-3003	App. 41-54
3	Acceptance of Appointment of Family Trustee, executed by Nancy Marie Dondero on October 13, 2015	App. 55-60
4	Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees, The Dugaboy Investment, dated November 15, 2010	App. 61-97

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
TRUST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez

Exhibit A

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ATTORNEYS FOR DEFENDANTS JAMES DONDERO AND NANCY DONDERO

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

In re:	§	Case No. 19-34054
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	Chapter 11
	§	
Debtor.	§	
	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO, NANCY DONDERO,	§	
AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	
<hr/>		

**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION**

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendants James Dondero and Nancy Dondero, and I submit this Declaration in support of the *Motion to Compel Arbitration and Stay Litigation* being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts of the May 28, 2021 Remote Deposition of James Dondero Transcript at 176-178; 212:18-25; 213:1-17.

4. Attached as **Exhibit 3** is a true and correct copy of the *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

5. Attached as **Exhibit 4** is a true and correct copy of *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

Dated: September 1, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“Class B Limited Partner” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“Class B Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“Class B NAV Ratio Trigger Period” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“Class C Limited Partner” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“Class C Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“Class C NAV Ratio Trigger Period” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“Code” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“Contribution Note” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“Default Loan” has the meaning set forth in Section 3.1(c)(i).

“Defaulting Partner” has the meaning set forth in Section 3.1(c).

“Delaware Act” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“Effective Date” means the date first recited above.

“Fiscal Year” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; provided, however, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however, any* action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

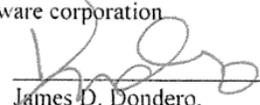
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

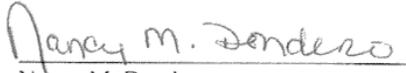
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST - EXEMPT TRUST #1**

By: _____

Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST - EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

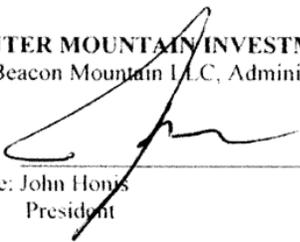
By: _____
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain LLC, Administrator

By:  _____

Name: John Honis

Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20_, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___ % Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

Exhibit 2

1 Dondero - 5-28-2021
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 In re:)
6)
6 HIGHLAND CAPITAL) Case No.
MANAGEMENT, LP,) 19-34054 L.P.
7) Chapter 11
Debtor,)
8 -----)
9 HIGHLAND CAPITAL MANAGEMENT,)
LP,)
10 Plaintiff,) Adversary No.
11 vs.) 21-03003-sgi
12 JAMES D. DONDERO,)
13 Defendant.)

14
15 REMOTE DEPOSITION OF
16 JAMES DONDERO
17
18 Pages 103 - 282
19 Dallas, Texas
20 Friday, 28th day of May, 2021
21
22

23 Job No. 194690
24 Reported by:
25 Daniel J. Skur, Notary Public and CSR

1 Dondero - 5-28-2021

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3

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7

8 28th day of May, 2021

9 9:33 a.m. - 1:59 p.m.

10

11

12 Remote Deposition of JAMES DONDERO,
13 located in Dallas, Texas, before Daniel J.
14 Skur, Notary Public and Certified Shorthand
15 Reporter in and for the State of Texas
16 located in Waxahachie, Texas.

17

18

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1 Dondero - 5-28-2021

2 A P P E A R A N C E S:

3 Pachulski Stang Ziehl & Jones
4 Attorney(s) for Debtor
780 Third Avenue

5 New York, New York 10017

6 BY: John Morris, Esq.

7 Gregory Demo, Esq.

8
9 Stinson
Attorney(s) for The Witness
3102 Oak Lawn Avenue

10 Dallas, Texas 75219

11 BY: Deborah Deitsch-Perez

12 Michael Aigen, Esq.

13 Paul Lackey, Esq.

14
15 Sidley Austin
16 Attorney(s) for The Committee
2021 McKinney Avenue

17 Dallas, Texas 75201

18 BY: Paige Montgomery, Esq.

19

20

21 ALSO PRESENT:

22 Davor Rukavina, NexPoint

23 La Asia Canty

24

25

1 Dondero - 5-28-2021

2

3 IT IS HEREBY STIPULATED AND AGREED
4 by and between the attorneys for the respective
5 parties herein, that filing and sealing be and
6 the same are hereby waived.

7 IT IS FURTHER STIPULATED AND AGREED
8 that all objections, except as to the form of
9 the question, shall be reserved to the
10 time of the trial.

11 IT IS FURTHER STIPULATED AND AGREED
12 that the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath, with the same force and
15 effect as if signed and sworn to before the
16 Court.

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1 Dondero - 5-28-2021

2 P R O C E E D I N G S

3 REMOTE ORAL DEPOSITION OF

4 JAMES DONDERO

5 (REPORTER NOTE: This deposition is
6 being conducted remotely in accordance with
7 the Current Emergency Order regarding the
8 COVID-19 State of Disaster.

9 Today's date is the 28th day of
10 May, 2021. The time is 9:33 a.m. Daylight
11 Savings Time. The witness is located in
12 Dallas, Texas.)

13 JAMES DONDERO,
14 having been duly cautioned and sworn to tell
15 the truth, the whole truth and nothing but the
16 truth, testified as follows:

17 (9:33 A.M.)

18 EXAMINATION

19 BY MR. MORRIS:

20 Q. Good morning, Mr. Dondero.

21 A. Morning.

22 Q. It's John Morris, again, from
23 Pachulski on behalf of the debtor. We're here
24 for your deposition today.

25 Do you understand that?

1 Dondero - 5-28-2021

2 BY MR. MORRIS:

3 Q. Mr. Dondero, can you describe for
4 me -- withdrawn.

5 Did you discuss with your sister
6 Nancy, the agreement that's referred to in
7 paragraph 40?

8 A. The agreement to subsequent
9 conditions, yes, absolutely. But this
10 agreement that's on the screen, I've never --
11 I've never -- I've never shown her this
12 document or talked to her about it.

13 Q. I'm not asking about the document.
14 I'm not asking about the document. I'm asking
15 about the agreement that's referred to in
16 paragraph 40.

17 Do you understand that?

18 A. Yes. And, yes, we had several
19 conversations about it.

20 Q. Okay. Can you describe for me
21 everything you remember about your discussions
22 with Nancy concerning the agreement that's
23 referred to in paragraph 40?

24 A. That the loans that were in place
25 would be forgiven upon a monetization -- the

1 Dondero - 5-28-2021

2 favorable monetization of certain large or
3 liquid assets on the Highland balance sheet;
4 and the three that were focused on was MGM,
5 Trussway, and Cornerstone.

6 Q. Did she say anything in response?

7 A. Just, "How much are we talking
8 about?" And I told her it was about 9 million
9 in aggregate, and -- and I told her that it
10 was -- that the forgiveness or the compensation
11 was compliant regarding any credit covenants or
12 Hunter Mountain covenants --

13 Q. Do you recall any --

14 A. -- that -- that if it were to be
15 forgiven, that additional compensation would be
16 compliant or permitted and really not material
17 relative to any outstanding credit agreements
18 that Highland had or agreements with Hunter
19 Mountain.

20 Q. Is this something that you discussed
21 with her, or is this just information that
22 you're giving me?

23 A. This is what I discussed -- that's
24 almost the entirety of the conversation. It
25 happened over a couple different conversations,

1 Dondero - 5-28-2021

2 but...

3 Q. Did anybody participate in any of
4 the conversations you're describing other than
5 you and your sister?

6 A. I don't believe it was necessary, it
7 didn't include anybody else.

8 Q. Okay. Again, I'm not here to
9 question. I'm just looking for facts,
10 Mr. Dondero.

11 So nobody participated in any of
12 these conversations that you can recall other
13 than you and Nancy; is that correct?

14 A. Correct, that I -- yes, there was
15 never a third party involved in our
16 conversations. I don't know -- I don't think
17 she discussed it with anybody else, but I don't
18 know.

19 Q. Did -- was the agreement subject to
20 any negotiation? Did she make any
21 counterproposal of any kind?

22 A. No. No, I -- again, I believe both
23 of our views at the time was that it was
24 immaterial to Highland overall or any other
25 agreements.

1 Dondero - 5-28-2021

2 three assets would trigger the conditions
3 subsequent?

4 A. Correct.

5 Q. Okay. And who decided whether the
6 asset was sold on a favorable basis?

7 Who made that decision, under your
8 agreement with Nancy?

9 A. It was just defined relative to
10 cost, so it was just -- it was just a
11 factual -- there's nothing to decide. It would
12 just be a factual answer.

13 Q. So, I just want to make sure I
14 understand.

15 Your agreement with Nancy was that
16 --

17 A. Yes.

18 Q. -- that -- all right. Withdrawn.

19 Your agreement with Nancy in January
20 or February 2019, was that if any of MGM,
21 Cornerstone, or Trussway was sold at cost, the
22 debtor would forgive your obligations under the
23 three notes.

24 Do I have that right?

25 MS. DEITSCH-PEREZ: Object to the

1 Dondero - 5-28-2021

2 form.

3 A. If any of them were sold above cost,
4 it would -- monetization would trigger the --
5 the three notes -- forgiveness of the three
6 notes, yes.

7 BY MR. MORRIS:

8 Q. Okay. And I just want to see if I
9 can understand: Did you and Nancy discuss in
10 January or February 2019 how much above cost
11 the sale would have to be in order for the
12 debtor to forgive your obligations under the
13 three notes?

14 MS. DEITSCH-PEREZ: Object to the
15 form.

16 A. No. It just had to be above cost,
17 not a amount above cost.

18 BY MR. MORRIS:

19 Q. Okay.

20 A. Because just monetizing it -- just
21 monetizing it and getting liquidity for an
22 illiquid investment, even if it was at cost, is
23 good. So something above cost is great. And
24 those are all big assets, and the notes were
25 small.

1 Dondero - 5-28-2021

2 C E R T I F I C A T E
3 STATE OF TEXAS)
4 COUNTY OF ELLIS)

5 I, Daniel J. Skur, a Notary Public
6 within and for the State of Texas, do
7 hereby certify:

8 That JAMES DONDERO, the witness whose
9 deposition is hereinbefore set forth, was
10 duly sworn by me and that such deposition
11 is a true record of the testimony given by
12 such witness.

13 That pursuant to Rule 30 of the Federal
14 Rules of Civil Procedure, signature of the
15 witness was not reserved by the witness or
16 other party before the conclusion of the
17 deposition;

18 I further certify that I am not
19 related to any of the parties to this
20 action by blood or marriage; and that I am
21 in no way interested in the outcome of this
22 matter.

23 IN WITNESS WHEREOF, I have hereunto
24 set my hand this 28th day of May, 2021.

25

16



17

18

Daniel J. Skur
Notary Public, State of Texas.
My Commission Expires 7/7/2022
TSG Reporting, Inc.
228 East 45th Street, Suite 810
New York, New York
(877) 702-9580

19

20

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22

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24

25

Dondero - 5-28-2021

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name:

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

In re:)	
HIGHLAND CAPITAL	)	Case No.
MANAGEMENT, LP,	)	19-34054 L.P.
Debtor,	)	Chapter 11
)	
<hr/>)	
HIGHLAND CAPITAL MANAGEMENT, LP,)	
)	
Plaintiff,	)	Adversary No.
vs.	)	21-03003-sgi
JAMES D. DONDERO,)	
Defendant.)	
Dep. Date: 05/28/2021		
Deponent: JAMES DONDERO		

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

CORRECTIONS:

Pg.	LN.	Now Reads	Should Read	Reason
140	4	THE WITNESS	MR. MORRIS	3
140	6	THE WITNESS	MR. MORRIS	3
140	8	THE WITNESS	MR. MORRIS	3
140	11	THE WITNESS	MR. MORRIS	3
140	13	THE WITNESS	MR. MORRIS	3
140	14	MR. MORRIS	THE WITNESS	3
140	15	THE WITNESS	MR. MORRIS	3
177	3	liquid	illiquid	3

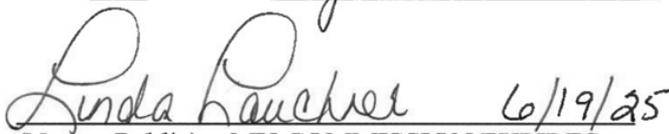
181	25		Add to end (after yes): as long as the conditions subsequent could still be met.	1
182	13	focused	focus	3
188	11		Add to end (after monetized); or were monetized for less than cost.	1



 JAMES DONDERO

SUBSCRIBED AND SWORN BEFORE ME

THIS 29th DAY OF June, 2021.


 (Notary Public) MY COMMISSION EXPIRES: 6/19/25

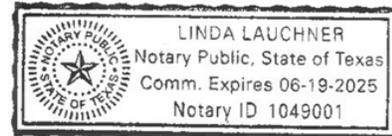


Exhibit 3

THE DUGABOY INVESTMENT TRUST
James D. Dondero, Primary Beneficiary

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

Re: The Dugaboy Investment Trust

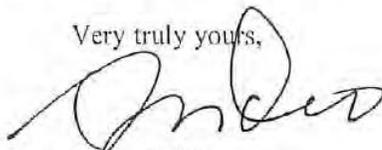
Dear Ms. Breault,

I, James D. Dondero, am writing to inform you that on October 12, 2015, I received notice from Grant James Scott that he will cease to serve as Family Trustee of The Dugaboy Investment Trust (the "**Trust**") and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust.

Pursuant to the attached Resignation of Family Trustee from Grant James Scott, I appoint Nancy Marie Dondero as the successor Family Trustee of the Trust.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.2 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with notice of my appointment of a successor Family Trustee.

Very truly yours,



James D. Dondero

THE DUGABOY INVESTMENT TRUST
Grant James Scott, Family Trustee

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

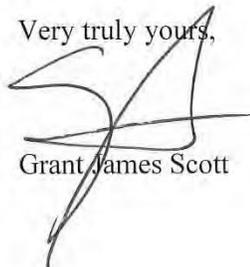
Re: The Dugaboy Investment Trust

Dear Ms. Breault,

I, Grant James Scott, am writing to inform you that as of October 12, 2015, I will cease to serve as Family Trustee of The Dugaboy Investment Trust (the “**Trust**”) and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust pursuant to the attached Resignation of Family Trustee.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.1 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with written notice of my resignation.

Very truly yours,

A handwritten signature in black ink, appearing to be 'G. Scott', written over the typed name 'Grant James Scott'.

Grant James Scott

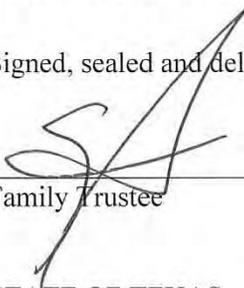
RESIGNATION OF FAMILY TRUSTEE

I, **GRANT JAMES SCOTT**, do hereby acknowledge that I voluntarily tender my resignation as Family Trustee of The Dugaboy Investment Trust pursuant to that Trust Agreement, dated November 15, 2010 by, between and among Dana Scott Breault, as Settlor, and Common Wealth Trust Company, as Administrative Trustee.

This resignation shall take effect immediately upon the execution hereof and delivery of a written acknowledged instrument wherein NANCY MARIE DONDERO accepts the trust and the position of Family Trustee.

IN WITNESS WHEREOF, I hereby sign my Resignation as Family Trustee of the above trust.

Signed, sealed and delivered in the presence of:



Family Trustee

10/12/2015
Date

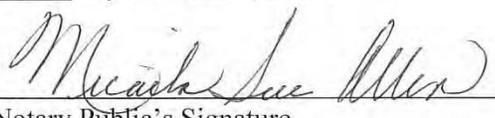
STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **GRANT JAMES SCOTT** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]



Notary Public's Signature

Expiration: January 15, 2019

ACCEPTANCE OF APPOINTMENT OF FAMILY TRUSTEE

I, **NANCY MARIE DONDERO**, appointed as Family Trustee under Article V, Section 5.2(a)(i) of The Dugaboy Investment Trust, dated November 15, 2010 (the "Trust"), hereby acknowledge and accept the position of Family Trustee of the Trust and hereby agree to faithfully perform all the duties and adopt all of the obligations imposed.

Signed this 13th day of October, 2015.

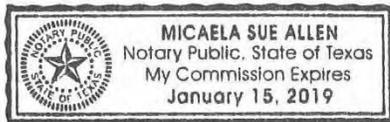
Nancy Marie Dondero

NANCY MARIE DONDERO
Family Trustee

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **NANCY MARIE DONDERO** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]

Micaela Sue Allen

Notary Public's Signature

Expiration: January 15, 2019

ACKNOWLEDGEMENT OF DELIVERY

I, JAMES D. DONDERO, acknowledge that this Acceptance of Appointment of Family Trustee by NANCY MARIE DONDERO was delivered to and received by me on October __, 2015.

A handwritten signature in black ink, appearing to read 'James D. Dondero', written over a horizontal line.

James D. Dondero

Exhibit 4

TRUST AGREEMENT

Between

DANA SCOTT BREault,
Settlor

and

JAMES D. DONDERO and
COMMONWEALTH TRUST COMPANY,
Trustees

THE DUGABOY INVESTMENT TRUST

WINSTEAD PC
DALLAS, TEXAS

THE DUGABOY INVESTMENT TRUST

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THE DUGABOY INVESTMENT TRUST

AGREEMENT OF TRUST made and entered into at Dallas, Texas, this ____ day of October, 2010, by and between DANA SCOTT BREault, as Settlor, and JAMES D. DONDERO, and COMMONWEALTH TRUST COMPANY, as Trustees.

ARTICLE I

DEFINITIONS

The following terms, as used in this Trust Agreement, have the meanings set forth below, unless another meaning is clearly indicated by context or circumstances:

1.1 Settlor. "Settlor" means DANA SCOTT BREault.

1.2 Jim. "Jim" means JAMES D. DONDERO.

1.3 Trustees. The initial Trustee of each trust created hereunder is JAMES D. DONDERO. "Trustee" means any person or entity serving as Trustee, whether original or successor and whether one or more in number. "Administrative Trustee" means COMMONWEALTH TRUST COMPANY in its capacity as Administrative Trustee, and any successor Administrative Trustee appointed in accordance with Section 5.2(c). "Independent Trustee" means GRANT JAMES SCOTT, III, (upon his acceptance as set forth in Section 5.2(b)) in his capacity as Trustee, and any successor Independent Trustee appointed in accordance with Section 5.2(b). "Family Trustee" means JAMES D. DONDERO in his capacity as Trustee, and any successor Family Trustee appointed in accordance with Section 5.2(a). The rights, powers, duties, and obligations, of the Family Trustee, Independent Trustee and Administrative Trustee are to be exercised and allocated pursuant to Section 6.2 of this Trust Agreement.

1.4 Children. "Children" means REESE AVRY DONDERO, JAMESON DRUE DONDERO, and any other child born to or adopted by Jim after the date of this Trust Agreement. "Child" means one of the Children.

1.5 Descendants. "Descendants" means the legitimate children of the person designated and the legitimate lineal descendants of such children, and includes any person adopted before attaining age fifteen (15) and the adopted person's legitimate lineal descendants. A posthumous child shall be considered as living at the death of his parent.

1.6 Code. "Code" means the Internal Revenue Code of 1986, as amended, and corresponding provisions of future federal tax law.

1.7 Per Stirpes. "Per Stirpes," when used with respect to a distribution of property among a class of beneficiaries, shall mean by representation; that is, the Descendants of a deceased ancestor take the share such ancestor would have received had he or she been living, and the issue of a living ascendant would not take in competition with such ascendant. The per

stirpital allocation shall commence with the most senior generation that has a living representative.

ARTICLE II

FUNDING

Settlor has transferred to the Trustee, without consideration, One Thousand and No/100 Dollars (\$1,000.00) which shall be administered and distributed in accordance with the terms of this Trust Agreement. Settlor and others may transfer to the Trustee properties acceptable to them, to be added to the trust estate. The Trustee shall administer the initial trust estate pursuant to the terms of Section 3.1.

ARTICLE III

DISTRIBUTION OF PRINCIPAL AND INCOME

3.1 Trust for Jim. The trust for the benefit of Jim shall be administered and distributed upon the following terms:

(a) Distributions to Jim. The Family Trustee may distribute to Jim so much of the net income and principal of the trust as the Family Trustee deems necessary to provide for Jim's maintenance, support and health. Undistributed income shall be accumulated and added to principal. In exercising its discretion, the Family Trustee shall take into account the following factors:

- (i) Jim is the primary beneficiary of the trust.
- (ii) The Family Trustee shall take into consideration in determining Jim's needs any other income or resources known upon reasonable inquiry by the Family Trustee to be available to Jim for these purposes.
- (iii) Settlor's intention to assist or enable Jim to obtain and furnish a home commensurate with his standard of living.
- (iv) Settlor's intention to assist or enable Jim to obtain capital to enter a business or profession.
- (v) Any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust

(b) Distributions by Independent Trustee. The Independent Trustee may, in its sole and absolute discretion, distribute to Jim so much of the income and principal of the trust as the Independent Trustee shall deem appropriate or advisable. It is Settlor's intention to give the Independent Trustee the broadest discretion possible in determining the amount and timing of distributions of income and principal hereunder and Settlor recognizes that the Independent Trustee may, in the exercise of its discretion, determine

to distribute the entire trust estate to Jim or to make no distributions to Jim during Jim's disability or for so long as Jim shall have a judgment outstanding, or for so long as any distribution might be lost to Jim's creditors. It is also Settlor's intention and desire for the Independent Trustee to consider any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust in determining the amount of distributions to be made to Jim under this subsection (b).

(c) Inter Vivos Special Power of Appointment. During Jim's lifetime, he shall have a special power to appoint any part or all of the trust estate to any individual or entity, except that no appointment shall be made to Jim, his creditors, his estate, or the creditors of his estate. Valid appointments may be in such amounts and proportions and upon such terms and conditions as Jim shall determine and evidence by written instrument delivered to the Trustee which specifically refers to this power of appointment and expresses the intention to exercise it; provided that such power of appointment shall not extend to any life insurance policies insuring Jim's life that constitute a part of the trust estate; and provided further that Jim shall not have a power to appoint by deed to or for the benefit of Jim or any individual or entity if such appointment has the effect of satisfying Jim's contractual or legal obligations. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.1(c).

(d) Independent Trustee's Power to Grant Testamentary General Power of Appointment. Except as otherwise provided herein, the Independent Trustee, by signed acknowledged instrument delivered to Jim, may grant Jim a testamentary general power of appointment (as defined in Sections 2041 of the Code) over part or all of the trust estate, provided, however, that such power of appointment shall only be effective in an amount up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless Jim's will provides otherwise by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of the trust estate over which the power is exercisable. As used in this section, the term "Net Death Taxes" shall mean the aggregate death taxes (including, without limitation, Federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to Jim's estate.

(i) If Jim has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (d) above, the amount that Jim may appoint under subsection (d) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of Jim's death, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers

together shall be no greater than the amount otherwise appointable under subsection (d) above.

(ii) The scope and terms of the power shall be defined in the instrument. Before such a power is exercised by Jim and the exercise becomes effective, the Independent Trustee may, in a similar manner, revoke or alter the power which was granted. This power shall not apply if the trust has an inclusion ratio of zero for generation-skipping transfer tax purposes. Jim shall not have a general power of appointment over any part of the trust estate unless such power is specifically granted to Jim by the Independent Trustee pursuant to this subsection.

(e) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon Jim's death. Upon termination of the trust, the Trustee shall distribute the balance of the trust estate as follows:

(i) Pursuant to General Testamentary Power of Appointment. This paragraph (i) shall apply if, but only if, the Independent Trustee grants Jim a general testamentary power of appointment pursuant to subsection (d) above and the Independent Trustee has not revoked the grant of that general power prior to the date of Jim's death. In that event, if Jim validly exercises such general testamentary power of appointment, the Trustee shall distribute so much of the trust estate then remaining as is validly appointed by Jim pursuant to such power in accordance with the terms of such appointment.

(ii) Special Testamentary Power of Appointment. This paragraph (ii) shall apply to so much of the trust estate then remaining as is not distributed pursuant to paragraph (i) above. The Trustee shall distribute the trust estate to such one or more individuals and entities, in such amounts and proportions and upon such terms and conditions, as Jim appoints by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, Jim may not appoint to Jim, Jim's estate, Jim's creditors, or creditors of Jim's estate.

(iii) Alternative Disposition. The remaining and unappointed trust estate shall be held in trust or distributed as follows:

(1) If one or more of Jim's Descendants are then living, the Trustee shall divide the trust estate into separate equal shares, one for each then living Child and one for the then living Descendants, collectively, of each deceased Child with one or more Descendants then living. The Trustee shall administer a share for each Child in a separate trust for the primary benefit of the Child and for the Child's Descendants pursuant to Section 3.2 hereof. The Trustee shall administer a share for the Descendants of each deceased Child pursuant to Section 3.3 hereof.

(2) If none of Jim's Descendants is then living, the trust estate shall be administered or distributed in accordance with Section 3.4 hereof.

3.2 Trust for Child. All property directed to be administered in a separate trust for a Child under this Section 3.2 shall be administered and distributed for the Child's benefit upon the following terms:

(a) Distributions to Child. The Trustee may distribute to the Child so much of the net income and principal of the trust as the Trustee deems necessary to provide for the Child's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Child's standard of living at the creation of the trust.

(ii) The Child is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Child's needs, any other income or resources known upon reasonable inquiry by it to be available to the Child for these purposes.

(iv) Settlor's intention to enable or assist each Child to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Child's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Child's motivation to provide for her own needs in life.

(b) Distributions to Child's Descendants. The Trustee may distribute to the Child's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Child, acting in the Child's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of the Descendants of the Children, in such amounts and proportions and upon such terms and conditions, as the Child shall direct; provided that the Child shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Child. This power of appointment may be exercised subject to such terms and conditions as the Child shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.2(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon the death of the Child. Upon termination, the Trustee shall distribute the trust estate then remaining, or any part thereof, to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Child shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Child may not appoint to the Child, the Child's creditors, estate, or creditors of the Child's estate. The trust property not appointed by the Child in accordance with this special power of appointment shall be administered by the Trustees for the Child's then living Descendants pursuant to Section 3.3 hereof. If there are no Descendants of the Child then living, the Trustee shall distribute the remaining trust estate to Jim's then living Descendants, Per Stirpes. If any property is distributable to a person for whose benefit a trust which was established under this Trust Agreement is then being administered, the property shall be added to that trust and administered according to its terms. If no Descendant of Jim is then living, the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.3 Trusts for Descendants. The Trustee shall divide property which is to be administered under this Section 3.3 for the Descendants of a deceased Child, among such

Descendants, Per Stirpes. The Trustee shall administer each share created for a Descendant of a deceased Child (the "Beneficiary") in a separate trust for the Beneficiary's benefit upon the following terms:

(a) Distributions. The Trustee shall distribute to the Beneficiary so much of the net income and principal of the trust as the Trustee deems necessary for the Beneficiary's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Beneficiary's standard of living at the creation of the trust.

(ii) The Beneficiary is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Beneficiary's needs, any other income or resources known upon reasonable inquiry by it to be available to the Beneficiary for these purposes.

(iv) Settlor's intention to enable or assist each Beneficiary to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Beneficiary's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Beneficiary's motivation to provide for his or her own needs in life.

(b) Distributions to Beneficiary's Descendants. The Trustee may distribute to the Beneficiary's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in

life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Beneficiary, acting in the Beneficiary's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of Jim's Descendants in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall direct; provided that the Beneficiary shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Beneficiary. Furthermore, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. This power of appointment may be exercised subject to such terms and conditions as the Beneficiary shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.3(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate at the death of the Beneficiary. Upon termination, and except as otherwise provided pursuant to Section 3.5 hereof, the Trustee shall distribute the trust estate then remaining, or any part thereof to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. The trust property not effectively appointed by the Beneficiary in accordance with this special power of appointment or pursuant to Section 3.5 hereof shall be distributed, Per Stirpes, to: the Beneficiary's Descendants living at the termination of the trust; or if there are no such Descendants then living, to the then living Descendants of the Child who was the parent of the Beneficiary; or if there are no such Descendants then living, to Jim's then living Descendants. If any property is distributable under this subsection to a Child, such property shall be added to the Child's Trust and administered pursuant to the terms of Section 3.2. If any property is distributable under this subsection to a Descendant of Jim (other than a Child), such property shall be administered in trust for such Descendant's benefit pursuant to the terms of this Section 3.3. If no Descendant of Jim is then living,

the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.4 Contingent Distribution. If Jim and Jim's Descendants are all are deceased and no other disposition of the trust estate is called for in this Trust Agreement, the trust estate then remaining shall be distributed to those persons other than creditors and Settlor who, under the laws of Texas in force at that time, would have taken the personal property of Jim had he died intestate, a single person without Descendants, domiciled in the State of Texas, the moment after the event causing the distribution hereunder, the shares and proportions of taking to be determined by Texas laws.

3.5 General Power of Appointment for Certain Beneficiaries.

(a) Except as provided in subsection (c) below, any provision of this Trust Agreement to the contrary notwithstanding, at the death of any individual ("such beneficiary") at whose death the generation-skipping transfer tax would, but for the provisions of this section, be applicable with respect to any trust created under this Trust Agreement, the Trustees shall pay out of the principal of such trust such amount as such beneficiary, by express provision referring to this Trust Agreement and this power of appointment in his or her will, appoints, to or among such beneficiary's creditors, up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless such beneficiary's will otherwise provides by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of such trust over which such power is exercisable. The foregoing provisions of this section shall be effective only if the Trustees make a determination that the generation-skipping transfer tax would not be applicable with respect to the amount of such trust over which such power is exercisable. As used in this section, the term "Net Death Taxes" shall mean "the aggregate death taxes (including, without limitation, federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to the estate of such beneficiary."

(b) If under the will of any individual or individuals and/or any other trust instrument or instruments, such beneficiary has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (a) above, the amount such beneficiary may appoint under subsection (a) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of death of such beneficiary, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers together shall be no greater than the amount otherwise appointable under subsection (a) above.

(c) The provisions of this section shall not apply to the trust administered for Jim under Section 3.1.

3.6 Postponement of Distribution. Upon termination of any trust established hereunder, if any property is distributable to a beneficiary who is then under age twenty-five (25), or who, because of age, physical or mental weakness, or for any other reason is, in the sole discretion of the Trustee, unable to manage the property, the Trustee shall retain such property in a separate trust for the benefit of that beneficiary, until he or she attains age twenty-five (25) and in the sole discretion of the Trustee becomes able to manage the property. At that time, the remaining trust property shall be distributed to the beneficiary and the separate trust shall terminate. During the term of the trust, the Trustee shall distribute to the beneficiary so much of the net income and principal as the Trustee deems necessary to provide for the beneficiary's health, support, maintenance and education. If the beneficiary dies before the termination of the trust, the then remaining trust estate shall be distributed to the beneficiary's estate.

ARTICLE IV

PROVISIONS AFFECTING DISTRIBUTION

4.1 Withdrawal Right. Jim shall have the right, following a contribution to Jim's trust, to make a withdrawal in accordance with the provisions of this section unless the transferor indicates otherwise when making the transfer. A separate withdrawal right shall attach to each separate contribution of properties to Jim's trust. If a transferor is married at the time of contribution to the Trustee, then solely for purposes of the withdrawal rights granted in this Section 4.1, unless the transferor notifies the Trustee in writing to the contrary, such contribution shall be treated as two separate contributions having been made one-half (1/2) by the transferor and one-half (1/2) by the transferor's spouse, regardless of whether the property contributed is community property and regardless of whether they elect to treat such contribution as having been made one-half by each of them for Federal gift tax purposes. Any person making a contribution to Jim's trust may give the Trustee written instructions that no withdrawal right is to be granted, or that alternative withdrawal rights are to be granted with respect to the contribution being made.

(a) Amount That May Be Withdrawn. When a contribution is made, Jim may withdraw the lesser of the following amounts:

(i) the maximum present interest exclusion amount permitted, under Section 2503(b) of the Code, or any similar succeeding statute (such amount being \$12,000 at the date of execution of this Trust Agreement), less the cumulative value of all previous known gifts to or for the benefit of Jim by the same transferor during the same calendar year which would qualify for the present interest exclusion; or

(ii) the remainder determined by subtracting Jim's cumulative rights of withdrawal with respect to any other gifts from any transferor that are either

currently outstanding or that have previously lapsed (but not including the present right of withdrawal) during the same calendar year from the greater of (1) Five Thousand Dollars (\$5,000), or (2) Five Percent (5%) of the total value of Jim's trust determined as of the date the current withdrawal power is to lapse (such value may be estimated by the Trustee), or (3) any greater withdrawal power, the lapse of which would not constitute a release of such power under Sections 2041(b)(2) and 2514(e) of the Code or any similar subsequent statute; or

(iii) the value of the contribution that is subject to the withdrawal right.

(b) Withdrawal Period and Notice. Unless directed to the contrary by the transferor, the Trustee shall promptly provide Jim with written notice of the date of the contribution, the name of the transferor, the value of the properties contributed, and the value of Jim's withdrawal right. Withdrawals may be made at any time for a period of thirty (30) days following Jim's receipt of the notice of the existence of the withdrawal right. During any period that Jim lacks legal capacity, Jim's guardian or other legal representative, other than Settlor, may exercise Jim's withdrawal right on Jim's behalf. If Jim does not exercise the withdrawal right before the expiration of that period, the unexercised right shall lapse. For purposes of this section, the term "contribution" means any cash or other property which is transferred to the Trustee as part of the trust estate. The value of any contribution to the trust estate shall be its value for federal gift tax purposes.

(c) Payment of Withdrawal Amount. If Jim exercises his withdrawal right, payment of the amount due shall be made in cash immediately upon receipt by the Trustee of a demand in writing from Jim or his guardian or other legal representative, other than Settlor. Upon the exercise of a withdrawal right, payment shall be made, first, from any gifts made to Jim's trust prior to the exercise of such withdrawal right, but during the same calendar year in which the withdrawal right is exercised, and shall be charged against the trust. Should such gift or gifts not consist of sufficient cash to satisfy the exercised withdrawal right, the Trustee shall use other liquid assets of Jim's trust for such purpose. Should Jim's trust not contain sufficient liquid assets to satisfy an exercised withdrawal right when made, the Trustee shall borrow funds in order to satisfy the demand and shall, if necessary, pledge trust property to secure the loan.

(d) Distributions During Withdrawal Period. If any contribution is made subject to a withdrawal right, the Trustee shall not make any distributions under any other provision of the Trust Agreement which would prevent the Trustee from being able to satisfy fully any unexpired right of withdrawal.

(e) Lapse of Withdrawal Right. In the event Jim allows a withdrawal right granted under this Section 4.1 to lapse with respect to a contribution, or any portion thereof, the Trustee is authorized to characterize such lapse as a "release" for purposes of Section 678(a) of the Code.

4.2 Restriction Upon Alienation. No beneficiary may anticipate, by assignment or otherwise, his beneficial interest in the principal or income of the trust estate; nor may any beneficiary sell, transfer, encumber, or in any way charge his interest in trust income or principal prior to actually receiving it. Neither the income nor the principal of any trust established hereunder shall be subject to any execution, garnishment, attachment, bankruptcy, claims for alimony or support, other legal proceeding of any character, legal sequestration, levy or sale, or in any other event or manner be applicable or subject, voluntarily or involuntarily, to the payment of a beneficiary's debts. The Trustee shall make distributions to or for each beneficiary according to the terms hereof, notwithstanding any purported sale, assignment, hypothecation, transfer, attachment, or judicial process. The provisions of this section shall not limit or detract from any power of appointment or withdrawal right granted to any beneficiary herein.

4.3 Distributions Constitute Separate Property. Settlor intends to make a gift to each beneficiary hereunder of only that portion of the income and principal of each trust that is in fact distributed to such beneficiary. Inasmuch as the amounts actually distributed to a beneficiary hereunder constitute the gift Settlor contemplated making, such distributions, whether they be income or principal, shall constitute the separate property of such beneficiary and not the community property of such beneficiary. Furthermore, it is Settlor's intention that no beneficiary shall have any interest in any undistributed income or principal until the distribution of such income or principal and, accordingly, such undistributed income and principal shall not be deemed the community property of any such beneficiary and that beneficiary's spouse.

4.4 Method of Payment. The Trustee, in its discretion, may make distributions to any beneficiary, including a beneficiary who is under a physical, mental, or legal disability (minority or other), in any one or more of the following ways: directly to the beneficiary without the intervention of any legal guardian or other legal representative; as expenditures in the beneficiary's behalf; to the guardian, committee, conservator, or other similar official acting for the beneficiary; to a custodian for the beneficiary under a Uniform Transfers to Minors Act or Uniform Gifts to Minors Act; to a relative of the beneficiary or to any suitable person with whom the beneficiary resides or who has care or custody of the beneficiary; and in all ways provided by law for gifts or other transfers to or for minors or other persons under disability. In each case, receipt by the beneficiary or other person to whom payment is made or a distribution entrusted shall be a complete discharge of the Trustee with respect thereto. The Trustee may act upon such evidence as it deems appropriate and reliable in determining a beneficiary's ability to manage property and identifying a proper recipient of trust funds hereunder.

4.5 Evidence of Need. In exercising its discretion under this Trust Agreement, the Trustee shall be entitled to rely upon the written certification of a beneficiary or of another as to the nature and extent of a beneficiary's needs, and the adequacy of the beneficiary's resources apart from the trust to meet those needs. The Trustee may, but shall not be required to, make inquiry into the accuracy of the information it receives

4.6 Termination of Small Trust. Notwithstanding any provision of this Trust Agreement to the contrary, the Trustee may at any time terminate any trust when in its judgment the trust is so small that it would be inadvisable or uneconomical to continue the trust administration. In the event of termination, the Trustee shall distribute the trust to the income

beneficiaries of the trust determined at the time of distribution in the proportions to which they are entitled to receive income. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes. Distribution of trust funds in the manner herein provided shall relieve the Trustee of any further responsibility with respect to such funds. This section shall not apply to a Trustee with respect to any trust of which such Trustee is a beneficiary, or if Trustee has duty to support the beneficiary or to any Trustee who may be removed and replaced by a beneficiary of the trust unless the successor trustee must be a corporate fiduciary or someone who is not related or subordinate to the beneficiary within the meaning of Section 672(c) of the Code. The provisions of this section shall not limit or detract from any withdrawal right granted to any beneficiary herein.

4.7 Generation-Skipping Transfer Taxes and Payment. It is Settlor's intent that the trusts created hereunder be exempt from Generation-Skipping Transfer Taxes. If, however, the Trustee considers any distribution or termination of an interest or power in a trust to be a taxable distribution (a "Distribution") or a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination or Direct Skip. In the case of a Distribution, the Trustee may increase the amount to be distributed by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part by reason of property held in trust under a Settlor's will or codicil, and in part by reason of other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the Distribution, Termination, or Direct Skip hereunder, taking into consideration deductions, exemptions, credits and other factors which the Trustee deems appropriate. The Trustee may, but need not make any equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions or Terminations or Direct Skips.

ARTICLE V

THE TRUSTEE

5.1 Resignation of Trustee. The Trustee may resign as to any one or more of the trusts created hereunder by giving written notice to Settlor, if living; otherwise to the current income beneficiary of the trust.

5.2 Appointment and Succession of Trustees.

(a) Generally.

(i) Family Trustee. Jim is the initial Family Trustee of all trusts created hereunder. If Jim ceases to act as Family Trustee, or if any successor Family Trustee fails or ceases to act, Jim may appoint a successor Family Trustee within thirty (30) days of a vacancy arising. If Jim is deceased or if Jim otherwise fails to appoint a successor, GRANT JAMES SCOTT, III is appointed as successor Family Trustee. If GRANT JAMES SCOTT, III fails or ceases to act as Family Trustee, or if any other Family Trustee fails or ceases to act, and a successor is not appointed by Jim as provided above, JOHN WILLIAM HONIS is appointed as successor Family Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Family Trustee, and a successor is not appointed by Jim as provided above, the Family Trustee last serving shall appoint a successor Family Trustee. If a successor Family Trustee is not appointed within sixty (60) days of a vacancy arising, the successor Family Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(ii) Independent Trustee. GRANT JAMES SCOTT, III is appointed as the initial Independent Trustee and shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee wherein GRANT JAMES SCOTT, III accepts the trust and the position of Independent Trustee. If GRANT JAMES SCOTT, III, fails or ceases to act, or if any other Independent Trustee fails or ceases to act, Jim may appoint a successor within thirty days (30) of the vacancy arising; provided that Jim shall not serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of Section 672(c) of the Code. If a successor is not so appointed, JOHN WILLIAM HONIS is appointed Independent Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Independent Trustee, and a successor is not appointed by Jim as provided above, the Independent Trustee last serving may appoint the successor Independent Trustee. If a successor Independent Trustee is not so appointed within sixty (60) days of a vacancy arising, a successor Independent Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(iii) Administrative Trustee. COMMONWEALTH TRUST COMPANY is the initial Administrative Trustee. If COMMONWEALTH TRUST COMPANY fails or ceases to serve, Jim may appoint a successor Administrative Trustee within thirty days (30) of the vacancy arising. If a successor is not so appointed, the Family Trustee may appoint a successor Administrative Trustee within sixty (60) days of the vacancy arising. If a successor is not so appointed, a successor shall be appointed in the same manner as provided for the Family Trustee under subsection (a) above. The selection of the Administrative Trustee can have a substantial impact on the situs of the trust, which should be considered in appointing a successor Administrative Trustee.

Notwithstanding any other provision in the Trust Agreement to the contrary, no Administrative Trustee may be appointed under this paragraph if the appointment of such Administrative Trustee would change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust

The Administrative Trustee shall act in a fiduciary capacity but shall not be a Trustee or co-Trustee except to the extent and for the limited purposes described in Section 6.2. Accordingly, no reference in this Trust Agreement to the "Trustee" or "co-Trustee" shall include, or be deemed to refer to, the Administrative Trustee. Notwithstanding the foregoing, the same individual or bank or trust company may serve simultaneously as both a Trustee or co-Trustee and as Administrative Trustee for any trust created hereunder. The initial Administrative Trustee and each successor may resign at any time and may be removed at any time by the Family Trustee.

For services rendered as Administrative Trustee under this Agreement, any Administrative Trustee shall be entitled to reasonable compensation for his, her or its services, as well as be entitled to reimbursement for all expenses reasonably incurred in performing his, her or its duties hereunder. Any Administrative Trustee may receive (or retain) payment in accordance with its schedule or rates as published from time to time and as in effect at the time such compensation becomes payable, unless otherwise agreed in writing with the Family Trustee.

No termination fee shall be charged upon removal or resignation of an Administrative Trustee. However, such Administrative Trustee shall be entitled to reasonable compensation for time and materials for additional services over and above Administrative Trustee's normal duties in transferring trust assets and administration of the trust to the new Administrative Trustee.

(b) Successor Trustee. If a named or appointed successor Trustee fails or ceases to serve and no other successor is named or appointed pursuant to subsection (a) hereof, a majority in number of the beneficiaries to whom the Trustee is to or may distribute income at that time may appoint the successor Trustee, and each shall have a reasonable time in which to act. If a successor Trustee is not so appointed, any beneficiary of a trust may secure the appointment of a successor Trustee by a court of competent jurisdiction at the expense of the trust estate.

(c) Manner of Appointment; Permissible Trustees. Appointment, other than by a court, shall be by a signed, acknowledged instrument delivered to the appointed Trustee. An appointment may be made before a vacancy arises, to become effective in the event of the vacancy with the last such instrument to control. The successor Trustee appointed by Jim or a Trustee may be one or more persons and/or entities; provided that neither Settlor nor Jim shall serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of

Section 672(c) of the Code. Any other successor Trustee shall be a trust company or a bank in the United States having trust powers with not less than Fifty Million Dollars unimpaired capital and surplus. A successor Trustee shall have a reasonable time after a vacancy occurs in which to accept the office by signed, acknowledged instrument delivered to those making the appointment, if living, or to the then current beneficiaries to whom the Trustees are to or may make distributions.

5.3 Removal of Trustee. Jim shall have the power to remove the Trustee of any trust created hereunder, without cause. If Jim is deceased or if Jim is incapacitated within the meaning of Section 5.11 hereof, the primary beneficiary (or, if more than one, a majority of the primary beneficiaries) of a trust may remove any Trustee without cause. Removal shall be effected by delivering to the Trustee a signed acknowledged instrument which is effective thirty (30) days from its receipt (unless a shorter period is agreed to by the Trustee).

5.4 Succession of Corporate Trustee. If any corporate Trustee before or after qualification changes its name, becomes consolidated or merged with another corporation, or otherwise reorganizes, any resulting corporation which succeeds to the fiduciary business of such corporate Trustee shall become a Trustee hereunder in lieu of such corporate Trustee.

5.5 Trustee's Fees. Jim and Jim's Descendants shall not receive a fee for serving as Trustee. Any other Trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities, taking into account the value and nature of the trust estate and the time and work involved. The Trustee shall be reimbursed for reasonable costs and expenses incurred in connection with its fiduciary duties hereunder.

5.6 Bond. The Trustee shall not be required to furnish bond or other security.

5.7 Liability of Trustee.

(a) Generally. A Trustee other than a corporate trustee shall only be liable for willful misconduct or gross negligence, and shall not be liable for breach of fiduciary duty by virtue of mistake or error in judgment.

(b) Administrative Trustee. Every act done, power exercised or obligation assumed by the Administrative Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Administrative Trustee acting in a fiduciary capacity and not otherwise, and every person, firm, corporation or other entity contracting or otherwise dealing with the Administrative Trustee shall look only to the funds and property of the trust fund for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Administrative Trustee shall not be individually liable therefor even though the Administrative Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of the trust fund.

The decision of the Administrative Trustee hereunder with respect to the exercise or nonexercise by such Administrative Trustee of any power hereunder, or the time or

manner of the exercise thereof, made in good faith, shall fully protect such Administrative Trustee and shall be final, conclusive and binding upon all persons interested in the Trust or the income therefrom. To the extent permitted under applicable law, the Administrative Trustee acting hereunder shall not be responsible for any error of judgment or mistake of fact or law, absent bad faith or willful misconduct.

The Administrative Trustee shall be liable hereunder only for the Administrative Trustee's bad faith or willful misconduct proved by clear and convincing evidence in the court then having primary jurisdiction over the trust. The Administrative Trustee shall not be personally liable for making any delegation that is authorized under this Agreement, nor for any action taken without the Administrative Trustee's express agreement, nor for any failure to act absent willful misconduct. The Administrative Trustee shall not be liable for relying absolutely on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Administrative Trustee by any entity in which the trust fund holds an ownership interest; and (ii) the opinions of counsel or any accountant to any trust.

Prior to the death of Settlor, the Administrative Trustee shall be under no duty to inform any person having a beneficial interest in any trust created hereunder of the existence of any such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust. Following the death of Settlor, the Administrative Trustee shall be under no duty to inform any person, other than the primary beneficiary of each trust hereunder, having a beneficial interest in any trust created hereunder of the existence of such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust.

While not required, the same procedure used to settle the Administrative Trustee's accounts may also be employed to obtain the conclusive consent by the beneficiaries to the Administrative Trustee's specific conduct of any other particular matter. The Administrative Trustee and each former Administrative Trustee shall be indemnified and held harmless by each trust created hereunder against any threatened, pending or completed action, claim, demand, suit or proceeding, whether civil, criminal, administrative or investigative, falling within the exculpatory provisions of this Section or to which the Administrative Trustee is made a party, or threatened to be made a party, by reason of serving as Administrative Trustee if the Administrative Trustee acted in good faith, subject to the limitations set forth above. Such indemnification shall include expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually incurred by the Administrative Trustee in connection with such action, claim, demand, suit or proceeding. The cost of indemnification shall be apportioned against the various trusts created hereunder as the Administrative Trustee reasonably considers appropriate, taking into account the nature of the claims involved.

The Administrative Trustee shall not have any fiduciary responsibility to observe, monitor or evaluate the actions of any Trustee or other fiduciary and shall not be liable to any party for the failure to seek to attempt to prevent a breach of trust, or failure to remedy a breach of trust, or in a recurring situation to request instructions from a court

having jurisdiction over the trust. In no event shall any Administrative Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

Any Successor Administrative Trustee shall be deemed vested with all the duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Administrative Trustee. No Successor Administrative Trustee shall be personally liable for any act or failure to act of any predecessor Administrative Trustee or any other Trustee. The Successor Administrative Trustee may accept the account rendered and the property delivered by the predecessor Administrative Trustee as a full and complete discharge to the predecessor Administrative Trustee, without incurring any liability for so doing.

5.8 Predecessor Fiduciary. No successor Trustee shall be obligated or required to inquire into the acts, omissions, or accounts of any prior trustee or to bring any action against any prior trustee to compel redress of any breach of trust or for any other reason. In no event shall a successor Trustee be liable for any act or omission of any prior Trustee. A successor Trustee may accept the account rendered and the property received from a prior Trustee as a full and complete discharge to the prior Trustee without incurring any liability for doing so. A successor Trustee shall have all of the powers and discretions conferred in the governing instrument upon the original trustee.

5.9 Periodic Accounting. The Trustee may from time to time render an informal account, statement or report of its administration of each separate trust hereunder to each beneficiary who during the period covered by the account was entitled absolutely to a current payment of income or principal from the trust, or, if there is no such beneficiary, to such beneficiaries who are entitled absolutely or in the discretion of the Trustee to a payment of income or principal from the trust. If any beneficiary or legal representative or parent of a beneficiary who is not of full age or legal capacity to whom any such account is rendered shall not, within ninety (90) days after the mailing of such statement, have notified the Trustee in writing of its disapproval of the same, such statement shall be deemed to be approved

No Administrative Trustee shall be required to file or render periodic accounts in or to any court other than for good cause shown. No Administrative Trustee shall be required to give any bond.

Within 90 days following the close of each calendar year, if information is available, and if not within 30 days after it is delivered to the Administrative Trustee, and within 90 days after the removal or resignation of the Administrative Trustee, the Administrative Trustee may deliver an accounting to each primary beneficiary. The accounting shall be a written accounting of the trusts hereunder during such year or during the period from the close of the last preceding year to the date of such removal or resignation and shall set forth all investments, receipts, distributions, expenses and other transactions of each such trust and show all cash, securities, and other property held as a part of each such trust at the end of such year or as of the date of such removal or resignation, as the case may be. The accountings referred to in this Section shall be deemed to be an account stated, accepted and approved by all of the beneficiaries of each trust for which an

accounting is rendered, and the Administrative Trustee shall be relieved and discharged, as if such accounting had been settled and allowed by a final judgment or decree of a court of competent jurisdiction, unless protested by written notice to the Administrative Trustee, within 60 days of mailing thereof, by the person designated to receive such accounting. The Administrative Trustee shall have the right, at the expense of the trust, to apply at any time to a court of competent jurisdiction for judicial settlement of any account of the Administrative Trustee whether or not previously settled as herein provided or for the determination of any question of construction or for instructions. In any such action or proceeding it shall be necessary to join as parties solely the Administrative Trustee and the Settlor (although the Administrative Trustee may also join such other parties as it may deem appropriate), and any judgment or decree entered therein shall be conclusive and binding on all persons at any time interested in the trust.

5.10 Beneficiary under Disability. A parent, custodian, or guardian of any beneficiary who is under the disability of minority or, in the Trustee's opinion, any other legal, physical, or mental disability, may, in carrying out the provisions of this Trust Agreement, act and receive notice in the beneficiary's stead, and sign any instrument for the beneficiary.

5.11 Incapacity of Individual Trustee. In the event a Trustee other than a corporate Trustee becomes unable to discharge his duties as Trustee hereunder by reason of accident, physical or mental illness or deterioration, or other cause, and does not resign, then upon certification by two medical doctors affirming that each has examined the Trustee and that each has concluded, based on such examination, that he is unable to discharge his duties hereunder, the Trustee shall cease to serve, as if he had resigned, effective the date of the certification.

ARTICLE VI

TRUST ADMINISTRATION

6.1 General Powers. Subject to any limitation stated elsewhere in this Trust Agreement, and the division of powers contained in Section 6.2, the Trustee shall have, in addition to all powers granted to trustees by the common law and by Delaware statutes, as amended from time to time, the following powers with respect to each trust established hereunder:

(a) Retain Property. To retain any property received from any source, including any corporate Trustee's securities, regardless of lack of diversification, risk, or nonproductivity.

(b) Invest. To invest the trust estate in any kind of property, including common trust funds administered by a corporate Trustee or by others, without being limited by any statute or any rule of law dealing with the character, risk, productivity, diversification of, or otherwise concerning, investments by trustees.

(c) Sell. By public offering or private negotiation, to sell, exchange, assign, transfer, or otherwise dispose of all or any real or personal trust property and give options

for these purposes, for such price and on such terms, with such covenants of warranty and such security for deferred payment as the Trustee deems proper. To partition between the trust and any other owner, as the Trustee deems proper, any property in which the trust owns an undivided interest.

(d) Lease. To lease trust property for terms within or extending beyond the term of the trust, for any purpose.

(e) Real Estate. To operate, maintain, repair, rehabilitate, alter, erect, improve, or remove any improvements on real estate; to subdivide real estate; to grant easements, give consents, and enter into contracts relating to real estate or its use; and to release or dedicate any interest in real estate.

(f) Borrow. To borrow money for any purpose either from the banking department of any corporate Trustee or from others; to encumber or hypothecate trust property by mortgage, deed of trust, or otherwise; and to maintain, renew, or extend any indebtedness upon such terms as the Trustee deems appropriate.

(g) Loans. To lend money to any person or entity, including, but not limited to, a beneficiary hereunder, but not including a Settlor or a Trustee (other than a beneficiary serving as Trustee) hereunder, or a spouse of theirs, upon such terms and with such security as the Trustee deems advisable.

(h) Conserve Estate. To take any action to conserve the trust estate.

(i) Litigation. To commence or defend at the expense of the trust such litigation with respect to the trust estate as the Trustee deems advisable.

(j) Claims. To collect, pay, contest, compromise, settle, renew, or abandon any claims or demands of or against the trust estate without court authority on whatever terms the Trustee deems advisable.

(k) Abandon Property. To abandon any property or interest in property belonging to the trust when, in the Trustee's discretion, such abandonment is in the best interest of the trust and its beneficiaries.

(l) Documents. To execute contracts, notes, conveyances, and other instruments containing covenants, representations, or warranties binding upon and creating a charge against the trust estate or containing provisions excluding personal liability, or any other written instrument of any character appropriate to any of the powers or duties conferred upon the Trustee.

(m) Agents. To employ attorneys, auditors, investment advisors, depositaries, and agents with or without discretionary powers, to employ a bank with trust powers as agent for the purpose of performing any ministerial duties incident to the administration, and to pay all expenses and fees so incurred.

(n) Securities. To engage in all actions necessary to the effective administration of securities including, but not limited to, the authority to: vote securities in person or by proxy; engage in a voting trust or voting agreement; and consent to or participate in mergers, consolidations, sales of assets, recapitalizations, reorganizations, dissolutions, or other alterations of corporate structure affecting securities held in the trust.

(o) Nominee. To hold securities and other property in bearer form or in the name of a trustee or nominee with or without disclosure of any fiduciary relationship.

(p) Additional Property. To receive additional property from any source and add it to the trust estate.

(q) Insurance. To carry insurance of such kinds and in such amounts as the Trustee deems advisable, except for insurance on the life of a Settlor, the Trustee, or a spouse of theirs. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of Settlor, the Trustee, or a spouse of theirs.

(r) Business Powers.

(i) In General. To engage in any lawful business including, but not limited to, the power to continue at the risk of the trust estate the operation of any business which may become a part of the trust estate, and to sell, liquidate, or otherwise terminate any business interest, including, but not limited to, the fulfillment of any agreement for the disposition of any such business interest.

(ii) Closely Held Businesses. This trust may be funded with, or subsequently purchase or otherwise acquire, securities or other financial interests in one or more closely held businesses (each of which is hereinafter referred to as the "business").

(1) Exoneration from Liability. It is realized that the business may not be the type of investment in which fiduciaries would normally invest estate or trust funds. Nonetheless, the Trustees shall incur no liability for any loss which may be sustained by reason of the retention, operation or sale of the business or the exercise of any power conferred upon the Trustees with respect to the business.

(2) Management Powers. The Family Trustee shall have the exclusive duty to deal with and manage the business. In addition to any power granted by law or elsewhere in this document, the Family Trustee shall have the following powers:

(A) To retain and continue the business or any interest therein for such time as the Family Trustee considers advisable;

(B) To operate or participate in the operation of the business in the form of a corporation, limited liability company, partnership or proprietorship;

(C) To direct, control, supervise, manage, operate or participate in the operation of the business; to serve as an officer and director of the business; and to receive from the business compensation for his services in addition to his compensation as a Family Trustee;

(D) To delegate all or any part of his power to supervise, manage or operate the business to such persons as he may select, including any director, officer or employee of the business;

(E) To engage, compensate and discharge such managers, employees, agents, attorneys, accountants, consultants or other representatives as he considers advisable, including anyone who may be a beneficiary or fiduciary of this Trust;

(F) To invest or employ in the business, or to use as collateral for loans to the business, such other estate or trust funds as he considers advisable;

(G) To sell, liquidate or otherwise dispose of all or any part of the business at such time or times, for such prices and upon such terms and conditions as he considers advisable, and to sell the business to anyone who is a beneficiary or a fiduciary of this Trust; and

(3) Exclusion from Powers. Neither Commonwealth Trust Company nor any successor Administrative Trustee shall have any power, duty and/or responsibility in connection with the operation, control, supervision, management and participation of the business.

(s) Income and Principal. To determine, in accordance with the provisions of Delaware law, what constitutes income and principal of the trust estate, the manner in which expenses and other charges shall be allocated between these accounts, and whether or not to establish reserves for depreciation or depletion, and to add undistributed income to principal.

(t) Tax Elections. To exercise any tax option or election permitted by law as the Trustee determines, in its sole discretion, even though the effect is to treat beneficiaries hereunder differently, or to favor some at the expense of others. The Trustee may, but need not, make such compensating adjustments among beneficiaries with respect thereof as it deems appropriate considering the nature of the tax election and the amounts involved.

(u) Reliance. To rely upon any notice, certificate, affidavit, or other document or evidence believed by the Trustee to be genuine and accurate, in making any payment or distribution. The Trustee shall incur no liability for a disbursement or distribution made in good faith and without actual notice or knowledge of a changed condition or status affecting any person's interest in the trust or any other matter.

(v) Commingling. To commingle and invest as one fund, or make joint investments with, the principal of two or more separate trusts established hereunder, with each trust having an undivided interest therein.

(w) Division and Distribution. To make all allocations, distributions, or divisions contemplated by this Trust Agreement; to allocate, distribute and divide different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or trusts, in cash or in kind, or both, without regard to the income tax basis of specific property allocated to any beneficiary or trust, even though shares may as a result be composed differently, and to determine the value of any property so allocated, divided or distributed.

(x) Withholding of Distribution. To withhold from distribution all or any part of the trust property as long as the Trustee, in its discretion, determines that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the trust.

(y) Mineral Powers. To retain or acquire interests in oil, gas, or other mineral resources; to execute as to those interests any agreements, assignments, contracts, deeds, grants or leases for any term (even though the term may extend beyond the termination of the trust); to manage, control, operate, explore, mine, develop, or take any action for the production, recovery, sale, treatment, storage, or transportation of any such interest; to drill, rework, or recompleat wells of any type; to conduct or participate in secondary recovery operations; to enter into agreements for pooling or unitization; and to install, operate, or participate in the operation of any plant, mine, or other facility.

(z) Environmental Hazards. To use and expend the trust income and principal to (i) take all appropriate action to prevent, identify, or respond to actual or threatened violations of any environmental law or regulation for which the Trustee may have responsibility, including the authority to conduct environmental assessments, audits, and site monitoring to determine compliance with any environmental law or regulation; (ii) take all appropriate remedial action to contain, cleanup, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; and (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards.

(aa) Miscellaneous Powers. Generally to do and perform any and all acts, things, or deeds which, in the discretion of the Trustee, may be necessary or proper for the protection, preservation, and promotion of the trust properties and estate.

6.2 Division of Powers. The powers and duties granted under this Trust Agreement shall be divided among the Trustees as follows:

(a) Administrative Trustee. The Administrative Trustee shall have the following exclusive duties, which shall all be carried out in the State of Delaware or such other jurisdiction as the Trustee shall, from time to time, select as the situs of the trust:

(i) To maintain bank accounts, brokerage accounts and other custody accounts which receive trust income and contributions and from which trust expenditures and distributions are disbursed.

(ii) To maintain storage of tangible personalty and evidence of intangible trust property.

(iii) To maintain trust records.

(iv) To maintain an office for Trustee meetings and other trust business.

(v) To originate, facilitate and review trust accountings, reports and other communications with the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vi) To respond to inquiries concerning the trust from the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vii) To execute documents with respect to trust account transactions.

(viii) To retain accountants, attorneys, investment counsel, agents and other advisers in connection with the performance of its duties under this Section 6.2.

(b) Independent Trustee. The Independent Trustee shall have all of the powers and duties specifically assigned to the Independent Trustee under this Trust Agreement. These powers may only be exercised by the Independent Trustee.

(c) Family Trustee. The Family Trustee shall possess and exercise all of the powers and duties of the Trustee not specifically granted to the Administrative Trustee or the Independent Trustee under this Trust Agreement, including those specifically assigned to the Family Trustee. Without limiting the generality of the foregoing, the Family Trustee shall exercise all Trustee authority and have all Trustee responsibility with respect to the investment of the trust estate. If there is no Family Trustee serving,

however, all of the powers and duties of the Trustee, including those assigned to the Family Trustee, shall be exercised and discharged by the Independent Trustee.

6.3 Merger of Trusts. If at any time a Trustee of any trust created pursuant to this Trust Agreement shall also be acting as Trustee of any other trust created by trust instrument or by will for the benefit of the same beneficiary or beneficiaries and upon substantially the same terms and conditions, the Trustee is authorized and empowered, if in the Trustee's discretion such action is in the best interest of the beneficiary or beneficiaries of the trust created hereunder, to transfer and merge all of the assets then held under such trust created pursuant to this Trust Agreement to and with such other trust and thereupon and thereby to terminate the trust created pursuant to this Trust Agreement. The Trustee is further authorized to accept the assets of the other trust which may be transferred to the Trustee of the trust created hereunder and to administer and distribute such assets and properties so transferred in accordance with the provisions of this Trust Agreement. If the component trusts differ as to contingent beneficiaries and the contingency occurs, the funds may be distributed in such shares as the Trustee, in the Trustee's sole discretion, shall deem necessary to create a fair ratio between the various sets of remaindermen. If any trust created in this Trust Agreement is merged with any trust created under any other instrument, such merged trust shall not continue beyond the date on which the earliest maximum term of the trusts so merged would, without regard to such merger, have been required to expire. Settlor further directs that, as to any property at any time a part of any trust estate (including a merged trust) as to which under the laws of any state applicable to said property that trust is required to be terminated at any time prior to its normal termination date, the trust as to that particular property shall terminate at the time required by the laws of said state.

6.4 Certain Powers and Rights Limited. Settlor intends that the trust created under Section 3.1 hereof shall not be included in Jim's gross estate for estate tax purposes unless the Independent Trustee grants Jim a general power of appointment pursuant to paragraph 3.1(d). All issues applicable to the trust shall be resolved accordingly.

6.5 GST Inclusion Ratio. If property not having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio equal to zero. If property having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio not equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio not equal to zero.

6.6 Out-of-State Properties. If any trust property is situated in a jurisdiction in which the Trustee is unable or unwilling to act, the Trustee may appoint an ancillary trustee for such jurisdiction and may confer upon the ancillary trustee such powers and discretions, exercisable without court order, to act with respect to such property as the Trustee deems proper. The ancillary trustee shall be responsible to the Trustee for all property it administers. The Trustee

may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.7 Management of Real Property. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof), acting alone, shall make any and all decisions regarding: (i) the acquisition, retention and disposal of real estate; (ii) the operation, maintenance, repair, rehabilitation, alteration, construction, erection, improvement, or removal of any improvements on real estate; (iii) the subdivision of real estate; (iv) the granting of easements, giving of consents, and entering into contracts relating to real estate or its use; (v) the release or dedication of any interest in real estate; and (vi) the payment of taxes, utilities, and maintenance expenses attributable to real estate owned by any trust created hereunder. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof) may, in its discretion, either exercise such powers or appoint an ancillary trustee to exercise such powers. The Trustee may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.8 No Court Supervision. The Trustee shall not be required to qualify before or be appointed by any court; nor shall the Trustee be required to obtain the order or approval of any court in the exercise of any power or discretion.

6.9 Division of Trusts. The Trustee may divide any trust established by this Trust Agreement into two or more separate trusts as provided in this section. Settlor exonerates the Trustee from any liability arising from the exercise or failure to exercise any powers granted herein, provided the Trustee acts in good faith.

(a) Division and Funding of Separate Trusts. The Trustee may divide any trust established by this Trust Agreement, at any time, into two or more separate trusts so that the generation-skipping transfer tax inclusion ratio as defined in Section 2642(a) of the Code for each trust shall be either zero or one. Any such division shall be accomplished in accordance with applicable regulations under Chapter 13 of the Code.

(b) Administration of Separate Trusts. Such separate trusts shall have the identical provisions as the original trust. However, with respect to each separate trust, the Trustee may: (1) make different tax elections, (2) expend principal and exercise any other discretionary powers with respect to such separate trusts differently, (3) invest such separate trusts differently, and (4) take all other actions consistent with such trusts being separate trusts.

(c) Powers of Appointment. The donee of any power of appointment with respect to a trust so divided may exercise such power of appointment differently with respect to the separate trusts created by the division.

6.10 Limitation of Powers. The following limitations, affecting the administration of the trusts created hereunder, apply notwithstanding any other provision of this Trust Agreement. For purposes of this Section 6.10, the term "Settlor" shall include any individual who contributes property to the Trustee to be added to the trust estate.

(a) Support Duty. Distributions from the trust estate shall not be made which discharge, in whole or in part, the personal legal obligations of a Settlor or a Trustee from time to time existing, to support or educate any of the trust beneficiaries. When determining these legal obligations, the existence of this trust and funds made available by it shall not be taken into consideration.

(b) Adequacy of Consideration. No party may, through purchase, exchange, or otherwise, deal with or dispose of the corpus or the income of the trust estate for less than adequate consideration in money or money's worth.

(c) Insurance. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of a Settlor, the Trustee or a spouse of either of them.

(d) Borrow. The Trustee shall not allow a Settlor to borrow trust principal or income, directly or indirectly, without adequate interest or security.

(e) Substitute Property. The Trustee shall not allow a Settlor to reacquire or exchange any property of the trust estate by substituting other property with an equivalent value.

(f) Vote. A Settlor, acting as a Trustee, shall not be entitled to vote, directly or indirectly, shares of stock of a controlled corporation, as defined under Section 2036 of the Code, which is held as part of the trust estate.

6.11 Dealing with Fiduciaries. The Trustee may enter into any transaction with the Trustee or beneficiaries of the trusts created hereunder, acting in their individual or in another fiduciary capacity, or with any person or entity related to the Trustee or a beneficiary in any manner, if such transaction is otherwise authorized under this Trust Agreement. Without limiting the generality of the foregoing authorization, the Trustee may enter into any transaction otherwise authorized hereunder on behalf of any trust created hereunder even though the other party to the transaction is: a trust of which a beneficiary or Trustee under this Trust Agreement is a beneficiary or trustee, including, but not limited to, any trust established by this Trust Agreement; an estate of which a beneficiary or Trustee under this Trust Agreement is a representative or beneficiary; or a business or charitable corporation of which a beneficiary or Trustee under this Trust Agreement is a director, officer, employee, or owner.

ARTICLE VII

IRREVOCABILITY

This Trust Agreement and each of its provisions may not be revoked, amended, or modified.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

8.1 Applicable Law. The trust created under this Trust Agreement shall be deemed a Delaware trust and all matters pertaining to the validity, construction, and application of this Trust Agreement or to the administration of the trust created hereunder shall, in all respects, be governed by the laws of the State of Delaware. However, if the Trustee, in its sole discretion, determines that a change of situs would be beneficial to the purposes of the trust established by this Trust Agreement, the Trustee shall have the discretion and authority to change the situs of any such trust to another state. No change of situs shall be authorized herein, however, which would result in a termination of the trust for federal tax purposes. Furthermore, the Trustee shall not be entitled to change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust. Any proceeding involving the Trust must be brought in the State of Delaware for so long as the situs of the Trust shall be the State of Delaware.

8.2 Perpetuities Provision. The trust created hereunder shall be perpetual to the fullest extent permitted by Delaware law. If the trust created hereunder is deemed to be subject to the law of a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust shall terminate in all events upon the expiration of the longest period the property may be held in trust under this Agreement under the law of such jurisdiction (including any application periods in gross, such as 110 years, 360 years, or 1,000 years); provided, however, that if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this Section shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust is determined with reference to the death of the last survivor of a group of individuals in being upon the date of this Trust Agreement, those individuals shall consist of Jim and Jim's Descendants who are in being on the date of this Trust Agreement. Upon termination of a trust pursuant to the provisions of this Section 8.2, the Trustee shall distribute such trust to its income beneficiaries determined at the time of distribution. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes.

In the event any trust created hereunder owns real property, and if such real property is subject to a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then the Trustee shall take such action as is necessary to avoid termination of the trust with respect to that real property interest including, without limitation, selling the real property or contributing the real property to a business entity in exchange for ownership interests in such entity to be owned by the trust.

8.3 Gestation. A child in gestation who is born alive shall be considered a child in being throughout the period of gestation.

8.4 Survivorship. Any person must survive by thirty (30) days for a gift made in this Trust Agreement which directly or indirectly requires such person's survival of another to be effective.

8.5 Release of Powers and Interests. Any person, including a beneficiary and a Trustee, shall have the power to disclaim, release, or restrict, irrevocably, in whole or in part, any interest, right, power, or discretion granted to such person with respect to any trust by signed instrument delivered to the Trustee, or in any other manner permitted by law. Any person designated or appointed as a Trustee may, prior to accepting the trust, by written instrument decline to accept any right, power, or discretion with respect to the trust and may accept the trust without such right, power, or discretion.

8.6 Powers of Appointment.

(a) Capacity in Which Exercisable. Every power of appointment granted to a beneficiary under this Trust Agreement is exercisable by that beneficiary in the beneficiary's individual capacity, notwithstanding the fact that the beneficiary may also be serving as a Trustee of the trust.

(b) Manner of Appointment. Every power of appointment granted herein: (i) shall be personal to the donee of such power and may not be exercised on behalf of the donee by any other person, including an attorney-in-fact, a guardian, or any other court appointed representative, and (ii) may be exercised in whole or in part and in favor of one or more potential beneficiaries to the exclusion of others. Appointment may be outright or in further trust, with all provisions determined by the donee of the power, and may confer a power of appointment upon the beneficiary or others, if within the constraints imposed by any applicable rule against perpetuities and any other law which is applicable to the appointment.

(c) Exercise of Inter Vivos Power. An inter vivos power of appointment granted in this Trust Agreement may be exercised only by a written instrument, executed and acknowledged by the donee and delivered to the Trustee during the donee's lifetime, which specifically refers to the power of appointment and expresses the intention to exercise it. If no such instrument is delivered to the Trustee during the donee's lifetime, upon the donee's death the Trustee may distribute the property subject to the power in the manner provided in this Trust Agreement for distribution in default of exercise.

(d) Determination of the Exercise of a Testamentary Power. The Trustee may rely upon any instrument admitted to probate as a will or codicil in determining whether a testamentary power of appointment granted herein has been exercised. If no will or codicil is brought to the Trustee's attention within ninety (90) days of a death to indicate the exercise of a testamentary power, the Trustee may distribute the property subject to the power according to the terms herein provided for distribution in default of exercise. The Trustee will be protected from liability for its actions as authorized in this subsection (d), but this subsection does not affect a beneficiary's rights in the property subject to the power of appointment.

(e) Tax Consequences. The exercise of a power of appointment may have important tax consequences. The donee of any power of appointment should consult with counsel before exercising such power of appointment.

8.7 Liability of Third Party. No person paying money or delivering property to the Trustee need see to the application of such money or property. No person dealing with the Trustee need inquire into the propriety of any transaction or the Trustee's authority to enter into and consummate the same.

8.8 Use of Words. As used in this Trust Agreement, the masculine, feminine, and neuter gender, and the singular or plural of any word each includes the others unless the context indicates otherwise.

8.9 Unenforceable Provision. If any provision of this Trust Agreement is unenforceable, the remaining provisions shall be given effect, unless to do so would produce an unreasonable result.

8.10 Titles, Headings, and Captions. All titles, headings, and captions used in this Trust Agreement have been included for administrative convenience only and should not be construed in interpreting this Trust Agreement.

8.11 Counterpart Signatures. This document may be executed in counterparts, and all counterparts so executed shall constitute a single document, notwithstanding that the interested parties are not or may not be signatories to the original or to the same counterpart.

8.12 Trust Name. The trusts established under Article II of this Trust Agreement, collectively, shall be known as the "The Dugaboy Investment Trust".

IN WITNESS WHEREOF, the Settlor, the Family Trustee and the Administrative Trustee have hereunto set their hands on the day and year first above written in multiple originals. The Trustees agree to administer the trust estate in accordance with the terms of this Trust Agreement. The Independent Trustee shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee in accordance with Section 5.2 hereof.

Dana Scott Breault 23 Oct 10
DANA SCOTT BREAULT, Settlor

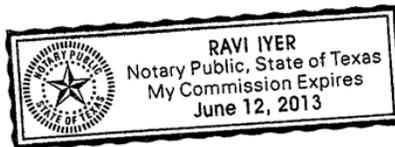
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared DANA SCOTT BREAULT, as Settlor, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 23rd day of October, 2010.

Ravi Iyer

Notary Public



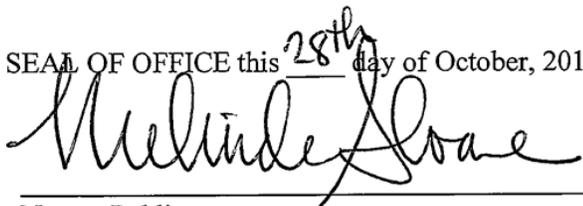


JAMES D. DONDERO, Family Trustee

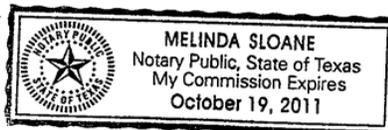
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JAMES D. DONDERO, as Family Trustee, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ^{28th} day of October, 2010.



Notary Public



COMMONWEALTH TRUST COMPANY,
Administrative Trustee

By: Cynthia D M Brown
Name: Cynthia D. M. Brown
Title: President

STATE OF DELAWARE §
 §
COUNTY OF NEW CASTLE §

BEFORE ME, the undersigned authority on this day personally appeared Cynthia D. M. Brown, President, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed as the act of COMMONWEALTH TRUST COMPANY and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 15th day of ~~October~~ November, 2010.

Laura M Owens
Notary Public



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EXHIBIT 68

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In the alternative to and contingent upon a denial by the Court of Defendants' Motion to Compel Arbitration (which the Court should not deny), Defendants move to dismiss the Fifth, Sixth, and Seventh Claims for Relief in Plaintiff's Amended Complaint for failure to state claims on which this Court could grant relief under Federal Rule of Civil Procedure 12(b)(6), as incorporated into this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure. In filing this Motion to Dismiss, Defendants do not waive any rights to compel arbitration, as set forth in Defendants' Motion to Compel Arbitration.² Defendants show in support as follows:

I. BACKGROUND

A. The Bankruptcy and Rejection of Executory Contracts

1. Highland Capital Management, L.P. ("Plaintiff") filed a voluntary Chapter 11 bankruptcy petition ("Bankruptcy Petition") on October 16, 2019 ("Petition Date") in the United States Bankruptcy Court for the District of Delaware, and venue was subsequently transferred to this Court on December 4, 2019.³ On November 24, 2020, Plaintiff filed its Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") along with its Disclosure Statement, which the Court approved on November 24, 2020.⁴

2. On January 11, 2021, Plaintiff filed its Second Notice of Executory Contracts and Unexpired Leases to be Assumed by the Plaintiff [then, Debtor] Pursuant to the Plan (the

² *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff's complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

³ Order Transferring Venue, Case 19-12239-Css [Doc. 184].

⁴ Case No. 19-34054-sgj11 [Doc. 1476]

“Assumption Notice”).⁵ The Assumption Notice itemized seventy-one (71) executory contracts to be assumed by the Plaintiff, notably including the Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. (the “LPA”). However, on January 21, 2021, the Debtor entered a Withdrawal Notice, rejecting the LPA along with several other executory contracts,⁶ and confirmed on February 1, 2021, that it had withdrawn the LPA from its list of assumed executory contracts.⁷ On February 22, 2021 (the “Rejection Date”), the Court confirmed the Plan, causing the rejection of the LPA.⁸

B. The Limited Partnership Agreement

3. James Dondero (“Jim Dondero”) is the co-founder of Highland Capital (Plaintiff in this Adversary Proceeding), and served as its President and CEO until January 9, 2020.⁹ The Dugaboy Family Trust (“Dugaboy”) is one of Debtor’s Class A limited partners and holds the majority of the Debtor’s Class A limited partnership interests. LPA, Exhibit A. Jim Dondero’s sister Nancy Dondero serves as the Dugaboy Family Trustee.¹⁰ Jim Dondero is a lifetime beneficiary of Dugaboy.¹¹

4. Dugaboy’s explicit authorization to approve compensation for Jim Dondero - and thus bind the Partnership - comes specifically from the LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The *General Partner* and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered

⁵ Case 19-34054-sgj11 [Doc. 1719].

⁶ Case 19-34054-sgj11 [Doc. 1791, Schedule A].

⁷ Case 19-34054-sgj11 [Doc. 1871].

⁸ Case 19-34054-sgj11 [Doc. 1943].

⁹ Am. Compl. ¶ 11, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 12, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 12, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 12, Adv. No. 21-03005 [Doc. 63].

¹⁰ Am. Compl. ¶ 13, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 14, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 14, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 14, Adv. No. 21-03005 [Doc. 63].

¹¹ Am. Compl. ¶ 12, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 13, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 13, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 13, Adv. No. 21-03005 [Doc. 63].

pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.

Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests. LPA, Exhibit A, line 5.¹²

Based on the Compensation provision and definitions, Dugaboy clearly had the right to approve compensation for the General Partner and its Affiliates. The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“**Affiliate**’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘**control**’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“**Person**’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Jim Dondero was an Affiliate of Strand under the LPA’s definition. It is also undisputed that he controlled Highland Capital Real Estate Partners (“HCRE”), Nexpoint Advisors, L.P. (“Nexpoint”), and Highland Capital Management Services, Inc. (“HCMS”).¹³

Thus, Jim Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

¹² See attached, LPA Exhibit A.

¹³ Am. Compl. ¶ 2, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 2, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 2, Adv. No. 21-03005 [Doc. 63].

C. The Promissory Notes

5. Over the last several years, multiple promissory notes were executed in favor of the Plaintiff to different entities and individuals, which obligations became subject to potential forgiveness as compensation for Jim Dondero that, under the LPA, Dugaboy was charged with approving:

Notes to Jim Dondero (the “Dondero Notes”):

1. A note for \$3,825,000, executed on February 2, 2018, payable on demand.
2. A note for \$2,500,000, executed on August 1, 2018, payable on demand.
3. A note for \$2,500,000, executed on August 13, 2018, payable on demand.¹⁴

Notes to HCRE (the “HCRE Notes”):

1. A note for \$100,000, executed on November 27, 2013, payable on demand.
2. A note for \$2,500,000, executed on October 12, 2017, payable on demand.
3. A note for \$750,000, executed on October 15, 2018, payable on demand.
4. A note for \$900,000, executed on September 25, 2019, payable on demand.
5. A term note for \$6,059,831, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁵

Notes to HCMS (the “HCMS Notes”):

1. A note for \$150,000, executed on March 28, 2018, payable on demand.
2. A note for \$200,000, executed on June 25, 2018, payable on demand.
3. A note for \$400,000, executed on May 29, 2019, payable on demand.
4. A note for \$150,000, executed on June 26, 2019, payable on demand.¹⁶

Note to Nexpoint (the “Nexpoint Note”):

1. A term note for \$30,746,812.33, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁷

¹⁴ Am. Compl. ¶¶ 20-22, Adv. No. 21-03003, Case No. 19-34054-sgj11 [Doc. 79].

¹⁵ Am. Compl. ¶¶ 21-24, Adv. No. 21-03007, Case No. 19-34054-sgj11 [Doc. 63]; According to its Amended Complaint, Plaintiff alleges in ¶ 63 that it has suffered damages under the note “in the amount of at least \$5,012,260.96, as of December 11, 2020,” but in ¶ 64 that it has suffered damages “in the amount of at least \$6,145,466.84 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date...”

¹⁶ Am. Compl. ¶¶ 21-24, Adv. No. 21-03006, Case No. 19-34054-sgj11 [Doc. 68].

¹⁷ Am. Compl. ¶ 21, Adv. No. 21-03005, Case No. 19-34054-sgj11 [Doc. 63]; Plaintiff alleges in ¶ 31 that “as of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03,” and claims the same amount as damages in ¶ 48.

6. Jim Dondero entered into agreement (the “Subsequent Agreements,” or as Plaintiff refers to them, the “Alleged Agreements”) with Nancy Dondero (acting for Dugaboy as its Trustee) that Plaintiff would not demand collection of the Notes unless events had occurred that made fulfillment of conditions subsequent impossible.¹⁸ However, annual term loan payments and annual interest payments on the demand notes were to be (and were) made.¹⁹

7. On December 3, 2020, after the bankruptcy Petition Date, Plaintiff demanded payment from Jim Dondero, HCRE, and HCMS on their respective demand notes due by December 11, 2020.²⁰ On January 7, 2021, Plaintiff made a demand on the Nexpoint term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98,” and a demand on the HCRE term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84.”²¹ Plaintiff has refused to recognize the Subsequent Agreement, calling it a “fiction.”²² Other than annual term and interest payments and some voluntary prepayments on the term notes, Defendants have not paid the Notes.²³

¹⁸ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

¹⁹ *E.g.*, Am. Compl. ¶ 21,27, Adv. No. 21-03005 [Doc. 63], showing the original principal of the note being \$30,746,812.33, but Plaintiff only demanding \$24,471,804.98 in its demand letter; *E.g.*, Am. Compl. ¶ 37,63,64, Adv. No. 21-03007 [Doc. 63], showing the original principal of the note being \$6,059,831, but Plaintiff alleging it was damaged in the amount of at least \$5,012,260.96 as of December 11, 2020, but also in the next paragraph inconsistently alleging it was damaged in the amount of at least \$6,145,466.84.

²⁰ Am. Compl. ¶ 26, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 28, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 28, Adv. No. 21-03006 [Doc. 68].

²¹ Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63]; Am. Compl. ¶ 43, Adv. No. 21-03007 [Doc. 63].

²² Am. Compl. ¶ 3, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 3, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 3, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 3, Adv. No. 21-03005 [Doc. 63].

²³ With respect to the NexPoint term loans, due to a mistake, the 2020 end-of-year payment was late and the notes should be deemed current, Am. Ans. ¶ 40,41, Adv. Pro. 21-03005 [Doc. 50]; Am. Compl. ¶ 28, Adv. No. 21-03005 [Doc. 55-2], acknowledging payment of \$1,406,111.92.

D. The Adversary Proceedings

8. On January 22, 2021, Plaintiff initiated Adversary Proceedings against Jim Dondero, HCRE, HCMS, and Nexpoint for breach of contract and turnover of property.²⁴ On August 17, 2021, Plaintiff filed Amended Complaints against each Defendant alleging additional claims against Jim Dondero and new claims against Dugaboy and Nancy Dondero. Defendants each filed Amended Answers asserting several affirmative defenses, including that the Subsequent Agreements preclude the respective claims.²⁵

9. In the Fifth Claim of each Amended Complaint,²⁶ Plaintiff asks the Court to declare (a) that limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the LPA, (b) that neither Dugaboy nor Nancy Dondero was authorized under the LPA to enter into the Subsequent Agreement on behalf of the Partnership, (c) that neither Dugaboy nor Nancy Dondero otherwise had the right or authority to enter into the Subsequent Agreement on behalf of the Partnership, and (d) the Subsequent Agreement is null and void.²⁷

10. In the Sixth Claim of each Amended Complaint,²⁸ Plaintiff alleges that if Dugaboy, as a limited partner under the LPA, or Nancy Dondero, as the representative of Dugaboy, had the

²⁴ Am. Compl. ¶ 33, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 47, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 45, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 33, Adv. No. 21-03005 [Doc. 63].

²⁵ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

²⁶ Nancy Dondero is a Defendant on Counts V, VI, and VII in Adv. No. 21-03005, Adv. No. 21-3006, and Adv. No. 21-3007. Nancy Dondero is a Defendant only on Count VII in Adv. No. 21-03003.

²⁷ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63], Plaintiff alleges against Dugaboy and Nancy Dondero; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

²⁸ See note 26, *supra*.

authority to enter into the Subsequent Agreement on behalf of [Plaintiff], then Dugaboy incurred a fiduciary duty of care, and breached said duty by entering into the Subsequent Agreement.²⁹

11. In the Seventh Claim of each Amended Complaint, Plaintiff alleges that Jim and Nancy Dondero were aware that Dugaboy would have fiduciary duties owed to the Plaintiff if acting to bind the Plaintiff per the authorization in the LPA, and aided and abetted Dugaboy's breach of its fiduciary duties by knowingly participating in the authorization of the Subsequent Agreement.³⁰

II. STANDARD OF REVIEW

12. An asserted cause of action must be dismissed when the complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must meet two criteria: (1) it must assert a plausible claim, and (2) it must set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at 1949-50 (citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)). Thus, either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" requires dismissal. *Id.* The plaintiff must allege specific facts and not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). A court may not strain to find inferences favorable to the plaintiff or accept conclusory allegations, unwarranted deduction, or legal conclusion. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

13. To satisfy *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, *Twombly*, at 570. A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court

²⁹ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

³⁰ Am. Compl. ¶ 79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 77, Adv. No. 21-03005 [Doc. 63].

to draw the reasonable inference that the defendant is liable under the alleged claim. *Id.* at 556. Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also “plausibly suggest an entitlement to relief.” *Id.*, *Iqbal*, at 1951.

III. ARGUMENTS AND AUTHORITIES

A. **Plaintiff’s Fifth Claim for Declaratory Relief Under the LPA Should Be Dismissed for Two Reasons.**

1. **Plaintiff’s Fifth Claim Fails Because the Terms of the LPA are so Clear on their Face That There is No Actual Controversy between Parties.**

14. Plaintiff’s claim presents no “actual controversy” because the provisions of the LPA clearly allow Dugaboy to bind the Partnership by approving compensation and there is no controversy that could require a declaration by this Court.

15. Plaintiff argues that Dugaboy was not authorized to enter into the Subsequent Agreement regarding Jim Dondero’s compensation, nor was it authorized to bind the Partnership.³¹ Plaintiff further attached the LPA as “Exhibit 5” to its Amended Complaints and referenced this Court to § 4.2, which states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership *other than as specifically set forth in this Agreement*.³² (emphasis added).

16. Contrary to Plaintiff’s argument, the LPA explicitly authorizes Dugaboy as the Majority Interest to approve compensation for Jim Dondero as previously articulated in this Motion. Approving compensation inherently binds the Partnership in that it exchanges money on behalf of the Partnership for services rendered. Because it is so expressly provided for in the LPA,

³¹ *Id.*

³² Am. Compl. ¶ 43, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 55, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 53, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63].

Plaintiff's contention that Dugaboy could not act to bind the Partnership through compensation agreements amounts to Plaintiff's misinterpretation of the LPA as opposed to an "actual controversy" in need of declaratory relief. This claim is nothing more than Plaintiff's attempt at an end-around to avoid proving the merits of its breach of fiduciary duty claims and essentially asks this Court for an advisory opinion to help Plaintiff do so. Under *Twombly*, Plaintiff's claim for declaratory relief should be dismissed pursuant to Rule 12(b)(6).

2. Debtor Lacks Standing to Assert a Claim for Declaratory Relief Based Upon an Executory Contract It Rejected.

17. There is no authority for "allowing a debtor's estate or a successor-in-interest such as the [creditor's committee or litigation trustee] to pursue claims for post-petition breaches of a rejected contract. Because rejection is an affirmative declaration by the debtor that the estate will not take on the obligations of a prepetition contract made by the debtor, [Plaintiff-Debtor's] rejection of the [LPA] not only relieved the estate of its post-petition performance obligations, but also relieved the estate of its ability to assert claims for post-petition breaches thereof." *Lauter v. Citgo Petroleum Corp.*, CV H-17-2028, 2018 WL 801601, at *15 (S.D. Tex. Feb. 8, 2018). As explained below, as a result, not only does this preclude Debtor's claims for breach of fiduciary duty (see sections B.2., C.5. *infra*), it also precludes Debtor's attempt to obtain declaratory relief.

18. Plaintiff seeks declaratory relief against Dugaboy and Nancy Dondero to determine if either of them were authorized to enter into the Subsequent Agreement under the LPA.³³ Although most causes of action accrue when an injury results from a wrongful act, a cause of action for declaratory relief differs in that it does not accrue until there is an actual controversy between the parties. *In re Estate of Denman*, 362 S.W.3d 134, 144 (Tex. App. -- San Antonio

³³ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2011, no pet.); *Murphey v. Honeycutt*, 199 S.W.2d 298, 299 (holding that declaratory judgment action accrued in a will construction case at the time when an heir committed an act indicating she was operating against the will, not when the will was executed years prior to the heir's act); *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 278 (Tex. App. – El Paso 2021, pet. filed) (holding that in a lease dispute, the actual controversy did not arise-- and the claim did not accrue- when the lease was entered into by the parties, but rather when plaintiff challenged the lease terms at a later date).

19. Here, Plaintiff's declaratory relief claim accrued (if at all) when Jim Dondero asserted the Subsequent Agreement as an affirmative defense. Plaintiff alleges that the actual controversy here is whether or not Dugaboy or Nancy Dondero had authority to enter into the Subsequent Agreement under the rejected LPA. Plaintiff specifically pleads that "[a] bona fide, actual, present dispute exists between the [Plaintiff] and Dugaboy concerning whether Dugaboy was authorized to enter into the Alleged Agreement on the [Plaintiff]'s behalf...[and a] judgment declaring the parties' respective rights and obligations will resolve their dispute."³⁴ Plaintiff did not allege anywhere in its Original Complaint that a dispute regarding Dugaboy's authority to enter the Subsequent Agreement required declaratory relief. Only after Defendants filed their Amended Answers did Plaintiff seek such relief in its Amended Complaint.³⁵ Therefore, this cause of action for declaratory relief accrued when Plaintiff received Defendant's Amended Answers after the bankruptcy began, as that is when facts came into existence that created an actual controversy under the LPA.

20. Section 365 of Title 11 of the United States Code (the "Bankruptcy Code") governs the inclusion and exclusion of executory contracts in bankruptcy. Section 365 vests the power to

³⁴ *Id.*

³⁵ *Id.*

reject or assume any of the Debtor's executory contracts in the trustee, subject to the court's approval. 11 U.S.C. § 365(a). A debtor's rejection of an executory contract constitutes a breach of such contract immediately before the date of the filing of the [bankruptcy] petition. 11 U.S.C. § 365(g)(1). In this case, Plaintiff's act of rejection resulted in a material breach of the LPA that relates back to October 15, 2019 (the "Breach Date") pursuant to the Bankruptcy Code. *See* 11 U.S.C. § 365(g)(1).

21. "Rejection is an affirmative declaration that the estate will not take on the obligations of a pre-petition contract made by the debtor" and "places the obligation to perform outside of the bankruptcy administration." *Lauter*, at *13, citing *Matter of Austin Dev. Co*, 19 F.3d 1077, 1082-83 (5th Cir. 1994); *In re Continental Airlines*, 981 F.2d 1450, 1459 (5th Cir. 1993). "[R]ejection does not change the substantive rights of the parties to the contract, but merely means the bankruptcy estate itself will not become a party to it." *In re Alongi*, 272 B.R. 148, 153 (Bankr. D. Md. 2001) (citing M. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U.Colo.L.Rev. 845 (1988)). As noted above, rejection not only relieves the estate of post-[bankruptcy]petition performance obligations, but also of its ability to assert claims for post-petition breaches thereof. *Lauter*, at *15.

22. The court in *Lauter* looked to the reasoning of Fifth Circuit opinions examining the effects of plaintiffs rejecting executory contracts under § 365. In *In re Continental*, the court reasoned in part that, under § 365, "An agreement cannot 'exist' for one purpose yet take on a 'nonexistent' quality which works for the advantage of one party or the other" when a debtor-plaintiff sought to avoid paying airline pilots under an executory contract it rejected, attempting to treat the contract as terminated. *Id.* at 1460. Likewise, the court in *Matter of Austin* reasoned that a rejection of a lease under § 365 did not terminate the lease, but moved the rights of the parties

affected “outside of the bankruptcy court’s realm because after rejection, the debtor’s estate is no longer involved in the leasehold transaction.” *Id.* at 1083.

23. Following the Fifth Circuit’s application of § 365 in cases such as *In re Continental* and *Matter of Austin*, the court in *Lauter* addressed the impact of a debtor-plaintiff’s attempt to pursue post-petition claims against a defendant whose executory contract had been rejected. The court held that just as in any other contract dispute, a prior material breach by a counterparty relieved the aggrieved party of the duty to perform and deprived the breaching party of the ability to make claims for breach after its own breach. *Id.* at *12-13, 15. After a thorough discussion of § 365, the court ultimately found that the plaintiff lacked standing to pursue claims resulting from a post-petition breach of an executory contract, holding that “the court has not found any authority allowing a debtor’s estate . . . to pursue claims for post-petition breaches of a rejected contract.” *Id.* at *15.

24. Here, Plaintiff asks this Court to interpret and, in effect, determine a breach of the same LPA it rejected and breached prior to the bankruptcy petition date. The LPA was rejected on February 22, 2021 and thus deemed materially breached on October 15, 2019 under § 365(g)(1). Because this cause of action accrued after both rejection and the relation-back breach provision of § 365, Plaintiff’s Fifth Claim for declaratory relief amounts to a post-petition claim arising from a rejected executory contract, which the court in *Lauter* held a Debtor lacks standing to assert in a bankruptcy proceeding. Therefore, this claim should be dismissed pursuant to *Twombly* and Rule 12(b)(6).

B. Plaintiff's Sixth Claim of Breach of Fiduciary Duty Against Dugaboy and Nancy Dondero Fails for Two Reasons.

1. Dugaboy Owes No Fiduciary Duty to Plaintiff as a Consequence of Exercising Its Right to Approve Compensation.

25. Plaintiff alleges that “if Dugaboy, as a limited partner, had the authority to enter into the Alleged Agreement...then Dugaboy would owe the [Plaintiff] a fiduciary duty.”³⁶ The LPA in this case is governed by the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”) except as specifically provided for in the LPA. LPA §§ 1.1,1.2; *see also* Del. Code Ann. Tit. 6, § 17-1102. The DRULPA allows partnership agreements to expand, restrict, or eliminate fiduciary and other legal or equitable duties, provided it may not eliminate the implied contractual duty of good faith and fair dealing. Del. Code Ann. Tit. 6, § 17-1101(d). The DRULPA also specifically permits a partnership agreement to provide the rules for how partners may transact with the partnership. Del. Code Ann. Tit. 6, § 17-107.

26. In Delaware, a limited partner does not owe a fiduciary duty as a consequence of exercising a right of the limited partner under the partnership agreement. *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 864 (Del. Ch. 1999); *In re Est. of Conaway*, 2012 WL 524190, at *3 (Del. Ch. Feb. 15, 2012), *aff'd sub nom. Russell-Conaway v. Frederick-Conaway*, 2012 WL 4478655, 54 A.3d 257 (Del. 2012) (unpublished).

27. In *Bond Purchase*, a limited partner exercised its right under the limited partnership agreement to obtain records of the owners of the partnership for the purpose of making a tender offer for additional interests in the partnership. Although the other partners claimed this request for records was a breach of a fiduciary duty, the court held that “in the absence of any provision in the partnership agreement engrafting duties onto [the limited partner],” “[the limited partner]

³⁶ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

owes no fiduciary duties,” and allowed the limited partner access to the records it sought under the partnership agreement. *Id.* at 864.

28. In *In re Est. of Conaway*, a limited partner withheld consent to transfer another partner’s interest as he was allowed to under the limited partnership agreement. The receiving party alleged a breach of the non-consenting limited partner’s fiduciary duty. The court held that where the limited partner “merely exercised his contracted-for rights under the terms of the [limited partnership agreement],” the limited partner breached no fiduciary duty, assuming there even was one. *Id.* at *3.

29. Just as the limited partners in *Bond Purchase* and *In re Est. of Conaway*, Dugaboy was merely exercising its right to approve compensation pursuant to the LPA when it entered into the Subsequent Agreement. LPA § 3.10(a); § 2.1. Therefore, Dugaboy owes no fiduciary duty to the Plaintiff as a consequence of simply exercising its right under the LPA. While a limited partner who takes on an active role in the management of the entity may thereby assume fiduciary duties, *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (citing cases); *Bond Purchase* at 863-64, merely engaging in actions delegated to the limited partner in the partnership agreement does not constitute participating in the control of a business so as to trigger the assumption of fiduciary duties. Del. Code Ann. Tit. 6, § 17-303(b)(8)(o).

30. Texas has similarly held that “a limited partner does not participate in the control of the business” by taking certain actions listed in the statutes, and such “actions complained of by the plaintiff did not amount to the types of control that could give rise to a duty to the other limited partners.” *Strebel v. Wimberly*, 371 S.W.3d 267, 280 (Tex. App. 2012) (summarizing holding of *AON Properties, Inc. v. Riveraine Corp.*, 1999 WL 12739, at *23 (Tex. App. Jan. 14, 1999)).

31. Here, Dugaboy did not participate in the control of the business because it was taking actions explicitly extended to it in the LPA by approving compensation under § 3.10(a). LPA § 3.10(a); § 2.1. Since the LPA explicitly gives Dugaboy the right to approve such compensation, and Dugaboy was not participating in the control of the business, Dugaboy does not owe a fiduciary duty to Plaintiff. Dugaboy cannot breach a fiduciary duty it does not owe. Further, Nancy Dondero as Trustee owes no fiduciary duty to Plaintiff independently from what Dugaboy owes, as Dugaboy is her principal. Like Dugaboy, Nancy Dondero cannot breach a fiduciary duty she does not owe. Under *Twombly*, Plaintiff's claim for breach of fiduciary duty against Dugaboy and Nancy Dondero should be dismissed pursuant to Rule 12(b)(6).

2. Nancy Dondero Owes No Fiduciary Duty to Debtor.

32. Under Delaware law, a trustee's fiduciary duties of care and loyalty flow to the trust and the beneficiar(ies) of the trust. *Tigani v. Tigani*, 2021 Del. Ch. LEXIS 60, *1, 2021 WL 1197576 (March 30, 2021). A trustee is prohibited from considering her own interests and "all consideration of the interests of third persons." *Id.* at * 38.

33. Plaintiff claims that if Dugaboy had the authority to enter into the Subsequent Agreement, then Ms. Dondero would then somehow owe a fiduciary duty directly to Plaintiff. The Amended Complaint does not allege any facts as to why or how such a fiduciary duty would appear, and there is no legal authority to support such a conclusion. As discussed above, not even Dugaboy owed a fiduciary duty to Plaintiff in determining compensation, as Dugaboy was expressly authorized to do under § 3.10(a) of the LPA. Nancy Dondero, individually, is even further removed from owing any duty to Plaintiff, much less a fiduciary duty. Plaintiff cannot create a legal duty simply by claiming one exists, and its breach of fiduciary duty claim against Nancy Dondero should be dismissed under *Twombly* and Rule 12(b)(6).

3. Debtor Lacks Standing to Assert a Claim for Breach of Fiduciary Duty Based Upon an Executory Contract It Rejected.

34. Plaintiff's Sixth Claim is also barred for the same reasons that discussed in Section A.2 *supra*, and similarly relies on the fact that this cause of action accrued after the LPA was breached on October 15, 2019. In this case, Plaintiff suffered no legal injury – and no cause of action accrued - until the notes were not paid on demand by December 11, 2020.

35. Generally, “a cause of action accrues...when facts come into existence that authorize a claimant to seek judicial remedy.” *Dunmore v. Chicago Title Ins. Co.*, 400 S.W.3d 635, 640 (Tex. App. – Dallas 2013, no pet.) (citing cases). “Breach of fiduciary duty claims generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act *and* resulting injury.” *Dunmore*, at 641 (emphasis added). Further, “[t]he general rule governing when a claim accrues...is the ‘legal injury rule,’ which provides that a claim accrues ‘when a wrongful act causes some legal injury, even if that fact of injury is not discovered until later, and even if all damages have not yet occurred.’” *Id.* (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)). “[A] legal injury [is] an injury giving cause of action by reason of its being an invasion of a Plaintiff's right...be the damage however slight.” *Murphy*, at 270. Although the discussion of when a claim accrues in Texas generally involves application of the discovery rule (which is not applicable to these facts), the concept of “legal injury” is still the cornerstone of an accrual analysis.

36. Here, Plaintiff alleges that Dugaboy and Nancy Dondero breached a fiduciary duty when it entered into the Subsequent Agreement.³⁷ The alleged wrongful act was the Subsequent Agreement itself which Plaintiff alleges breached a fiduciary duty. However, Plaintiff suffered no

³⁷ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

legal injury from the Subsequent Agreement until Defendant did not pay the Notes when demanded (if it even suffered one at all). The Subsequent Agreement simply made the Notes potentially forgivable upon conditions subsequent, which could not have impacted the alleged value of the Notes until the conditions occurred. As a result, the cause of action did not accrue until December 11, 2020, after the Petition Date. Debtor's rejection of the LPA, the alleged source of the fiduciary duties allegedly breached,³⁸ therefore bars pursuit of the Plaintiff's Sixth Claim for the same reasons set forth in Section A.2 *supra*.

C. Plaintiff's Seventh Claim of Aiding and Abetting Breach of Fiduciary Duty against Jim and Nancy Dondero Fails for Several Reasons.

1. Neither Jim nor Nancy Dondero could have Aided and Abetted a Breach of Fiduciary Duty because Dugaboy did Not Owe a Fiduciary Duty to Plaintiff.

37. Plaintiff claims that Jim and Nancy Dondero aided and abetted Dugaboy's alleged breach of fiduciary duty by entering into the Subsequent Agreement. However, aiding and abetting is a fundamentally dependent claim that can only succeed if there is a valid underlying breach of fiduciary duty claim. *In re Draw Another Circle*, 602 B.R. 878, 904 (Bankr. D. Del. 2019) (citing Restatement (Second) of Torts § 876 for the proposition "the derivative nature of an aiding and abetting claim will exist only with the success of the breach of fiduciary duty claim"); *West Fork Advisors LLC v. SunGard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App.-Dallas 2014) (citing Restatement (Second) of Torts § 876(b) (1979)). As previously discussed in Section B.1., Dugaboy did not owe any fiduciary duty to Plaintiff that could have been breached. Therefore, Plaintiff's derivative claim of aiding and abetting against both Jim and Nancy Dondero is legally impossible and should be dismissed under *Twombly* and Rule 12(b)(6).

³⁸ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2. Nancy Dondero Cannot Aid and Abet Herself as Dugaboy Trustee Because Aiding and Abetting Requires More Than One Actor.

38. Even if Dugaboy owed and breached a fiduciary duty to Plaintiff (which it did not), it is legally impossible for Nancy Dondero to have aided and abetted Dugaboy's alleged breach of fiduciary duty by authorizing the Subsequent Agreement as she was acting as Dugaboy in her trustee status. Because there are limited cases on point, an analysis under the Restatement (Second) of Torts § 876 (1979) is compelling because Delaware courts routinely look to the Restatement to fill lacunae in the law. *In re Rural Metro Corp.*, 88 A.3d 54, 98 (Del. Ch. 2014), decision clarified on denial of reargument sub nom. *In re Rural Metro Corp. Stocholders Litig.* (Del. Ch. 2014) (applying the Restatement to an aiding and abetting breach of fiduciary duty analysis). "The Delaware Supreme Court often relies on the Restatement (Second) of Torts." *Id.* at 98. Comparison to cases in other jurisdictions construing law similar to Delaware law is also instructive.

39. The Restatement (Second) § 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with *the other* or pursuant to a common design with him, or (b) knows that *the other's* conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to *the other* in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979), adopted in Delaware by *Patton v. Simone*, Civ. A. 90C-JA-29, 1992 WL 183064 (Del. Super. Ct. June 25, 1992) (emphasis added). Under the Restatement (Second), people act "in concert" with each other when they act "in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." Restatement (Second) of Torts § 876, comment A. Under the Restatement (Second), Nancy

Dondero could not have conceivably acted “in accordance with an agreement” with herself in her Trustee capacity, as she is a singular individual.

40. Delaware has not directly addressed the issue of whether one can aid and abet one's self, but it has applied the Restatement (Second) when analyzing aiding and abetting a breach of fiduciary duty claims, which requires a plaintiff to prove: (1) the existence of a fiduciary relationship, (2) breach of the fiduciary's duty, (3) defendant, who is not a fiduciary, knowingly participated in the breach, and (4) damages to the plaintiff as the result of the concerted action of the fiduciary and the non-fiduciary. *In re USDigital, Inc.*, 443 B.R. 22, 46 (Bankr. D. Del. 2011) (citing elements of aiding and abetting breach of fiduciary duty in Delaware and holding that a director defendant cannot have aided and abetted the same fiduciary duty he allegedly breached in a previous count); *In re Draw*, at 904 (applying Restatement (Second) to the knowing participation element); *Patton*, at *8 (applying Restatement (Second) to aiding and abetting analysis); *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) (applying the Restatement (Second) to knowing participation in aiding and abetting analysis and acknowledging that § 876 has been cited with approval in Delaware in). Again, because Plaintiff is alleging that Nancy Dondero aided and abetted Dugaboy (which was acting through Nancy Dondero), the requirement of a second actor is not met because Nancy Dondero cannot act in concert with herself.

41. Analogously, officers and agents cannot aid and abet their principal or each other in the commission of a tort. *Cornell Glasgow, LLC v La Grange Props., LLC*, 2012 WL 2106945, at *11 (Del. Super. Ct. June 6, 2012); *Amaysing Techs. Corp. v. Cyberair Communications, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts

of the corporation.”). Application of this law to the present circumstances further compels the conclusion that Nancy Dondero cannot aid and abet herself. Texas also has looked to the Restatement (Second) of Torts § 876 for guidance regarding its aiding and abetting doctrine, which states that “[i]t is settled as the law of [the State of Texas] that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with [that] fiduciary and is liable as such.” *In re TOCFHBI, Inc.*, 413 B.R. 523, 534 (Bankr. N.D. Tex. 2009) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 574, 160 S.W.2d (1942)) (emphasis added, citing elements); *W. Fork Advisors, LLC v. SunGuard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App. – Dallas 2014, pet. denied) (looking to Restatement (Second) regarding aiding and abetting analysis). Although also having sparse law regarding whether one can aid and abet one's own self, Texas law still requires a third party in order to prove aiding and abetting a breach of fiduciary duty. For the same reasons mentioned above, Nancy simply cannot aid and abet her own actions as Dugaboy Trustee.

42. Arizona courts have more directly held that under the Restatement (Second), “when [Plaintiffs] fail to allege [agent] took any actions in [their] individual capacity ‘in concert’ with the actions giving rise to the breach of fiduciary duty claim against [insurance company], [plaintiff’s] aiding and abetting claim against [agent] will be dismissed.” *Young v. Liberty Mut. Group, Inc.*, CV-12-2302-PHX-JAT, 2013 WL 840618, at *4 (D. Ariz. Mar. 6, 2013).³⁹ In *Young*, the Court reasoned that “...it does not follow that [agent] must have committed the separate tort of aiding and abetting merely because he was the agent through which [insurance company] breached its duty.” *Id.* at *4. The Court dismissed the claim on the agent’s 12(b)(6) motion.

³⁹ In *Young*, Plaintiff sued both Liberty Mutual for breach of fiduciary duty, and her personal insurance agent for aiding and abetting said breach. Because Plaintiff failed to allege [agent] took any actions in his individual capacity “in concert” with the actions giving rise to Plaintiff’s claim against Liberty Mutual, the aiding and abetting claim was dismissed upon 12(b)(6) motion.

Further, in *Jones v. Colorado Cas. Ins. Co.*, the same Court dismissed a similar claim upon another insurance agent's 12(b)(6) motion, agreeing with the agent's assertion that "one cannot aid and abet one's self." *Jones v. Colorado Cas. Ins. Co.*, CV 12-1968-PHX-JAT, 2013 WL 4759260, at *3 (D. Ariz. Sept. 4, 2013) (dismissing a claim against an insurance agent for aiding and abetting the insurance company's breach of fiduciary duty, determining that in order for there to be harm to a third person, there must be at least two tortfeasors). Just as the insurance agents could not aid and abet themselves as representatives for the insurance companies, Nancy Dondero could not have aided and abetted herself in her capacity as Dugaboy Trustee.

43. Connecticut takes a similar approach in holding that aiding and abetting means to help or compel *another* to act, and that an alleged tortfeasor cannot aid or abet himself, and doing so would yield "circular results." *Bolick v. Alea Group Holdings, Ltd.*, 278 F. Supp. 2d 278, 282 (D. Conn. 2003) (dismissing aiding and abetting claim).⁴⁰ Because Nancy Dondero was acting as Dugaboy in the conduct about which Debtor complains, she is not a "third party" to an act. It is impossible for Nancy Dondero to aid and abet her own self - as most distinctly stated in *Cornell Glasgow, LLC* and *Bolick* - because aiding and abetting requires the concerted action and scienter of more than one person. Therefore, Plaintiff's Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

3. Plaintiff does Not Plead the Sufficient Scienter Requirement for Aiding and Abetting in its Amended Complaint for Either Jim or Nancy Dondero.

44. In addition to the above infirmities, Plaintiff fails to allege the necessary scienter required to show aiding and abetting for both Jim and Nancy Dondero. Delaware courts

⁴⁰ *Bolick* addressed an employment discrimination case where Plaintiff sued her supervisor for both harassment and aiding and abetting that same harassment. The Court held that to hold the supervisor liable for his wrongful behavior and also aiding and abetting that wrongful behavior is illogical and would yield circular results. Court used dictionary to reference "abettor" as someone who encourages an offender.

acknowledge that an aiding and abetting analysis largely comes down to what constitutes “knowing participation.” *In re Draw*, at 904. The aider and abettor must act “knowingly, intentionally, or with reckless indifference...that is, with an illicit state of mind.” *Id.* The Plaintiff must allege specific facts that show Defendants had “actual knowledge” that their conduct intentionally aided and abetted a breach, not simply that they “knew or should have known.” *Id.* (citing *Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass’n*, CIV. 10-520 JBS KMW, 2011 WL 864421, at *5 (D. Del. Mar. 9, 2011)).

45. In *In re Draw*, a Chapter 11 trustee filed an amended adversary complaint against several members of the company’s board of directors, asserting breach of fiduciary duties and aiding and abetting breaches of fiduciary duties. On the defendant’s 12(b)(6) motion, the court held that plaintiff’s amended complaint failed to allege specific facts showing actual knowledge that [Director] was liable for aiding and abetting, and that plaintiff simply alleged [Director] “knew or should have known” his conduct aided and abetted the breach. *Id.* at 904. The court subsequently dismissed plaintiff’s aiding and abetting claims against that particular director.

46. In *Capitaliza-T*, defendant moved to dismiss plaintiff’s amended complaint under Rule 12(b)(6), citing that it did not contain sufficient factual allegations regarding defendant’s knowledge of breach of fiduciary duty. The court applied the Delaware rule that “at a minimum, the complaint [must] alleged circumstantial facts suggesting that the defendant had knowledge of the specific principal violation.” *Id.* at *5 (citing *Brug v. Enstar Group, Inc.*, 755 F.Supp. 1247, 1256 (D. Del. 1991)). The court held that although plaintiff’s amended complaint contained circumstantial allegations against defendant for aiding and abetting, it was not enough to allege

that defendants “had knowledge of the underlying...breach of fiduciary duty” to survive a 12(b)(6) motion. *Capitaliza-T*, at *7.

47. In this case, Plaintiff simply alleges that “[the Donderos] were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and “[t]he Donderos aided and abetted Dugaboy’s breach of its fiduciary duties...by knowingly participating in the authorization of the...Alleged Agreement.”⁴¹ In its Amended Complaint, Plaintiff references only factors that could be circumstantial at best when describing its Third Claim for relief against Jim Dondero, but never clearly articulates the required specific facts that show “actual knowledge” that he was overtly acting to substantially assist Dugaboy in breaching a fiduciary duty as required by *In re Draw* and *Capitaliza-T*.⁴² Further, Plaintiff makes no specific factual allegations against Nancy Dondero, other than she “[was] aware” of Dugaboy’s fiduciary duties, and that she aided and abetted the breach. Neither claims against Jim nor Nancy Dondero rise to the standard of articulation discussed in *In re Draw* and *Capitaliza-T*. Therefore, Plaintiff’s Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

4. Neither Jim nor Nancy Dondero are Liable for Aiding and Abetting Because Aiding and Abetting Requires More Than One Single Act.

48. As discussed in Section C.3 *supra*, the test for stating an aiding and abetting claim is stringent and focuses on proof of scienter that a party knew it was aiding another party in committing tortious conduct. *In re Draw*, at 904. This would require Plaintiff to show (1) a primary act by Dugaboy (via Nancy) that breached a fiduciary duty (which it cannot), and (2) a

⁴¹Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

⁴² Am. Compl. ¶¶ 3,36,38,39,40,41, Adv. No. 21-03003 [Doc. 73-2]; Am. Compl. ¶¶ 3,50,51,52,53, Adv. No. 21-03007 [Doc. 55-2]; Am. Compl. ¶¶ 3,48,49,50,51, Adv. No. 21-03006 [Doc. 60-2]; Am. Compl. ¶¶ 3,35,36,37,38,39, Adv. No. 21-03005 [Doc. 55-2].

secondary act by each of Jim and Nancy Dondero that shows scienter and knowing participation in subverting a fiduciary duty.

49. Plaintiff cannot show concerted action here on behalf of Jim or Nancy Dondero, because the only singular act that occurred was Dugaboy approving the compensation under the LPA. Plaintiff alleges no other separate act by Nancy Dondero that would have been “in concert” with or “knowingly participating” in anything, as she was acting as the Dugaboy Trustee (discussed above in Section C.2.). Further, Plaintiff shows no other separate act or proof of scienter that Jim Dondero specifically set out to knowingly aid Dugaboy in tortious conduct under *In re Draw*, since Dugaboy engaged in no such conduct. Therefore, Plaintiff’s Seventh Claim fails *Twombly* and must be dismissed under Rule 12(b)(6).

5. Debtor Lacks Standing to Bring an Aiding and Abetting a Breach of Fiduciary Duty Claim Based on an Executory Contract It Rejected.

50. The analysis here is the same as in Argument III.A.2. and B.2, *supra*. Plaintiff argues that Jim and Nancy Dondero aided and abetted Dugaboy’s alleged breach of fiduciary duty by authorizing the Subsequent Agreement, which Plaintiff alleges may have violated the LPA.⁴³ A cause of action for a derivative claim such as aiding and abetting shares accrual and limitations periods with the underlying tort of breach of fiduciary duty. *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 144 (Tex. 2019), *reh’g denied*, (Sept. 6, 2019). “Because a civil conspiracy claim is derivative of an underlying tort, the claim accrues when the underlying tort accrues.” *Id.* at 145. Here, because Plaintiff’s aiding and abetting claims derive from the alleged breach of fiduciary duty claim, the claims share accrual dates.

⁴³ Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

51. Again, Plaintiff was not injured until Jim Dondero did not pay the Notes. This claim did not accrue until December 11, 2020, and is also predicated on allegations that the Subsequent Agreement violates fiduciary duties arising out of the rejected LPA. Once again, Plaintiff is attempting to bring a post-petition claim under the LPA it rejected. Therefore, Plaintiff's Seventh Claim must be dismissed under *Twombly* and Rule 12(b)(6).

IV. CONCLUSION

Dugaboy, Jim Dondero, and Nancy Dondero therefore respectfully request this Court dismiss Plaintiff's Fifth, Sixth, and Seventh Amended Claims in its Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

Dated: September 1, 2021

Respectfully submitted,

/s/ Deborah Deitsch-Perez

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

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MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James D. Dondero, Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy”) (the “Defendants”) move this Court for an order to stay this adversary proceeding and refer the parties to arbitration, and in further support state the following:

I. STATEMENT OF FACTS

1. On December 24, 2015, Mr. Dondero, on behalf of Strand Advisors, Inc., and Nancy Dondero, on behalf of Dugaboy, executed the Fourth Amended and Restated Agreement (the “LPA”) of Limited Partnership of Highland Capital Management, L.P. (“HCM”).¹ Section 6.14 of the LPA provides for Mandatory Arbitration in the event of a legal dispute between the parties arising from the agreement (“Arbitration Provision”). Section 6.14 specifically states:

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas.

The Arbitration Provision specifically governs the discovery process for arbitration, the authority of the arbitrators, and the costs of arbitration.²

¹ The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. Declaration of Michael P Aigen dated August 30, 2021 (“Aigen Dec.”) at Ex. 1. The signatories to it are: (1) General Partner, Strand Advisors, Inc., a Delaware corporation by James D. Dondero, President; (2) Limited Partner, The Dugaboy Investment Trust by Nancy M. Dondero, its Trustee; (3) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #1 by Lawrence Tonomura, its Trustee; (4) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #2 by Lawrence Tonomura, its Trustee; (5) Limited Partner, Mark K. Okada; and (6) Limited Partner, Hunter Mountain Investment Trust by John Honis, the President of Beacon Mountain 1 LC, Administrator.

² See LPA Section 6.14, which states:

2. In May 2017, NexPoint executed a promissory note in favor of the Debtor, as payee, in the original amount of \$30,746,812.33 (the “Note”). The authority to execute promissory note in favor of the Debtor arises from Article 4 of the LPA because a General Partner has full authority to conduct the business, which includes lending and borrowing money and executing promissory notes. Article 4 states:

In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation:

....

(ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations);

....

(vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrance of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.1;

....

(vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations.

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. . . . Each party shall bear its own attorney’s fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement.

3. In addition, the LPA provides authority for partners to lend money to their Affiliates.

Section 4(e) specifically provides:

The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine: provided, however, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

In addition, Section 3.9(f) of the LPA allows for the partnership to make tax loans to the Founding Partners:

The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

4. Debtor demanded payment on the Note and subsequently filed an adversary proceedings seeking collection, described further below. One of the affirmative defenses asserted in the adversary proceedings is that Debtor is not entitled to demand payment because, prior to the demands for payment, HCM had agreed that it would not collect the Note, and that they would be treated as compensation to the Debtor's founder and then-CEO Jim Dondero, if any of certain conditions subsequent were met.³ Debtor refers to the agreement as the "Alleged Agreement." The condition subsequent was the sale of any of HCM's interests in certain portfolio companies (Cornerstone, Trussway and/or MGM) for a greater amount than their cost.⁴

³ See Defendant NexPoint's First Amended Answer [Ad. No. 21-03005, Dkt. No. 50 at 6 ¶ 42].

⁴ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition of James Dondero Transcript at 212:18-25; 213:1-17.

5. Under Section 4.1(k) of the LPA, the “salaries or other compensation, if any, of the officers and agents of the Partnership [were to] be fixed from time to time by the General Partner.” Additionally, under the LPA, Dugaboy had explicit authorization to approve compensation for Jim Dondero and entities he was affiliated with, and thus bind the Partnership through, LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The General Partner and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.⁵

The Class A shareholders included Strand Advisors, The Dugaboy Investment Trust, Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark and Pamela Okada Family Trust – Exempt Trust #2.⁶ Dugaboy alone comprised 75% of the Class A shareholders,⁷

Nancy Dondero was the Family Trustee of the Dugaboy Trust,⁸ and had the power to act for Dugaboy in this regard.⁹

After the Note was entered into, Mr. Dondero asked Dugaboy (via Ms. Dondero) to approve an agreement that the Note would be forgiven as compensation to Mr. Dondero upon the favorable sale of any or all of the portfolio company interests by HCM, and she did.¹⁰

⁵ Aigen Dec. Ex. 1, LPA at Exhibit A thereof). Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests.

⁶ Aigen Dec. Ex. 1, LPA at Exhibit A thereof.

⁷ *See id.*

⁸ Aigen Dec. Ex. 3, *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

⁹ Aigen Dec. Ex. 4, *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

¹⁰ Aigen Dec Ex. 2, Remote Deposition of James Dondero Transcript at 176-178.

The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“‘*Affiliate*’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘*control*’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“‘*Person*’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Mr. Dondero was an Affiliate of Strand under the LPA’s definition. Thus, Mr. Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

6. On January 22, 2021, Highland Capital Management, L.P. (“Debtor” or “Plaintiff” when describing post-petition actions and HCM when describing pre-petition actions) commenced Adversary Proceeding No. 21-03005 against NexPoint, asserting a state law, non-core breach of contract claim (“Count I”) and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the Note (“Count II”).

7. NexPoint answered the adversary complaint, asserting, inter alia, that Debtor’s claims should be barred, because prior to the demand for payment HCM agreed it would not collect on the Note upon fulfillment of conditions subsequent,¹¹ based upon what the Debtor refers to as the “Alleged Agreement.”

8. On August 23, 2021, the Court entered an order permitting Debtor to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV)*

¹¹ Defendant NexPoint’s First Amended Answer [Ad. No. 21-03005, Dkt. No. 50 6 ¶ 42].

Breach of Fiduciary Duty (“Amended Complaint”) asserting additional claims for relief including: Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550 against Mr. Dondero (“Count III”); Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1) against Mr. Dondero (“Count IV”); Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy (“Count V”); Breach of Fiduciary Duty against Dugaboy (“Count VI”); and Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero (“Count VII”). Debtor seeks avoidance of the Alleged Agreement, declaratory relief, and damages. The Parties agreed that the Defendants would answer or otherwise move against the Amended Complaints on or before September 1, 2021.¹² The new claims, under Counts V, VI, and VII are non-core contract claims that arise from the LPA, containing a broad arbitration provision. Further, Defendants have critical affirmative defenses for the claims for declaratory relief, breach of fiduciary, and aiding and abetting breach of fiduciary duty, that are rooted in non-core state contract law that also arise from the LPA.

9. Although Debtor alleges that it “believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Note,”¹³ there is no doubt that adjudication of the existence and enforceability of the Alleged Agreement affects all of Debtor’s claims under Counts V, VI, and VII for declaratory relief, breach of fiduciary duty and breach of fiduciary duty. These claims pertain to loans made by the Debtor to its Affiliates and compensation for the Debtor’s CEO, all of which are governed by the LPA.¹⁴

¹² See *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* attached as Exhibit C to *Debtor’s Unopposed Motion for Leave to Serve and File Amended Complaint* [Adv. No. 21-03005, Dkt. No. 55-2 at Exhibit C] stipulating to August 30, 2021 which has been extended to September 1, 2021 by the parties via email communication.

¹³ *Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶ 3].

¹⁴ See generally Aigen Dec. Ex. 1, LPA Article 4 and Section 3.10.

10. Defendants request the Court order the parties to arbitration on Counts V, VI, and VII, as provided by the pre-petition LPA entered into by the parties, and stay the adversary proceeding pending arbitration.

II. STANDARD OF REVIEW

11. When deciding whether to grant a motion to compel arbitration, the Fifth Circuit has established a two-step analysis for determining whether parties must arbitrate a particular claim or set of claims under the FAA: (A) there must be an enforceable agreement to arbitrate; and (B) the claims must be arbitrable. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted) (stating “First we must ask if the party has agreed to arbitrate the dispute. . . If so, we then ask if any federal statute or policy renders the claims non-arbitrable.”); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (“A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement.”). Once a party seeking to compel arbitration establishes the asserted claims fall within a valid arbitration agreement, the burden shifts, and the party seeking to avoid arbitration must prove an affirmative defense to the provision’s enforcement, such as waiver. *Venture Cotton Coop.*, 435 S.W.3d at 227.

12. In applying the first portion of the two-step analysis, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (“This determination is generally made on the basis of ‘ordinary state-law principles that govern the formation of contracts.’” (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). The second part of determining whether the parties have agreed to arbitrate—the question of whether the dispute comes within the scope of the agreement—is answered by applying the federal substantive law of arbitrability.” *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009) (citations omitted).

13. Under both Texas and Federal law, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983); *see also Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)). In addition, the Supreme Court has declared that the Federal Arbitration Act, “is a strong congressional declaration of a liberal policy favoring arbitration.” *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 849 (N.D. Tex. 2014) (collecting cases) (“if a valid agreement to arbitrate does exist, the court must observe the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration.”).

III. ARGUMENT

14. This Court should compel arbitration as to Counts V, VI, and VII of the Amended Adversary Complaint because: (1) The claims under Counts V, VI, and VII comprise disputes involving legal rights or remedies arising from the LPA and are governed by an enforceable, and broadly worded, arbitration provision; (2) Counts V, VI, and VII assert noncore claims, and in the Fifth Circuit courts do not have discretion to refuse to compel the arbitration of matters not involving “core” bankruptcy proceedings and should compel arbitration of even core claims if they are not integral to the bankruptcy; and (3) federal and state policy strongly favors arbitration.

15. The Federal Arbitration Act (“FAA”) requires district courts to direct parties to arbitrate issues covered by a valid arbitration agreement. 9 U.S.C. §§ 3, 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “Federal policy strongly favors enforcing arbitration agreements.” *Dean Witter Reynolds*, 470 U.S. at 217; *Moses H. Cone Mem. Hosp*, 460 U.S. at 24. When a party moves to compel arbitration, the FAA requires district courts to order arbitration of arbitrable claims. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (In re*

Sedco, Inc.), 767 F.2d 1140, 1147 (5th Cir. 1985). Because of the strong presumption in favor of arbitration, “a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.” *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724–25 (S.D. Tex. 2013), *aff’d*, 559 F. App’x 417 (5th Cir. 2014) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)); *see also Grant v. Houser*, 469 Fed. Appx. 310, 315 (5th Cir. 2012) (noting the strong presumption in favor of arbitration).

16. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Henry*, 551 S.W.3d at 115 (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d at 174). The Fifth Circuit resolves doubts concerning the scope of matter covered by an arbitration provision in favor of referring arbitration. The court states:

We emphasize that our sole responsibility is to determine whether this dispute is governed by an arbitration clause, not to determine the merits of the dispute. *See Snap-On Tools Corp., v. Mason*, 18 F.3d 1261, 1267 (5th Cir.1994). “We resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration. . . . [A]rbitration should not be denied ‘unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’” *Neal*, 918 F.2d at 37 (internal citations omitted). *See also AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 643, 650 (1986).

Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

A. **This Dispute is Governed by An Enforceable Arbitration Provision Reaching All Legal Rights Arising From the LPA.**

17. Debtor’s claims asserted in Counts V, VI, and VII arise under the LPA, which contains an enforceable and broadly worded arbitration provision. The U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, has already interpreted arbitration provisions with identical scope language (and near-identical scope language) to the Arbitration Provision under the LPA, to be valid

and binding. See *In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 549-50 (Bankr. N.D. Tex. 2019).¹⁵ Importantly, the court made clear that “it would seem to be beyond peradventure that [the arbitration clause] was, at one time, enforceable between the parties, *with regard to any disputes that arose regarding the agreements.*” *Id.* at 552 (emphasis added); see also *id.* at 557 (emphasis added) (“there were valid arbitration agreements *that applied to all disputes* arising out of the [agreements at issue].”). Accordingly, the court concluded that all claims at issue, including claims for declaratory judgment, fell within the scope of the relevant arbitration clauses. See *id.* at 558.

18. The Arbitration Provision here also covers any “unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from this Agreement.*” LPA, Section 6.14 (emphasis added). Such broad language is sufficient to reach collateral matters, including the oral agreement between the parties which involves legal rights arising from LPA.¹⁶ *Buell Door Co.*

¹⁵ The Court’s decision provides the relevant arbitration clause language. The arbitration clause at Section 16(f) of the Sub-Advisory Agreement states:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from* this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .

In re Acis Cap. Mgmt., L.P., 600 B.R. at 550 (emphasis added).

¹⁶ It is important to note that the particular language “arising from” is significant in determining that the Arbitration Provision here is broad. The Fifth Circuit and Texas District Courts have specifically determined that only the phrase “arising under” indicates a narrow arbitration clause, rather than broad. This Court has held:

upon reviewing the above referenced Fifth Circuit cases, the court concludes that the phrase “arising out of” and similar language constitute “broad” arbitration clauses. *Accord Morphis v. Federal Home Loan Mortgage Corp.*, No. 3:02–CV–0210–P, 2002 WL 1461930, *3–4 (N.D.Tex. July 3, 2002) (provision that “any and all disputes between [the parties],” with no limiting clause constituted a broad clause). On the other hand, the phrase “arising under” indicates a “narrow” arbitration clause. See *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983) (the term “arising under” is relatively narrow) (citation omitted).

v. Architectural Sys., Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, at *6 (N.D. Tex. Aug. 20, 2002) (concluding that the phrase “arising out of” and similar language constitute “broad” arbitration clauses); *see also Elkjer*, 8 F. Supp. at 855 (concluding that the arbitration clause which uses the phrase “arising under or in connection with this [Partnership] Agreement,” is “broad [and] capable of expansive reach” to include statutory claims). “Broad arbitration clauses are not limited to claims which literally ‘arise under [a] contract,’ but rather embrace all disputes between the parties **having a significant relationship** to the contract regardless of their label.” *Id.* at *4 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir. 1998) (emphasis added) (internal citations omitted).

19. In the Fifth Circuit, a “broadly construed arbitration provision may encompass claims arising under a separate agreement.” *See, e.g., Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 393–94 (5th Cir. 2002) (holding that an arbitration provision, which covered “any and all claims. . . arising out of or relating to” an agreement, applied to claims arising under a separate agreement); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 38 (5th Cir. 1990) (holding that an arbitration provision encompassing “any and all disputes between [the parties] . . . reach[ed] all aspects of the parties’ relationship,” including claims arising under a separate agreement); *see also I.D.E.A. Corp. v. WC & R Ints., Inc.*, 545 F. Supp. 2d 600, 606 (W.D. Tex. 2008) (noting a broad arbitration provision may encompass claims arising under a separate agreement). Accordingly, the Arbitration Provision covers the claims regardless if they arise under the LPA or the separate Note because the authority to enter into the Note arises from the LPA which reaches all aspects of the parties’ relationship.

20. Here, the LPA choice of law provision, Section 6.1, provides the “Agreement shall be construed in accordance with and governed by the laws of the state of Delaware. . . .” As a result,

Buell Door Co., 2002 WL 1968223, at *6. Here, the “arising from” language of the Arbitration Provision is similar to “arising out of” and is therefore broad.

Delaware state contract law determines whether the LPA includes a valid agreement to arbitrate. Delaware arbitration law mirrors federal law in that “public policy of Delaware favors arbitration.” *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (citations omitted). Even Debtor’s rejection of the LPA does not absolve Debtor of its obligation to arbitrate. It is well established that the “rejection of a contract, or even breach of it, will not void an arbitration clause. . . . Any different conclusion would allow a party to avoid arbitration at will simply by breaching [or rejecting] the contract.” *Madison Foods v. Fleming Cos., Inc. (In re Fleming Cos, Inc.)*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005) (citations omitted).

21. Moreover, any question about the scope of the arbitration agreement, including the arbitrability of any particular claim, is for the arbitrator. Under the FAA, “parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). “Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . , so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). The Fifth Circuit provides an in-depth explanation of who decides what issues when a contract includes an arbitration provision. *See Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

22. Incorporating rules from an arbitration service provider that themselves delegate the question of arbitrability to the arbitrator clearly and unmistakably expresses the parties’ intent to leave the question of arbitrability to the arbitrator. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). Here, the Arbitration Provision provides that the “arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate,

decide and issue the final award.” The rules of the American Arbitration Association provide that the arbitrator is to decide questions of arbitrability. AAA Commercial Arbitration Rule 7(a). Because the parties’ arbitration delegates decision-making to the arbitrators, where the parties entered an agreement to arbitrate, questions of scope and arbitrability should be left to the arbitrator.

B. The Claims Asserted In Counts V, VI, and VII Are Arbitrable Because they Are Non-Core and Arise Under the LPA.

23. Under the LPA, the Court must compel arbitration on Counts V, VI, and VII of the Amended Complaint, because all of the claims are non-core claims arising from the rights and obligations under the LPA. Bankruptcy courts have no discretion to refuse to compel the arbitration of non-core matters. *See, e.g., Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *7 (S.D. Tex. Dec. 18, 2015) (citation omitted) (quoting “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings”). More specifically, under Fifth Circuit precedent, a bankruptcy court only has discretion to refuse to compel arbitration of an arbitrable claim where: (1) “the proceeding derives exclusively from the provisions of the bankruptcy code;” and (2) “arbitration of the proceeding would conflict with the purposes of [the bankruptcy code].” *See Matter of Nat’l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 242 (Bankr. N.D. Tex. 2010). “Importantly, however, ***a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings*** under 28 U.S.C. § 157(b).” *In re Cain*, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (emphasis added) (citation omitted) (stating “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings.”); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. at 560 (in the *Acis* case—unlike here—the claims at issue were “an integral part of determining . . . proofs of claim,” resulting in the court denying the motion to compel arbitration).

24. For claims that are “derivative of the pre-petition legal or equitable rights possessed by a debtor” it is beyond dispute that “it is ‘universally accepted’ that such issues are arbitrable.” *In re Cain*, 585 B.R. at 137 (citing *Nat’l Gypsum Co.*, 118 F.3d at 1066, 1069). In other words, for non-core proceedings, a court “must give effect to the terms of any applicable arbitration clauses.” *In re Daisytek, Inc.*, 323 B.R. 180, 188 (N.D. Tex. 2005).

1. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count V Because Debtor’s Proposed Declaratory Relief Claim Is A Non-Core Claim Arising From The LPA.**

25. Debtor’s declaratory relief claim simply seeks declarations concerning the extent of limited partner (including Dugaboy’s) authority under the LPA, including authority to enter into the Alleged Agreement on behalf of the Partnership.¹⁷ This is a legal dispute arising from LPA, a pre-petition contract, thus coming within the Arbitration Provision and governed by state contract law. Courts generally agree that claims for declaratory judgment which could also exist outside of bankruptcy are non-core proceedings.¹⁸ *See, e.g., In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La. 2007)(“That the doctors’ claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims.”)

26. Therefore, the Court lacks discretion to refuse to compel arbitration on Count V asserting Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 260 (5th Cir. 1996) (district court did not abuse

¹⁷ *See Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶¶ 67-70].

¹⁸ *See also In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 222–23 (C.D. Cal. 2014)(“That court found a trustee’s claim for declaratory relief as to the ownership of similar tax refunds non-core because it was a “dispute between private parties” and arose out of a pre-bankruptcy tax sharing agreement governed by state contract law); *see also In re SFD @ Hollywood, LLC*, 414 B.R. 794, 797 (Bankr. S.D. Fla. 2009)(“This proceeding [for declaratory judgment] could also exist outside of bankruptcy. Accordingly, this is a non-core proceeding in which the Court cannot enter a final order, absent consent of the district court and the parties.”); *see also Sunterra Corp. v. Perini Bldg. Co.*, No. 204CV00784MCEEFB, 2008 WL 11512082, at *4 (E.D. Cal. June 12, 2008)(“The new causes of action--strict liability, negligence, breach of contract, professional negligence, and declaratory relief--would also exist independently of bankruptcy laws and are similarly “non-core” proceedings.”).

discretion in refusing to consider plaintiffs' request for declaratory relief where order granting defendant's motion to compel arbitration disposed of same issues raised in declaratory judgment action); *see also Austin Cap. Mgmt., Ltd. v. Bd. of Trustees of Texas Iron Workers' Pension Fund*, No. A-09-CA-351 LY, 2009 WL 10699390, at *8 (W.D. Tex. July 30, 2009) (finding action seeking declaratory relief arbitrable); *see also Info. Sys. Audit & Control Ass'n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017) (stating that permitting a party to obtain declaratory relief from a court when there is a valid arbitration agreement is "essentially the same relief as that otherwise reserved for the arbitrator. It would make little sense to include such an expansive loophole in what is otherwise a sweeping arbitration provision.").

2. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count VI And VII Because Debtor's Proposed Claims Asserting Breach Of Fiduciary Duty And Aiding And Abetting Breach Of Fiduciary Duty Are Non-Core Claims Arising From The LPA.**

27. Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero for entering into the Alleged Agreement, must be arbitrated because they are non-core claims that arise under the LPA. It is well established that state law claims, such as breach of fiduciary duty and aiding and abetting breach of fiduciary duty, are non-core claims. *See, e.g., In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017) ("Courts within the Fifth Circuit have consistently found that post-confirmation suits by plan trustees based on state law claims are only within the 'related to' (and not 'core') bankruptcy jurisdiction of a federal court."); *see also Brickley for CryptoMetrics, Inc. Creditors' Tr. v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 829–30 (W.D. Tex. 2017) (stating post-confirmation claims for breach of fiduciary duty and state law claims are "related to" claims); *see also Mirant Corp. v. The S. Co.*, 337 B.R. 107, 120 (N.D. Tex. 2006).

28. The breach of fiduciary duty claims under Count VI and aiding and abetting breach of fiduciary duty under Count VII are—and by their own terms—premised on Dugaboy's authority to

bind the Debtor under the LPA.¹⁹ The Debtor challenges whether the LPA affords the right to Dugaboy to approve such compensation, thus, any evaluation of the breach of fiduciary duty-related claims must first entail an analysis of the LPA, making construction of the LPA – the agreement containing the arbitration clause, a predicate to the analysis of the breach of fiduciary duty claims. Thus, Counts VI and VII involve unresolved legal disputes between the parties—including the Debtor and Mr. Dondero, Nancy Dondero, and Dugaboy, who are all parties and/or officers/directors/partners/employees/agents/affiliates/representatives of a General or Limited Partner—concerning legal duties to the Partnership that would not exist outside of the LPA.

29. The Fifth Circuit makes clear that where, as here, the breach of fiduciary duty (or aiding and abetting fiduciary duty) claim is interwoven with the partnership agreement containing an arbitration clause, the fiduciary claims will be subject to arbitration. *See Coffman v. Provost * Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 732 (E.D. Tex. 2001), *aff'd sub nom. Coffman v. Provost Umphrey LLP*, 33 Fed. Appx. 705 (5th Cir. 2002) (“Even if it is conceivable that Plaintiff could maintain a claim for breach of fiduciary duty without the Partnership Agreements, that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause . . . the Partnership Agreements will determine whether a fiduciary duty was breached—whether that duty arises from the common law or from the contract itself. . . . For these reasons, the court finds Plaintiff’s breach of fiduciary duty claim to be subject to arbitration.”); *see also Omni Pinnacle, LLC v. ECC Operating Services, Inc.*, 255 F. App’x 24, 25-26 (5th Cir. 2007) (internal quotation marks

¹⁹ *See Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶ 73] (“If Dugaboy had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy breached its fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.”); *id.* ¶¶ 76–77 (the Donderos “were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and the Donderos “aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.”)

omitted) (“A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”).

30. Because breach of fiduciary duty and aiding and abetting breach of fiduciary duty are non-core state-law claims that could exist outside of bankruptcy, the reviewing court lacks discretion to refuse enforcement of an otherwise-applicable arbitration agreement as to these claims. *See In re McCollum*, 621 B.R. 655, 659 (Bankr. N.D. Miss. 2020) (finding that breaching its fiduciary duty “is a state law contract claim which arose prepetition, could exist outside the bankruptcy case, and is tangential to the bankruptcy case. It does not invoke a substantive right created by bankruptcy law and is a non-core claim.”); *In re Gaughf*, 19-50947-KMS, 2020 WL 1271595, at *4 (Bankr. S.D. Miss. Mar. 12, 2020) (“Aiding and Abetting Count is non-core.”). Additionally, claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty do not reference the Bankruptcy Code or any right conferred by the Code. *See In re McCollum*, 621 B.R. at 659. Therefore, the Court lacks discretion to refuse to compel arbitration on Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero.

31. That Nancy Dondero is not personally a party to the LPA does not impair her right to enforce the arbitration agreement it contains. Debtor alleges misconduct by her and a signatory to the LPA relating to fiduciary duties Debtor alleges arise out of the LPA. There are two circumstances under which a nonsignatory can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory; or (2) when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). Both circumstances are implicated by Debtor’s allegations against Nancy Dondero.

32. First, non-signatories are entitled to invoke an arbitration agreement when the claim against the non-signatory arises from the contract with an arbitration provision. *See, e.g., Bidas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)) (“[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a nonsignatory.”); *see also Amegy Bank Nat. Ass’n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 450–51 (S.D. Tex. 2012) (citing *Grigson*, 210 F.3d at 527). Because Debtor charges Nancy Dondero with breaching fiduciary duties (and aiding and abetting breaches of such duties) that arise out of the LPA, she falls precisely within the ambit of cases like *Bidas*, and *Grigson* and *Amegy*.

33. Second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract—here the allegations are made against Nancy Dondero (a non-signatory) and Dugaboy (a signatory) to the LPA—the non-signatory may compel arbitration on the claims. *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming that “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.”); *see also Grigson*, 210 F.3d at 526 (“a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff”).

C. The Court Should Stay All Claims Pending Arbitration.

34. The claims that the Court refers to arbitration must be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. *See In re Gandy*, 299 F.3d 489, 494–95 (5th Cir. 2002) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (“A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement”). Further,

bankruptcy courts generally do not have discretion to decline to stay, pending arbitration, proceedings involving non-core matters. *Id.* at 495. Accordingly, the Court should stay each of the Debtor's claims against Defendants pending arbitration.

35. Should the Court not refer arbitration on every claim, in the alternative, the Court should stay the entire adversary proceeding pending arbitration. Permitting any claims to continue herein, while some or all claims are subject to arbitration would be unnecessarily expensive and duplicative. The Court has the inherent power to grant a discretionary stay of a proceeding pending arbitration when there are issues common to the arbitration and the court proceeding and those issues may be decided by the arbitrator. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (stating that the power to stay proceedings is incidental to power "inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *see also In re Divine Ripe, L.L.C.*, 538 B.R. 300, 309 (Bankr. S.D. Tex. 2015) (same).

IV. CONCLUSION

WHEREFORE, for the reasons above, Defendants respectfully request that this Court compel arbitration on Counts V, VI, and VII, and order a stay of the proceedings pending arbitration.

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez _____

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EXHIBIT 70

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§ § § § § § § § § §	
Defendants.	§	



APPENDIX IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James Dondero, Nancy Dondero and The Dugaboy Investment Trust file this Appendix in Support of their Motion to Compel Arbitration and Stay Litigation and request the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Motion to Compel Arbitration and Stay Litigation, dated September 1, 2021	App. 1-3
1	Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.	App. 4-40
2	Excerpts from the Transcript of the Remote Deposition of James Dondero on May 28, 2021, Adversary Proceeding No. 21-3003	App. 41-54
3	Acceptance of Appointment of Family Trustee, executed by Nancy Marie Dondero on October 13, 2015	App. 55-60
4	Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees, The Dugaboy Investment, dated November 15, 2010	App. 61-97

Dated: September 1, 2021

Respectfully submitted,

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
TRUST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez

Exhibit A

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ATTORNEYS FOR DEFENDANTS JAMES DONDERO AND NANCY DONDERO

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	
<hr/>		

**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION**

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendants James Dondero and Nancy Dondero, and I submit this Declaration in support of the *Motion to Compel*

Arbitration and Stay Litigation being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts of the May 28, 2021 Remote Deposition of James Dondero Transcript at 176-178; 212:18-25; 213:1-17.

4. Attached as **Exhibit 3** is a true and correct copy of the *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

5. Attached as **Exhibit 4** is a true and correct copy of *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

Dated: September 1, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“**Class B Limited Partner**” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“**Class B Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“**Class B NAV Ratio Trigger Period**” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“**Class C Limited Partner**” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“**Class C Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“**Class C NAV Ratio Trigger Period**” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“**Code**” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“**Contribution Note**” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“**Default Loan**” has the meaning set forth in Section 3.1(c)(i).

“**Defaulting Partner**” has the meaning set forth in Section 3.1(c).

“**Delaware Act**” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“**Effective Date**” means the date first recited above.

“**Fiscal Year**” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "*Tax Distribution*"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however, any* action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

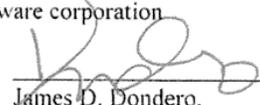
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

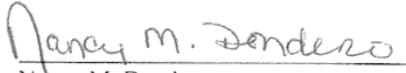
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

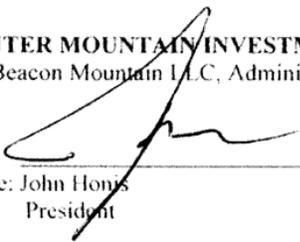
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain L.L.C., Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___ % Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

Exhibit 2

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Dondero - 5-28-2021

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

In re:)	
)	
HIGHLAND CAPITAL	)	Case No.
MANAGEMENT, LP,	)	19-34054 L.P.
	)	Chapter 11
Debtor,)	
-----)	
HIGHLAND CAPITAL MANAGEMENT,)	
LP,)	
)	
Plaintiff,	)	Adversary No.
	)	21-03003-sgi
vs.)	
)	
JAMES D. DONDERO,)	
)	
Defendant.)	

REMOTE DEPOSITION OF

JAMES DONDERO

Pages 103 - 282

Dallas, Texas

Friday, 28th day of May, 2021

Job No. 194690

Reported by:

Daniel J. Skur, Notary Public and CSR

1 Dondero - 5-28-2021

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8 28th day of May, 2021

9 9:33 a.m. - 1:59 p.m.

10

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12 Remote Deposition of JAMES DONDERO,
13 located in Dallas, Texas, before Daniel J.
14 Skur, Notary Public and Certified Shorthand
15 Reporter in and for the State of Texas
16 located in Waxahachie, Texas.

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1 Dondero - 5-28-2021

2 A P P E A R A N C E S:

3 Pachulski Stang Ziehl & Jones
4 Attorney(s) for Debtor
780 Third Avenue

5 New York, New York 10017

6 BY: John Morris, Esq.

7 Gregory Demo, Esq.

8
9 Stinson
Attorney(s) for The Witness
3102 Oak Lawn Avenue

10 Dallas, Texas 75219

11 BY: Deborah Deitsch-Perez

12 Michael Aigen, Esq.

13 Paul Lackey, Esq.

14
15 Sidley Austin
16 Attorney(s) for The Committee
2021 McKinney Avenue

17 Dallas, Texas 75201

18 BY: Paige Montgomery, Esq.

19

20

21 ALSO PRESENT:

22 Davor Rukavina, NexPoint

23 La Asia Canty

24

25

1 Dondero - 5-28-2021

2

3 IT IS HEREBY STIPULATED AND AGREED
4 by and between the attorneys for the respective
5 parties herein, that filing and sealing be and
6 the same are hereby waived.

7 IT IS FURTHER STIPULATED AND AGREED
8 that all objections, except as to the form of
9 the question, shall be reserved to the
10 time of the trial.

11 IT IS FURTHER STIPULATED AND AGREED
12 that the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath, with the same force and
15 effect as if signed and sworn to before the
16 Court.

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1 Dondero - 5-28-2021

2 P R O C E E D I N G S

3 REMOTE ORAL DEPOSITION OF

4 JAMES DONDERO

5 (REPORTER NOTE: This deposition is
6 being conducted remotely in accordance with
7 the Current Emergency Order regarding the
8 COVID-19 State of Disaster.

9 Today's date is the 28th day of
10 May, 2021. The time is 9:33 a.m. Daylight
11 Savings Time. The witness is located in
12 Dallas, Texas.)

13 JAMES DONDERO,
14 having been duly cautioned and sworn to tell
15 the truth, the whole truth and nothing but the
16 truth, testified as follows:

17 (9:33 A.M.)

18 EXAMINATION

19 BY MR. MORRIS:

20 Q. Good morning, Mr. Dondero.

21 A. Morning.

22 Q. It's John Morris, again, from
23 Pachulski on behalf of the debtor. We're here
24 for your deposition today.

25 Do you understand that?

1 Dondero - 5-28-2021

2 BY MR. MORRIS:

3 Q. Mr. Dondero, can you describe for
4 me -- withdrawn.

5 Did you discuss with your sister
6 Nancy, the agreement that's referred to in
7 paragraph 40?

8 A. The agreement to subsequent
9 conditions, yes, absolutely. But this
10 agreement that's on the screen, I've never --
11 I've never -- I've never shown her this
12 document or talked to her about it.

13 Q. I'm not asking about the document.
14 I'm not asking about the document. I'm asking
15 about the agreement that's referred to in
16 paragraph 40.

17 Do you understand that?

18 A. Yes. And, yes, we had several
19 conversations about it.

20 Q. Okay. Can you describe for me
21 everything you remember about your discussions
22 with Nancy concerning the agreement that's
23 referred to in paragraph 40?

24 A. That the loans that were in place
25 would be forgiven upon a monetization -- the

1 Dondero - 5-28-2021
2 favorable monetization of certain large or
3 liquid assets on the Highland balance sheet;
4 and the three that were focused on was MGM,
5 Trussway, and Cornerstone.

6 Q. Did she say anything in response?

7 A. Just, "How much are we talking
8 about?" And I told her it was about 9 million
9 in aggregate, and -- and I told her that it
10 was -- that the forgiveness or the compensation
11 was compliant regarding any credit covenants or
12 Hunter Mountain covenants --

13 Q. Do you recall any --

14 A. -- that -- that if it were to be
15 forgiven, that additional compensation would be
16 compliant or permitted and really not material
17 relative to any outstanding credit agreements
18 that Highland had or agreements with Hunter
19 Mountain.

20 Q. Is this something that you discussed
21 with her, or is this just information that
22 you're giving me?

23 A. This is what I discussed -- that's
24 almost the entirety of the conversation. It
25 happened over a couple different conversations,

1 Dondero - 5-28-2021

2 but...

3 Q. Did anybody participate in any of
4 the conversations you're describing other than
5 you and your sister?

6 A. I don't believe it was necessary, it
7 didn't include anybody else.

8 Q. Okay. Again, I'm not here to
9 question. I'm just looking for facts,
10 Mr. Dondero.

11 So nobody participated in any of
12 these conversations that you can recall other
13 than you and Nancy; is that correct?

14 A. Correct, that I -- yes, there was
15 never a third party involved in our
16 conversations. I don't know -- I don't think
17 she discussed it with anybody else, but I don't
18 know.

19 Q. Did -- was the agreement subject to
20 any negotiation? Did she make any
21 counterproposal of any kind?

22 A. No. No, I -- again, I believe both
23 of our views at the time was that it was
24 immaterial to Highland overall or any other
25 agreements.

1 Dondero - 5-28-2021

2 three assets would trigger the conditions
3 subsequent?

4 A. Correct.

5 Q. Okay. And who decided whether the
6 asset was sold on a favorable basis?

7 Who made that decision, under your
8 agreement with Nancy?

9 A. It was just defined relative to
10 cost, so it was just -- it was just a
11 factual -- there's nothing to decide. It would
12 just be a factual answer.

13 Q. So, I just want to make sure I
14 understand.

15 Your agreement with Nancy was that
16 --

17 A. Yes.

18 Q. -- that -- all right. Withdrawn.

19 Your agreement with Nancy in January
20 or February 2019, was that if any of MGM,
21 Cornerstone, or Trussway was sold at cost, the
22 debtor would forgive your obligations under the
23 three notes.

24 Do I have that right?

25 MS. DEITSCH-PEREZ: Object to the

1 Dondero - 5-28-2021

2 form.

3 A. If any of them were sold above cost,
4 it would -- monetization would trigger the --
5 the three notes -- forgiveness of the three
6 notes, yes.

7 BY MR. MORRIS:

8 Q. Okay. And I just want to see if I
9 can understand: Did you and Nancy discuss in
10 January or February 2019 how much above cost
11 the sale would have to be in order for the
12 debtor to forgive your obligations under the
13 three notes?

14 MS. DEITSCH-PEREZ: Object to the
15 form.

16 A. No. It just had to be above cost,
17 not a amount above cost.

18 BY MR. MORRIS:

19 Q. Okay.

20 A. Because just monetizing it -- just
21 monetizing it and getting liquidity for an
22 illiquid investment, even if it was at cost, is
23 good. So something above cost is great. And
24 those are all big assets, and the notes were
25 small.

1 Dondero - 5-28-2021

2 C E R T I F I C A T E
3 STATE OF TEXAS)
4 COUNTY OF ELLIS)

5 I, Daniel J. Skur, a Notary Public
6 within and for the State of Texas, do
7 hereby certify:

8 That JAMES DONDERO, the witness whose
9 deposition is hereinbefore set forth, was
10 duly sworn by me and that such deposition
11 is a true record of the testimony given by
12 such witness.

13 That pursuant to Rule 30 of the Federal
14 Rules of Civil Procedure, signature of the
15 witness was not reserved by the witness or
16 other party before the conclusion of the
17 deposition;

18 I further certify that I am not
19 related to any of the parties to this
20 action by blood or marriage; and that I am
21 in no way interested in the outcome of this
22 matter.

23 IN WITNESS WHEREOF, I have hereunto
24 set my hand this 28th day of May, 2021.

25

16



17

18

Daniel J. Skur
Notary Public, State of Texas.
My Commission Expires 7/7/2022
TSG Reporting, Inc.
228 East 45th Street, Suite 810
New York, New York
(877) 702-9580

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25

Dondero - 5-28-2021

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name:

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

In re:)	
HIGHLAND CAPITAL	)	Case No.
MANAGEMENT, LP,	)	19-34054 L.P.
Debtor,	)	Chapter 11
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, LP,)	
Plaintiff,	)	Adversary No.
vs.	)	21-03003-sgi
JAMES D. DONDERO,)	
Defendant.)	
Dep. Date: 05/28/2021		
Deponent: JAMES DONDERO		

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

CORRECTIONS:

Pg.	LN.	Now Reads	Should Read	Reason
140	4	THE WITNESS	MR. MORRIS	3
140	6	THE WITNESS	MR. MORRIS	3
140	8	THE WITNESS	MR. MORRIS	3
140	11	THE WITNESS	MR. MORRIS	3
140	13	THE WITNESS	MR. MORRIS	3
140	14	MR. MORRIS	THE WITNESS	3
140	15	THE WITNESS	MR. MORRIS	3
177	3	liquid	illiquid	3

181	25		Add to end (after yes): as long as the conditions subsequent could still be met.	1
182	13	focused	focus	3
188	11		Add to end (after monetized); or were monetized for less than cost.	1



 JAMES DONDERO

SUBSCRIBED AND SWORN BEFORE ME

THIS 29th DAY OF June, 2021.

Linda Lauchner 6/19/25
 (Notary Public) MY COMMISSION EXPIRES:

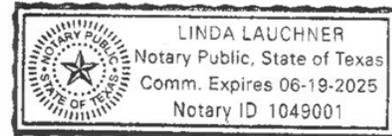


Exhibit 3

THE DUGABOY INVESTMENT TRUST
James D. Dondero, Primary Beneficiary

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

Re: The Dugaboy Investment Trust

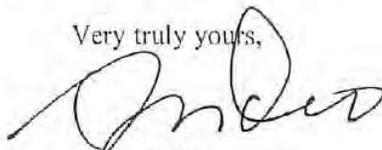
Dear Ms. Breault,

I, James D. Dondero, am writing to inform you that on October 12, 2015, I received notice from Grant James Scott that he will cease to serve as Family Trustee of The Dugaboy Investment Trust (the "Trust") and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust.

Pursuant to the attached Resignation of Family Trustee from Grant James Scott, I appoint Nancy Marie Dondero as the successor Family Trustee of the Trust.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.2 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with notice of my appointment of a successor Family Trustee.

Very truly yours,



James D. Dondero

THE DUGABOY INVESTMENT TRUST
Grant James Scott, Family Trustee

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

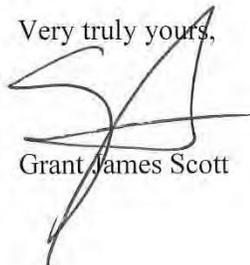
Re: The Dugaboy Investment Trust

Dear Ms. Breault,

I, Grant James Scott, am writing to inform you that as of October 12, 2015, I will cease to serve as Family Trustee of The Dugaboy Investment Trust (the “**Trust**”) and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust pursuant to the attached Resignation of Family Trustee.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.1 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with written notice of my resignation.

Very truly yours,

A handwritten signature in black ink, appearing to be 'G. Scott', written over the typed name 'Grant James Scott'.

Grant James Scott

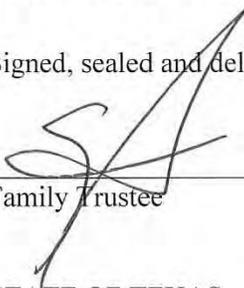
RESIGNATION OF FAMILY TRUSTEE

I, **GRANT JAMES SCOTT**, do hereby acknowledge that I voluntarily tender my resignation as Family Trustee of The Dugaboy Investment Trust pursuant to that Trust Agreement, dated November 15, 2010 by, between and among Dana Scott Breault, as Settlor, and Common Wealth Trust Company, as Administrative Trustee.

This resignation shall take effect immediately upon the execution hereof and delivery of a written acknowledged instrument wherein NANCY MARIE DONDERO accepts the trust and the position of Family Trustee.

IN WITNESS WHEREOF, I hereby sign my Resignation as Family Trustee of the above trust.

Signed, sealed and delivered in the presence of:



Family Trustee

10/12/2015
Date

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **GRANT JAMES SCOTT** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]



Notary Public's Signature

Expiration: January 15, 2019

ACCEPTANCE OF APPOINTMENT OF FAMILY TRUSTEE

I, **NANCY MARIE DONDERO**, appointed as Family Trustee under Article V, Section 5.2(a)(i) of The Dugaboy Investment Trust, dated November 15, 2010 (the "Trust"), hereby acknowledge and accept the position of Family Trustee of the Trust and hereby agree to faithfully perform all the duties and adopt all of the obligations imposed.

Signed this 13th day of October, 2015.

Nancy Marie Dondero

NANCY MARIE DONDERO
Family Trustee

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **NANCY MARIE DONDERO** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]

Micaela Sue Allen

Notary Public's Signature

Expiration: January 15, 2019

ACKNOWLEDGEMENT OF DELIVERY

I, JAMES D. DONDERO, acknowledge that this Acceptance of Appointment of Family Trustee by NANCY MARIE DONDERO was delivered to and received by me on October __, 2015.

A handwritten signature in black ink, appearing to read 'James D. Dondero', written over a horizontal line.

James D. Dondero

Exhibit 4

TRUST AGREEMENT

Between

DANA SCOTT BREAUTL,
Settlor

and

JAMES D. DONDERO and
COMMONWEALTH TRUST COMPANY,
Trustees

THE DUGABOY INVESTMENT TRUST

WINSTEAD PC
DALLAS, TEXAS

THE DUGABOY INVESTMENT TRUST

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THE DUGABOY INVESTMENT TRUST

AGREEMENT OF TRUST made and entered into at Dallas, Texas, this ____ day of October, 2010, by and between DANA SCOTT BREault, as Settlor, and JAMES D. DONDERO, and COMMONWEALTH TRUST COMPANY, as Trustees.

ARTICLE I

DEFINITIONS

The following terms, as used in this Trust Agreement, have the meanings set forth below, unless another meaning is clearly indicated by context or circumstances:

1.1 Settlor. "Settlor" means DANA SCOTT BREault.

1.2 Jim. "Jim" means JAMES D. DONDERO.

1.3 Trustees. The initial Trustee of each trust created hereunder is JAMES D. DONDERO. "Trustee" means any person or entity serving as Trustee, whether original or successor and whether one or more in number. "Administrative Trustee" means COMMONWEALTH TRUST COMPANY in its capacity as Administrative Trustee, and any successor Administrative Trustee appointed in accordance with Section 5.2(c). "Independent Trustee" means GRANT JAMES SCOTT, III, (upon his acceptance as set forth in Section 5.2(b)) in his capacity as Trustee, and any successor Independent Trustee appointed in accordance with Section 5.2(b). "Family Trustee" means JAMES D. DONDERO in his capacity as Trustee, and any successor Family Trustee appointed in accordance with Section 5.2(a). The rights, powers, duties, and obligations, of the Family Trustee, Independent Trustee and Administrative Trustee are to be exercised and allocated pursuant to Section 6.2 of this Trust Agreement.

1.4 Children. "Children" means REESE AVRY DONDERO, JAMESON DRUE DONDERO, and any other child born to or adopted by Jim after the date of this Trust Agreement. "Child" means one of the Children.

1.5 Descendants. "Descendants" means the legitimate children of the person designated and the legitimate lineal descendants of such children, and includes any person adopted before attaining age fifteen (15) and the adopted person's legitimate lineal descendants. A posthumous child shall be considered as living at the death of his parent.

1.6 Code. "Code" means the Internal Revenue Code of 1986, as amended, and corresponding provisions of future federal tax law.

1.7 Per Stirpes. "Per Stirpes," when used with respect to a distribution of property among a class of beneficiaries, shall mean by representation; that is, the Descendants of a deceased ancestor take the share such ancestor would have received had he or she been living, and the issue of a living ascendant would not take in competition with such ascendant. The per

stirpital allocation shall commence with the most senior generation that has a living representative.

ARTICLE II

FUNDING

Settlor has transferred to the Trustee, without consideration, One Thousand and No/100 Dollars (\$1,000.00) which shall be administered and distributed in accordance with the terms of this Trust Agreement. Settlor and others may transfer to the Trustee properties acceptable to them, to be added to the trust estate. The Trustee shall administer the initial trust estate pursuant to the terms of Section 3.1.

ARTICLE III

DISTRIBUTION OF PRINCIPAL AND INCOME

3.1 Trust for Jim. The trust for the benefit of Jim shall be administered and distributed upon the following terms:

(a) Distributions to Jim. The Family Trustee may distribute to Jim so much of the net income and principal of the trust as the Family Trustee deems necessary to provide for Jim's maintenance, support and health. Undistributed income shall be accumulated and added to principal. In exercising its discretion, the Family Trustee shall take into account the following factors:

- (i) Jim is the primary beneficiary of the trust.
- (ii) The Family Trustee shall take into consideration in determining Jim's needs any other income or resources known upon reasonable inquiry by the Family Trustee to be available to Jim for these purposes.
- (iii) Settlor's intention to assist or enable Jim to obtain and furnish a home commensurate with his standard of living.
- (iv) Settlor's intention to assist or enable Jim to obtain capital to enter a business or profession.
- (v) Any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust

(b) Distributions by Independent Trustee. The Independent Trustee may, in its sole and absolute discretion, distribute to Jim so much of the income and principal of the trust as the Independent Trustee shall deem appropriate or advisable. It is Settlor's intention to give the Independent Trustee the broadest discretion possible in determining the amount and timing of distributions of income and principal hereunder and Settlor recognizes that the Independent Trustee may, in the exercise of its discretion, determine

to distribute the entire trust estate to Jim or to make no distributions to Jim during Jim's disability or for so long as Jim shall have a judgment outstanding, or for so long as any distribution might be lost to Jim's creditors. It is also Settlor's intention and desire for the Independent Trustee to consider any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust in determining the amount of distributions to be made to Jim under this subsection (b).

(c) Inter Vivos Special Power of Appointment. During Jim's lifetime, he shall have a special power to appoint any part or all of the trust estate to any individual or entity, except that no appointment shall be made to Jim, his creditors, his estate, or the creditors of his estate. Valid appointments may be in such amounts and proportions and upon such terms and conditions as Jim shall determine and evidence by written instrument delivered to the Trustee which specifically refers to this power of appointment and expresses the intention to exercise it; provided that such power of appointment shall not extend to any life insurance policies insuring Jim's life that constitute a part of the trust estate; and provided further that Jim shall not have a power to appoint by deed to or for the benefit of Jim or any individual or entity if such appointment has the effect of satisfying Jim's contractual or legal obligations. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.1(c).

(d) Independent Trustee's Power to Grant Testamentary General Power of Appointment. Except as otherwise provided herein, the Independent Trustee, by signed acknowledged instrument delivered to Jim, may grant Jim a testamentary general power of appointment (as defined in Sections 2041 of the Code) over part or all of the trust estate, provided, however, that such power of appointment shall only be effective in an amount up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless Jim's will provides otherwise by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of the trust estate over which the power is exercisable. As used in this section, the term "Net Death Taxes" shall mean the aggregate death taxes (including, without limitation, Federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to Jim's estate.

(i) If Jim has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (d) above, the amount that Jim may appoint under subsection (d) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of Jim's death, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers

together shall be no greater than the amount otherwise appointable under subsection (d) above.

(ii) The scope and terms of the power shall be defined in the instrument. Before such a power is exercised by Jim and the exercise becomes effective, the Independent Trustee may, in a similar manner, revoke or alter the power which was granted. This power shall not apply if the trust has an inclusion ratio of zero for generation-skipping transfer tax purposes. Jim shall not have a general power of appointment over any part of the trust estate unless such power is specifically granted to Jim by the Independent Trustee pursuant to this subsection.

(e) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon Jim's death. Upon termination of the trust, the Trustee shall distribute the balance of the trust estate as follows:

(i) Pursuant to General Testamentary Power of Appointment. This paragraph (i) shall apply if, but only if, the Independent Trustee grants Jim a general testamentary power of appointment pursuant to subsection (d) above and the Independent Trustee has not revoked the grant of that general power prior to the date of Jim's death. In that event, if Jim validly exercises such general testamentary power of appointment, the Trustee shall distribute so much of the trust estate then remaining as is validly appointed by Jim pursuant to such power in accordance with the terms of such appointment.

(ii) Special Testamentary Power of Appointment. This paragraph (ii) shall apply to so much of the trust estate then remaining as is not distributed pursuant to paragraph (i) above. The Trustee shall distribute the trust estate to such one or more individuals and entities, in such amounts and proportions and upon such terms and conditions, as Jim appoints by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, Jim may not appoint to Jim, Jim's estate, Jim's creditors, or creditors of Jim's estate.

(iii) Alternative Disposition. The remaining and unappointed trust estate shall be held in trust or distributed as follows:

(1) If one or more of Jim's Descendants are then living, the Trustee shall divide the trust estate into separate equal shares, one for each then living Child and one for the then living Descendants, collectively, of each deceased Child with one or more Descendants then living. The Trustee shall administer a share for each Child in a separate trust for the primary benefit of the Child and for the Child's Descendants pursuant to Section 3.2 hereof. The Trustee shall administer a share for the Descendants of each deceased Child pursuant to Section 3.3 hereof.

(2) If none of Jim's Descendants is then living, the trust estate shall be administered or distributed in accordance with Section 3.4 hereof.

3.2 Trust for Child. All property directed to be administered in a separate trust for a Child under this Section 3.2 shall be administered and distributed for the Child's benefit upon the following terms:

(a) Distributions to Child. The Trustee may distribute to the Child so much of the net income and principal of the trust as the Trustee deems necessary to provide for the Child's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Child's standard of living at the creation of the trust.

(ii) The Child is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Child's needs, any other income or resources known upon reasonable inquiry by it to be available to the Child for these purposes.

(iv) Settlor's intention to enable or assist each Child to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Child's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Child's motivation to provide for her own needs in life.

(b) Distributions to Child's Descendants. The Trustee may distribute to the Child's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Child, acting in the Child's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of the Descendants of the Children, in such amounts and proportions and upon such terms and conditions, as the Child shall direct; provided that the Child shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Child. This power of appointment may be exercised subject to such terms and conditions as the Child shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.2(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon the death of the Child. Upon termination, the Trustee shall distribute the trust estate then remaining, or any part thereof, to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Child shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Child may not appoint to the Child, the Child's creditors, estate, or creditors of the Child's estate. The trust property not appointed by the Child in accordance with this special power of appointment shall be administered by the Trustees for the Child's then living Descendants pursuant to Section 3.3 hereof. If there are no Descendants of the Child then living, the Trustee shall distribute the remaining trust estate to Jim's then living Descendants, Per Stirpes. If any property is distributable to a person for whose benefit a trust which was established under this Trust Agreement is then being administered, the property shall be added to that trust and administered according to its terms. If no Descendant of Jim is then living, the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.3 Trusts for Descendants. The Trustee shall divide property which is to be administered under this Section 3.3 for the Descendants of a deceased Child, among such

Descendants, Per Stirpes. The Trustee shall administer each share created for a Descendant of a deceased Child (the "Beneficiary") in a separate trust for the Beneficiary's benefit upon the following terms:

(a) Distributions. The Trustee shall distribute to the Beneficiary so much of the net income and principal of the trust as the Trustee deems necessary for the Beneficiary's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Beneficiary's standard of living at the creation of the trust.

(ii) The Beneficiary is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Beneficiary's needs, any other income or resources known upon reasonable inquiry by it to be available to the Beneficiary for these purposes.

(iv) Settlor's intention to enable or assist each Beneficiary to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Beneficiary's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Beneficiary's motivation to provide for his or her own needs in life.

(b) Distributions to Beneficiary's Descendants. The Trustee may distribute to the Beneficiary's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in

life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Beneficiary, acting in the Beneficiary's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of Jim's Descendants in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall direct; provided that the Beneficiary shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Beneficiary. Furthermore, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. This power of appointment may be exercised subject to such terms and conditions as the Beneficiary shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.3(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate at the death of the Beneficiary. Upon termination, and except as otherwise provided pursuant to Section 3.5 hereof, the Trustee shall distribute the trust estate then remaining, or any part thereof to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. The trust property not effectively appointed by the Beneficiary in accordance with this special power of appointment or pursuant to Section 3.5 hereof shall be distributed, Per Stirpes, to: the Beneficiary's Descendants living at the termination of the trust; or if there are no such Descendants then living, to the then living Descendants of the Child who was the parent of the Beneficiary; or if there are no such Descendants then living, to Jim's then living Descendants. If any property is distributable under this subsection to a Child, such property shall be added to the Child's Trust and administered pursuant to the terms of Section 3.2. If any property is distributable under this subsection to a Descendant of Jim (other than a Child), such property shall be administered in trust for such Descendant's benefit pursuant to the terms of this Section 3.3. If no Descendant of Jim is then living,

the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.4 Contingent Distribution. If Jim and Jim's Descendants are all are deceased and no other disposition of the trust estate is called for in this Trust Agreement, the trust estate then remaining shall be distributed to those persons other than creditors and Settlor who, under the laws of Texas in force at that time, would have taken the personal property of Jim had he died intestate, a single person without Descendants, domiciled in the State of Texas, the moment after the event causing the distribution hereunder, the shares and proportions of taking to be determined by Texas laws.

3.5 General Power of Appointment for Certain Beneficiaries.

(a) Except as provided in subsection (c) below, any provision of this Trust Agreement to the contrary notwithstanding, at the death of any individual ("such beneficiary") at whose death the generation-skipping transfer tax would, but for the provisions of this section, be applicable with respect to any trust created under this Trust Agreement, the Trustees shall pay out of the principal of such trust such amount as such beneficiary, by express provision referring to this Trust Agreement and this power of appointment in his or her will, appoints, to or among such beneficiary's creditors, up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless such beneficiary's will otherwise provides by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of such trust over which such power is exercisable. The foregoing provisions of this section shall be effective only if the Trustees make a determination that the generation-skipping transfer tax would not be applicable with respect to the amount of such trust over which such power is exercisable. As used in this section, the term "Net Death Taxes" shall mean "the aggregate death taxes (including, without limitation, federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to the estate of such beneficiary."

(b) If under the will of any individual or individuals and/or any other trust instrument or instruments, such beneficiary has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (a) above, the amount such beneficiary may appoint under subsection (a) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of death of such beneficiary, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers together shall be no greater than the amount otherwise appointable under subsection (a) above.

(c) The provisions of this section shall not apply to the trust administered for Jim under Section 3.1.

3.6 Postponement of Distribution. Upon termination of any trust established hereunder, if any property is distributable to a beneficiary who is then under age twenty-five (25), or who, because of age, physical or mental weakness, or for any other reason is, in the sole discretion of the Trustee, unable to manage the property, the Trustee shall retain such property in a separate trust for the benefit of that beneficiary, until he or she attains age twenty-five (25) and in the sole discretion of the Trustee becomes able to manage the property. At that time, the remaining trust property shall be distributed to the beneficiary and the separate trust shall terminate. During the term of the trust, the Trustee shall distribute to the beneficiary so much of the net income and principal as the Trustee deems necessary to provide for the beneficiary's health, support, maintenance and education. If the beneficiary dies before the termination of the trust, the then remaining trust estate shall be distributed to the beneficiary's estate.

ARTICLE IV

PROVISIONS AFFECTING DISTRIBUTION

4.1 Withdrawal Right. Jim shall have the right, following a contribution to Jim's trust, to make a withdrawal in accordance with the provisions of this section unless the transferor indicates otherwise when making the transfer. A separate withdrawal right shall attach to each separate contribution of properties to Jim's trust. If a transferor is married at the time of contribution to the Trustee, then solely for purposes of the withdrawal rights granted in this Section 4.1, unless the transferor notifies the Trustee in writing to the contrary, such contribution shall be treated as two separate contributions having been made one-half (1/2) by the transferor and one-half (1/2) by the transferor's spouse, regardless of whether the property contributed is community property and regardless of whether they elect to treat such contribution as having been made one-half by each of them for Federal gift tax purposes. Any person making a contribution to Jim's trust may give the Trustee written instructions that no withdrawal right is to be granted, or that alternative withdrawal rights are to be granted with respect to the contribution being made.

(a) Amount That May Be Withdrawn. When a contribution is made, Jim may withdraw the lesser of the following amounts:

(i) the maximum present interest exclusion amount permitted, under Section 2503(b) of the Code, or any similar succeeding statute (such amount being \$12,000 at the date of execution of this Trust Agreement), less the cumulative value of all previous known gifts to or for the benefit of Jim by the same transferor during the same calendar year which would qualify for the present interest exclusion; or

(ii) the remainder determined by subtracting Jim's cumulative rights of withdrawal with respect to any other gifts from any transferor that are either

currently outstanding or that have previously lapsed (but not including the present right of withdrawal) during the same calendar year from the greater of (1) Five Thousand Dollars (\$5,000), or (2) Five Percent (5%) of the total value of Jim's trust determined as of the date the current withdrawal power is to lapse (such value may be estimated by the Trustee), or (3) any greater withdrawal power, the lapse of which would not constitute a release of such power under Sections 2041(b)(2) and 2514(e) of the Code or any similar subsequent statute; or

(iii) the value of the contribution that is subject to the withdrawal right.

(b) Withdrawal Period and Notice. Unless directed to the contrary by the transferor, the Trustee shall promptly provide Jim with written notice of the date of the contribution, the name of the transferor, the value of the properties contributed, and the value of Jim's withdrawal right. Withdrawals may be made at any time for a period of thirty (30) days following Jim's receipt of the notice of the existence of the withdrawal right. During any period that Jim lacks legal capacity, Jim's guardian or other legal representative, other than Settlor, may exercise Jim's withdrawal right on Jim's behalf. If Jim does not exercise the withdrawal right before the expiration of that period, the unexercised right shall lapse. For purposes of this section, the term "contribution" means any cash or other property which is transferred to the Trustee as part of the trust estate. The value of any contribution to the trust estate shall be its value for federal gift tax purposes.

(c) Payment of Withdrawal Amount. If Jim exercises his withdrawal right, payment of the amount due shall be made in cash immediately upon receipt by the Trustee of a demand in writing from Jim or his guardian or other legal representative, other than Settlor. Upon the exercise of a withdrawal right, payment shall be made, first, from any gifts made to Jim's trust prior to the exercise of such withdrawal right, but during the same calendar year in which the withdrawal right is exercised, and shall be charged against the trust. Should such gift or gifts not consist of sufficient cash to satisfy the exercised withdrawal right, the Trustee shall use other liquid assets of Jim's trust for such purpose. Should Jim's trust not contain sufficient liquid assets to satisfy an exercised withdrawal right when made, the Trustee shall borrow funds in order to satisfy the demand and shall, if necessary, pledge trust property to secure the loan.

(d) Distributions During Withdrawal Period. If any contribution is made subject to a withdrawal right, the Trustee shall not make any distributions under any other provision of the Trust Agreement which would prevent the Trustee from being able to satisfy fully any unexpired right of withdrawal.

(e) Lapse of Withdrawal Right. In the event Jim allows a withdrawal right granted under this Section 4.1 to lapse with respect to a contribution, or any portion thereof, the Trustee is authorized to characterize such lapse as a "release" for purposes of Section 678(a) of the Code.

4.2 Restriction Upon Alienation. No beneficiary may anticipate, by assignment or otherwise, his beneficial interest in the principal or income of the trust estate; nor may any beneficiary sell, transfer, encumber, or in any way charge his interest in trust income or principal prior to actually receiving it. Neither the income nor the principal of any trust established hereunder shall be subject to any execution, garnishment, attachment, bankruptcy, claims for alimony or support, other legal proceeding of any character, legal sequestration, levy or sale, or in any other event or manner be applicable or subject, voluntarily or involuntarily, to the payment of a beneficiary's debts. The Trustee shall make distributions to or for each beneficiary according to the terms hereof, notwithstanding any purported sale, assignment, hypothecation, transfer, attachment, or judicial process. The provisions of this section shall not limit or detract from any power of appointment or withdrawal right granted to any beneficiary herein.

4.3 Distributions Constitute Separate Property. Settlor intends to make a gift to each beneficiary hereunder of only that portion of the income and principal of each trust that is in fact distributed to such beneficiary. Inasmuch as the amounts actually distributed to a beneficiary hereunder constitute the gift Settlor contemplated making, such distributions, whether they be income or principal, shall constitute the separate property of such beneficiary and not the community property of such beneficiary. Furthermore, it is Settlor's intention that no beneficiary shall have any interest in any undistributed income or principal until the distribution of such income or principal and, accordingly, such undistributed income and principal shall not be deemed the community property of any such beneficiary and that beneficiary's spouse.

4.4 Method of Payment. The Trustee, in its discretion, may make distributions to any beneficiary, including a beneficiary who is under a physical, mental, or legal disability (minority or other), in any one or more of the following ways: directly to the beneficiary without the intervention of any legal guardian or other legal representative; as expenditures in the beneficiary's behalf; to the guardian, committee, conservator, or other similar official acting for the beneficiary; to a custodian for the beneficiary under a Uniform Transfers to Minors Act or Uniform Gifts to Minors Act; to a relative of the beneficiary or to any suitable person with whom the beneficiary resides or who has care or custody of the beneficiary; and in all ways provided by law for gifts or other transfers to or for minors or other persons under disability. In each case, receipt by the beneficiary or other person to whom payment is made or a distribution entrusted shall be a complete discharge of the Trustee with respect thereto. The Trustee may act upon such evidence as it deems appropriate and reliable in determining a beneficiary's ability to manage property and identifying a proper recipient of trust funds hereunder.

4.5 Evidence of Need. In exercising its discretion under this Trust Agreement, the Trustee shall be entitled to rely upon the written certification of a beneficiary or of another as to the nature and extent of a beneficiary's needs, and the adequacy of the beneficiary's resources apart from the trust to meet those needs. The Trustee may, but shall not be required to, make inquiry into the accuracy of the information it receives

4.6 Termination of Small Trust. Notwithstanding any provision of this Trust Agreement to the contrary, the Trustee may at any time terminate any trust when in its judgment the trust is so small that it would be inadvisable or uneconomical to continue the trust administration. In the event of termination, the Trustee shall distribute the trust to the income

beneficiaries of the trust determined at the time of distribution in the proportions to which they are entitled to receive income. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes. Distribution of trust funds in the manner herein provided shall relieve the Trustee of any further responsibility with respect to such funds. This section shall not apply to a Trustee with respect to any trust of which such Trustee is a beneficiary, or if Trustee has duty to support the beneficiary or to any Trustee who may be removed and replaced by a beneficiary of the trust unless the successor trustee must be a corporate fiduciary or someone who is not related or subordinate to the beneficiary within the meaning of Section 672(c) of the Code. The provisions of this section shall not limit or detract from any withdrawal right granted to any beneficiary herein.

4.7 Generation-Skipping Transfer Taxes and Payment. It is Settlor's intent that the trusts created hereunder be exempt from Generation-Skipping Transfer Taxes. If, however, the Trustee considers any distribution or termination of an interest or power in a trust to be a taxable distribution (a "Distribution") or a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination or Direct Skip. In the case of a Distribution, the Trustee may increase the amount to be distributed by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part by reason of property held in trust under a Settlor's will or codicil, and in part by reason of other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the Distribution, Termination, or Direct Skip hereunder, taking into consideration deductions, exemptions, credits and other factors which the Trustee deems appropriate. The Trustee may, but need not make any equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions or Terminations or Direct Skips.

ARTICLE V

THE TRUSTEE

5.1 Resignation of Trustee. The Trustee may resign as to any one or more of the trusts created hereunder by giving written notice to Settlor, if living; otherwise to the current income beneficiary of the trust.

5.2 Appointment and Succession of Trustees.

(a) Generally.

(i) Family Trustee. Jim is the initial Family Trustee of all trusts created hereunder. If Jim ceases to act as Family Trustee, or if any successor Family Trustee fails or ceases to act, Jim may appoint a successor Family Trustee within thirty (30) days of a vacancy arising. If Jim is deceased or if Jim otherwise fails to appoint a successor, GRANT JAMES SCOTT, III is appointed as successor Family Trustee. If GRANT JAMES SCOTT, III fails or ceases to act as Family Trustee, or if any other Family Trustee fails or ceases to act, and a successor is not appointed by Jim as provided above, JOHN WILLIAM HONIS is appointed as successor Family Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Family Trustee, and a successor is not appointed by Jim as provided above, the Family Trustee last serving shall appoint a successor Family Trustee. If a successor Family Trustee is not appointed within sixty (60) days of a vacancy arising, the successor Family Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(ii) Independent Trustee. GRANT JAMES SCOTT, III is appointed as the initial Independent Trustee and shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee wherein GRANT JAMES SCOTT, III accepts the trust and the position of Independent Trustee. If GRANT JAMES SCOTT, III, fails or ceases to act, or if any other Independent Trustee fails or ceases to act, Jim may appoint a successor within thirty days (30) of the vacancy arising; provided that Jim shall not serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of Section 672(c) of the Code. If a successor is not so appointed, JOHN WILLIAM HONIS is appointed Independent Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Independent Trustee, and a successor is not appointed by Jim as provided above, the Independent Trustee last serving may appoint the successor Independent Trustee. If a successor Independent Trustee is not so appointed within sixty (60) days of a vacancy arising, a successor Independent Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(iii) Administrative Trustee. COMMONWEALTH TRUST COMPANY is the initial Administrative Trustee. If COMMONWEALTH TRUST COMPANY fails or ceases to serve, Jim may appoint a successor Administrative Trustee within thirty days (30) of the vacancy arising. If a successor is not so appointed, the Family Trustee may appoint a successor Administrative Trustee within sixty (60) days of the vacancy arising. If a successor is not so appointed, a successor shall be appointed in the same manner as provided for the Family Trustee under subsection (a) above. The selection of the Administrative Trustee can have a substantial impact on the situs of the trust, which should be considered in appointing a successor Administrative Trustee.

Notwithstanding any other provision in the Trust Agreement to the contrary, no Administrative Trustee may be appointed under this paragraph if the appointment of such Administrative Trustee would change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust

The Administrative Trustee shall act in a fiduciary capacity but shall not be a Trustee or co-Trustee except to the extent and for the limited purposes described in Section 6.2. Accordingly, no reference in this Trust Agreement to the "Trustee" or "co-Trustee" shall include, or be deemed to refer to, the Administrative Trustee. Notwithstanding the foregoing, the same individual or bank or trust company may serve simultaneously as both a Trustee or co-Trustee and as Administrative Trustee for any trust created hereunder. The initial Administrative Trustee and each successor may resign at any time and may be removed at any time by the Family Trustee.

For services rendered as Administrative Trustee under this Agreement, any Administrative Trustee shall be entitled to reasonable compensation for his, her or its services, as well as be entitled to reimbursement for all expenses reasonably incurred in performing his, her or its duties hereunder. Any Administrative Trustee may receive (or retain) payment in accordance with its schedule or rates as published from time to time and as in effect at the time such compensation becomes payable, unless otherwise agreed in writing with the Family Trustee.

No termination fee shall be charged upon removal or resignation of an Administrative Trustee. However, such Administrative Trustee shall be entitled to reasonable compensation for time and materials for additional services over and above Administrative Trustee's normal duties in transferring trust assets and administration of the trust to the new Administrative Trustee.

(b) Successor Trustee. If a named or appointed successor Trustee fails or ceases to serve and no other successor is named or appointed pursuant to subsection (a) hereof, a majority in number of the beneficiaries to whom the Trustee is to or may distribute income at that time may appoint the successor Trustee, and each shall have a reasonable time in which to act. If a successor Trustee is not so appointed, any beneficiary of a trust may secure the appointment of a successor Trustee by a court of competent jurisdiction at the expense of the trust estate.

(c) Manner of Appointment; Permissible Trustees. Appointment, other than by a court, shall be by a signed, acknowledged instrument delivered to the appointed Trustee. An appointment may be made before a vacancy arises, to become effective in the event of the vacancy with the last such instrument to control. The successor Trustee appointed by Jim or a Trustee may be one or more persons and/or entities; provided that neither Settlor nor Jim shall serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of

Section 672(c) of the Code. Any other successor Trustee shall be a trust company or a bank in the United States having trust powers with not less than Fifty Million Dollars unimpaired capital and surplus. A successor Trustee shall have a reasonable time after a vacancy occurs in which to accept the office by signed, acknowledged instrument delivered to those making the appointment, if living, or to the then current beneficiaries to whom the Trustees are to or may make distributions.

5.3 Removal of Trustee. Jim shall have the power to remove the Trustee of any trust created hereunder, without cause. If Jim is deceased or if Jim is incapacitated within the meaning of Section 5.11 hereof, the primary beneficiary (or, if more than one, a majority of the primary beneficiaries) of a trust may remove any Trustee without cause. Removal shall be effected by delivering to the Trustee a signed acknowledged instrument which is effective thirty (30) days from its receipt (unless a shorter period is agreed to by the Trustee).

5.4 Succession of Corporate Trustee. If any corporate Trustee before or after qualification changes its name, becomes consolidated or merged with another corporation, or otherwise reorganizes, any resulting corporation which succeeds to the fiduciary business of such corporate Trustee shall become a Trustee hereunder in lieu of such corporate Trustee.

5.5 Trustee's Fees. Jim and Jim's Descendants shall not receive a fee for serving as Trustee. Any other Trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities, taking into account the value and nature of the trust estate and the time and work involved. The Trustee shall be reimbursed for reasonable costs and expenses incurred in connection with its fiduciary duties hereunder.

5.6 Bond. The Trustee shall not be required to furnish bond or other security.

5.7 Liability of Trustee.

(a) Generally. A Trustee other than a corporate trustee shall only be liable for willful misconduct or gross negligence, and shall not be liable for breach of fiduciary duty by virtue of mistake or error in judgment.

(b) Administrative Trustee. Every act done, power exercised or obligation assumed by the Administrative Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Administrative Trustee acting in a fiduciary capacity and not otherwise, and every person, firm, corporation or other entity contracting or otherwise dealing with the Administrative Trustee shall look only to the funds and property of the trust fund for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Administrative Trustee shall not be individually liable therefor even though the Administrative Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of the trust fund.

The decision of the Administrative Trustee hereunder with respect to the exercise or nonexercise by such Administrative Trustee of any power hereunder, or the time or

manner of the exercise thereof, made in good faith, shall fully protect such Administrative Trustee and shall be final, conclusive and binding upon all persons interested in the Trust or the income therefrom. To the extent permitted under applicable law, the Administrative Trustee acting hereunder shall not be responsible for any error of judgment or mistake of fact or law, absent bad faith or willful misconduct.

The Administrative Trustee shall be liable hereunder only for the Administrative Trustee's bad faith or willful misconduct proved by clear and convincing evidence in the court then having primary jurisdiction over the trust. The Administrative Trustee shall not be personally liable for making any delegation that is authorized under this Agreement, nor for any action taken without the Administrative Trustee's express agreement, nor for any failure to act absent willful misconduct. The Administrative Trustee shall not be liable for relying absolutely on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Administrative Trustee by any entity in which the trust fund holds an ownership interest; and (ii) the opinions of counsel or any accountant to any trust.

Prior to the death of Settlor, the Administrative Trustee shall be under no duty to inform any person having a beneficial interest in any trust created hereunder of the existence of any such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust. Following the death of Settlor, the Administrative Trustee shall be under no duty to inform any person, other than the primary beneficiary of each trust hereunder, having a beneficial interest in any trust created hereunder of the existence of such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust.

While not required, the same procedure used to settle the Administrative Trustee's accounts may also be employed to obtain the conclusive consent by the beneficiaries to the Administrative Trustee's specific conduct of any other particular matter. The Administrative Trustee and each former Administrative Trustee shall be indemnified and held harmless by each trust created hereunder against any threatened, pending or completed action, claim, demand, suit or proceeding, whether civil, criminal, administrative or investigative, falling within the exculpatory provisions of this Section or to which the Administrative Trustee is made a party, or threatened to be made a party, by reason of serving as Administrative Trustee if the Administrative Trustee acted in good faith, subject to the limitations set forth above. Such indemnification shall include expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually incurred by the Administrative Trustee in connection with such action, claim, demand, suit or proceeding. The cost of indemnification shall be apportioned against the various trusts created hereunder as the Administrative Trustee reasonably considers appropriate, taking into account the nature of the claims involved.

The Administrative Trustee shall not have any fiduciary responsibility to observe, monitor or evaluate the actions of any Trustee or other fiduciary and shall not be liable to any party for the failure to seek to attempt to prevent a breach of trust, or failure to remedy a breach of trust, or in a recurring situation to request instructions from a court

having jurisdiction over the trust. In no event shall any Administrative Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

Any Successor Administrative Trustee shall be deemed vested with all the duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Administrative Trustee. No Successor Administrative Trustee shall be personally liable for any act or failure to act of any predecessor Administrative Trustee or any other Trustee. The Successor Administrative Trustee may accept the account rendered and the property delivered by the predecessor Administrative Trustee as a full and complete discharge to the predecessor Administrative Trustee, without incurring any liability for so doing.

5.8 Predecessor Fiduciary. No successor Trustee shall be obligated or required to inquire into the acts, omissions, or accounts of any prior trustee or to bring any action against any prior trustee to compel redress of any breach of trust or for any other reason. In no event shall a successor Trustee be liable for any act or omission of any prior Trustee. A successor Trustee may accept the account rendered and the property received from a prior Trustee as a full and complete discharge to the prior Trustee without incurring any liability for doing so. A successor Trustee shall have all of the powers and discretions conferred in the governing instrument upon the original trustee.

5.9 Periodic Accounting. The Trustee may from time to time render an informal account, statement or report of its administration of each separate trust hereunder to each beneficiary who during the period covered by the account was entitled absolutely to a current payment of income or principal from the trust, or, if there is no such beneficiary, to such beneficiaries who are entitled absolutely or in the discretion of the Trustee to a payment of income or principal from the trust. If any beneficiary or legal representative or parent of a beneficiary who is not of full age or legal capacity to whom any such account is rendered shall not, within ninety (90) days after the mailing of such statement, have notified the Trustee in writing of its disapproval of the same, such statement shall be deemed to be approved

No Administrative Trustee shall be required to file or render periodic accounts in or to any court other than for good cause shown. No Administrative Trustee shall be required to give any bond.

Within 90 days following the close of each calendar year, if information is available, and if not within 30 days after it is delivered to the Administrative Trustee, and within 90 days after the removal or resignation of the Administrative Trustee, the Administrative Trustee may deliver an accounting to each primary beneficiary. The accounting shall be a written accounting of the trusts hereunder during such year or during the period from the close of the last preceding year to the date of such removal or resignation and shall set forth all investments, receipts, distributions, expenses and other transactions of each such trust and show all cash, securities, and other property held as a part of each such trust at the end of such year or as of the date of such removal or resignation, as the case may be. The accountings referred to in this Section shall be deemed to be an account stated, accepted and approved by all of the beneficiaries of each trust for which an

accounting is rendered, and the Administrative Trustee shall be relieved and discharged, as if such accounting had been settled and allowed by a final judgment or decree of a court of competent jurisdiction, unless protested by written notice to the Administrative Trustee, within 60 days of mailing thereof, by the person designated to receive such accounting. The Administrative Trustee shall have the right, at the expense of the trust, to apply at any time to a court of competent jurisdiction for judicial settlement of any account of the Administrative Trustee whether or not previously settled as herein provided or for the determination of any question of construction or for instructions. In any such action or proceeding it shall be necessary to join as parties solely the Administrative Trustee and the Settlor (although the Administrative Trustee may also join such other parties as it may deem appropriate), and any judgment or decree entered therein shall be conclusive and binding on all persons at any time interested in the trust.

5.10 Beneficiary under Disability. A parent, custodian, or guardian of any beneficiary who is under the disability of minority or, in the Trustee's opinion, any other legal, physical, or mental disability, may, in carrying out the provisions of this Trust Agreement, act and receive notice in the beneficiary's stead, and sign any instrument for the beneficiary.

5.11 Incapacity of Individual Trustee. In the event a Trustee other than a corporate Trustee becomes unable to discharge his duties as Trustee hereunder by reason of accident, physical or mental illness or deterioration, or other cause, and does not resign, then upon certification by two medical doctors affirming that each has examined the Trustee and that each has concluded, based on such examination, that he is unable to discharge his duties hereunder, the Trustee shall cease to serve, as if he had resigned, effective the date of the certification.

ARTICLE VI

TRUST ADMINISTRATION

6.1 General Powers. Subject to any limitation stated elsewhere in this Trust Agreement, and the division of powers contained in Section 6.2, the Trustee shall have, in addition to all powers granted to trustees by the common law and by Delaware statutes, as amended from time to time, the following powers with respect to each trust established hereunder:

(a) Retain Property. To retain any property received from any source, including any corporate Trustee's securities, regardless of lack of diversification, risk, or nonproductivity.

(b) Invest. To invest the trust estate in any kind of property, including common trust funds administered by a corporate Trustee or by others, without being limited by any statute or any rule of law dealing with the character, risk, productivity, diversification of, or otherwise concerning, investments by trustees.

(c) Sell. By public offering or private negotiation, to sell, exchange, assign, transfer, or otherwise dispose of all or any real or personal trust property and give options

for these purposes, for such price and on such terms, with such covenants of warranty and such security for deferred payment as the Trustee deems proper. To partition between the trust and any other owner, as the Trustee deems proper, any property in which the trust owns an undivided interest.

(d) Lease. To lease trust property for terms within or extending beyond the term of the trust, for any purpose.

(e) Real Estate. To operate, maintain, repair, rehabilitate, alter, erect, improve, or remove any improvements on real estate; to subdivide real estate; to grant easements, give consents, and enter into contracts relating to real estate or its use; and to release or dedicate any interest in real estate.

(f) Borrow. To borrow money for any purpose either from the banking department of any corporate Trustee or from others; to encumber or hypothecate trust property by mortgage, deed of trust, or otherwise; and to maintain, renew, or extend any indebtedness upon such terms as the Trustee deems appropriate.

(g) Loans. To lend money to any person or entity, including, but not limited to, a beneficiary hereunder, but not including a Settlor or a Trustee (other than a beneficiary serving as Trustee) hereunder, or a spouse of theirs, upon such terms and with such security as the Trustee deems advisable.

(h) Conserve Estate. To take any action to conserve the trust estate.

(i) Litigation. To commence or defend at the expense of the trust such litigation with respect to the trust estate as the Trustee deems advisable.

(j) Claims. To collect, pay, contest, compromise, settle, renew, or abandon any claims or demands of or against the trust estate without court authority on whatever terms the Trustee deems advisable.

(k) Abandon Property. To abandon any property or interest in property belonging to the trust when, in the Trustee's discretion, such abandonment is in the best interest of the trust and its beneficiaries.

(l) Documents. To execute contracts, notes, conveyances, and other instruments containing covenants, representations, or warranties binding upon and creating a charge against the trust estate or containing provisions excluding personal liability, or any other written instrument of any character appropriate to any of the powers or duties conferred upon the Trustee.

(m) Agents. To employ attorneys, auditors, investment advisors, depositaries, and agents with or without discretionary powers, to employ a bank with trust powers as agent for the purpose of performing any ministerial duties incident to the administration, and to pay all expenses and fees so incurred.

(n) Securities. To engage in all actions necessary to the effective administration of securities including, but not limited to, the authority to: vote securities in person or by proxy; engage in a voting trust or voting agreement; and consent to or participate in mergers, consolidations, sales of assets, recapitalizations, reorganizations, dissolutions, or other alterations of corporate structure affecting securities held in the trust.

(o) Nominee. To hold securities and other property in bearer form or in the name of a trustee or nominee with or without disclosure of any fiduciary relationship.

(p) Additional Property. To receive additional property from any source and add it to the trust estate.

(q) Insurance. To carry insurance of such kinds and in such amounts as the Trustee deems advisable, except for insurance on the life of a Settlor, the Trustee, or a spouse of theirs. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of Settlor, the Trustee, or a spouse of theirs.

(r) Business Powers.

(i) In General. To engage in any lawful business including, but not limited to, the power to continue at the risk of the trust estate the operation of any business which may become a part of the trust estate, and to sell, liquidate, or otherwise terminate any business interest, including, but not limited to, the fulfillment of any agreement for the disposition of any such business interest.

(ii) Closely Held Businesses. This trust may be funded with, or subsequently purchase or otherwise acquire, securities or other financial interests in one or more closely held businesses (each of which is hereinafter referred to as the "business").

(1) Exoneration from Liability. It is realized that the business may not be the type of investment in which fiduciaries would normally invest estate or trust funds. Nonetheless, the Trustees shall incur no liability for any loss which may be sustained by reason of the retention, operation or sale of the business or the exercise of any power conferred upon the Trustees with respect to the business.

(2) Management Powers. The Family Trustee shall have the exclusive duty to deal with and manage the business. In addition to any power granted by law or elsewhere in this document, the Family Trustee shall have the following powers:

(A) To retain and continue the business or any interest therein for such time as the Family Trustee considers advisable;

(B) To operate or participate in the operation of the business in the form of a corporation, limited liability company, partnership or proprietorship;

(C) To direct, control, supervise, manage, operate or participate in the operation of the business; to serve as an officer and director of the business; and to receive from the business compensation for his services in addition to his compensation as a Family Trustee;

(D) To delegate all or any part of his power to supervise, manage or operate the business to such persons as he may select, including any director, officer or employee of the business;

(E) To engage, compensate and discharge such managers, employees, agents, attorneys, accountants, consultants or other representatives as he considers advisable, including anyone who may be a beneficiary or fiduciary of this Trust;

(F) To invest or employ in the business, or to use as collateral for loans to the business, such other estate or trust funds as he considers advisable;

(G) To sell, liquidate or otherwise dispose of all or any part of the business at such time or times, for such prices and upon such terms and conditions as he considers advisable, and to sell the business to anyone who is a beneficiary or a fiduciary of this Trust; and

(3) Exclusion from Powers. Neither Commonwealth Trust Company nor any successor Administrative Trustee shall have any power, duty and/or responsibility in connection with the operation, control, supervision, management and participation of the business.

(s) Income and Principal. To determine, in accordance with the provisions of Delaware law, what constitutes income and principal of the trust estate, the manner in which expenses and other charges shall be allocated between these accounts, and whether or not to establish reserves for depreciation or depletion, and to add undistributed income to principal.

(t) Tax Elections. To exercise any tax option or election permitted by law as the Trustee determines, in its sole discretion, even though the effect is to treat beneficiaries hereunder differently, or to favor some at the expense of others. The Trustee may, but need not, make such compensating adjustments among beneficiaries with respect thereof as it deems appropriate considering the nature of the tax election and the amounts involved.

(u) Reliance. To rely upon any notice, certificate, affidavit, or other document or evidence believed by the Trustee to be genuine and accurate, in making any payment or distribution. The Trustee shall incur no liability for a disbursement or distribution made in good faith and without actual notice or knowledge of a changed condition or status affecting any person's interest in the trust or any other matter.

(v) Commingling. To commingle and invest as one fund, or make joint investments with, the principal of two or more separate trusts established hereunder, with each trust having an undivided interest therein.

(w) Division and Distribution. To make all allocations, distributions, or divisions contemplated by this Trust Agreement; to allocate, distribute and divide different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or trusts, in cash or in kind, or both, without regard to the income tax basis of specific property allocated to any beneficiary or trust, even though shares may as a result be composed differently, and to determine the value of any property so allocated, divided or distributed.

(x) Withholding of Distribution. To withhold from distribution all or any part of the trust property as long as the Trustee, in its discretion, determines that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the trust.

(y) Mineral Powers. To retain or acquire interests in oil, gas, or other mineral resources; to execute as to those interests any agreements, assignments, contracts, deeds, grants or leases for any term (even though the term may extend beyond the termination of the trust); to manage, control, operate, explore, mine, develop, or take any action for the production, recovery, sale, treatment, storage, or transportation of any such interest; to drill, rework, or recomplete wells of any type; to conduct or participate in secondary recovery operations; to enter into agreements for pooling or unitization; and to install, operate, or participate in the operation of any plant, mine, or other facility.

(z) Environmental Hazards. To use and expend the trust income and principal to (i) take all appropriate action to prevent, identify, or respond to actual or threatened violations of any environmental law or regulation for which the Trustee may have responsibility, including the authority to conduct environmental assessments, audits, and site monitoring to determine compliance with any environmental law or regulation; (ii) take all appropriate remedial action to contain, cleanup, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; and (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards.

(aa) Miscellaneous Powers. Generally to do and perform any and all acts, things, or deeds which, in the discretion of the Trustee, may be necessary or proper for the protection, preservation, and promotion of the trust properties and estate.

6.2 Division of Powers. The powers and duties granted under this Trust Agreement shall be divided among the Trustees as follows:

(a) Administrative Trustee. The Administrative Trustee shall have the following exclusive duties, which shall all be carried out in the State of Delaware or such other jurisdiction as the Trustee shall, from time to time, select as the situs of the trust:

(i) To maintain bank accounts, brokerage accounts and other custody accounts which receive trust income and contributions and from which trust expenditures and distributions are disbursed.

(ii) To maintain storage of tangible personalty and evidence of intangible trust property.

(iii) To maintain trust records.

(iv) To maintain an office for Trustee meetings and other trust business.

(v) To originate, facilitate and review trust accountings, reports and other communications with the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vi) To respond to inquiries concerning the trust from the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vii) To execute documents with respect to trust account transactions.

(viii) To retain accountants, attorneys, investment counsel, agents and other advisers in connection with the performance of its duties under this Section 6.2.

(b) Independent Trustee. The Independent Trustee shall have all of the powers and duties specifically assigned to the Independent Trustee under this Trust Agreement. These powers may only be exercised by the Independent Trustee.

(c) Family Trustee. The Family Trustee shall possess and exercise all of the powers and duties of the Trustee not specifically granted to the Administrative Trustee or the Independent Trustee under this Trust Agreement, including those specifically assigned to the Family Trustee. Without limiting the generality of the foregoing, the Family Trustee shall exercise all Trustee authority and have all Trustee responsibility with respect to the investment of the trust estate. If there is no Family Trustee serving,

however, all of the powers and duties of the Trustee, including those assigned to the Family Trustee, shall be exercised and discharged by the Independent Trustee.

6.3 Merger of Trusts. If at any time a Trustee of any trust created pursuant to this Trust Agreement shall also be acting as Trustee of any other trust created by trust instrument or by will for the benefit of the same beneficiary or beneficiaries and upon substantially the same terms and conditions, the Trustee is authorized and empowered, if in the Trustee's discretion such action is in the best interest of the beneficiary or beneficiaries of the trust created hereunder, to transfer and merge all of the assets then held under such trust created pursuant to this Trust Agreement to and with such other trust and thereupon and thereby to terminate the trust created pursuant to this Trust Agreement. The Trustee is further authorized to accept the assets of the other trust which may be transferred to the Trustee of the trust created hereunder and to administer and distribute such assets and properties so transferred in accordance with the provisions of this Trust Agreement. If the component trusts differ as to contingent beneficiaries and the contingency occurs, the funds may be distributed in such shares as the Trustee, in the Trustee's sole discretion, shall deem necessary to create a fair ratio between the various sets of remaindermen. If any trust created in this Trust Agreement is merged with any trust created under any other instrument, such merged trust shall not continue beyond the date on which the earliest maximum term of the trusts so merged would, without regard to such merger, have been required to expire. Settlor further directs that, as to any property at any time a part of any trust estate (including a merged trust) as to which under the laws of any state applicable to said property that trust is required to be terminated at any time prior to its normal termination date, the trust as to that particular property shall terminate at the time required by the laws of said state.

6.4 Certain Powers and Rights Limited. Settlor intends that the trust created under Section 3.1 hereof shall not be included in Jim's gross estate for estate tax purposes unless the Independent Trustee grants Jim a general power of appointment pursuant to paragraph 3.1(d). All issues applicable to the trust shall be resolved accordingly.

6.5 GST Inclusion Ratio. If property not having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio equal to zero. If property having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio not equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio not equal to zero.

6.6 Out-of-State Properties. If any trust property is situated in a jurisdiction in which the Trustee is unable or unwilling to act, the Trustee may appoint an ancillary trustee for such jurisdiction and may confer upon the ancillary trustee such powers and discretions, exercisable without court order, to act with respect to such property as the Trustee deems proper. The ancillary trustee shall be responsible to the Trustee for all property it administers. The Trustee

may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.7 Management of Real Property. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof), acting alone, shall make any and all decisions regarding: (i) the acquisition, retention and disposal of real estate; (ii) the operation, maintenance, repair, rehabilitation, alteration, construction, erection, improvement, or removal of any improvements on real estate; (iii) the subdivision of real estate; (iv) the granting of easements, giving of consents, and entering into contracts relating to real estate or its use; (v) the release or dedication of any interest in real estate; and (vi) the payment of taxes, utilities, and maintenance expenses attributable to real estate owned by any trust created hereunder. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof) may, in its discretion, either exercise such powers or appoint an ancillary trustee to exercise such powers. The Trustee may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.8 No Court Supervision. The Trustee shall not be required to qualify before or be appointed by any court; nor shall the Trustee be required to obtain the order or approval of any court in the exercise of any power or discretion.

6.9 Division of Trusts. The Trustee may divide any trust established by this Trust Agreement into two or more separate trusts as provided in this section. Settlor exonerates the Trustee from any liability arising from the exercise or failure to exercise any powers granted herein, provided the Trustee acts in good faith.

(a) Division and Funding of Separate Trusts. The Trustee may divide any trust established by this Trust Agreement, at any time, into two or more separate trusts so that the generation-skipping transfer tax inclusion ratio as defined in Section 2642(a) of the Code for each trust shall be either zero or one. Any such division shall be accomplished in accordance with applicable regulations under Chapter 13 of the Code.

(b) Administration of Separate Trusts. Such separate trusts shall have the identical provisions as the original trust. However, with respect to each separate trust, the Trustee may: (1) make different tax elections, (2) expend principal and exercise any other discretionary powers with respect to such separate trusts differently, (3) invest such separate trusts differently, and (4) take all other actions consistent with such trusts being separate trusts.

(c) Powers of Appointment. The donee of any power of appointment with respect to a trust so divided may exercise such power of appointment differently with respect to the separate trusts created by the division.

6.10 Limitation of Powers. The following limitations, affecting the administration of the trusts created hereunder, apply notwithstanding any other provision of this Trust Agreement. For purposes of this Section 6.10, the term "Settlor" shall include any individual who contributes property to the Trustee to be added to the trust estate.

(a) Support Duty. Distributions from the trust estate shall not be made which discharge, in whole or in part, the personal legal obligations of a Settlor or a Trustee from time to time existing, to support or educate any of the trust beneficiaries. When determining these legal obligations, the existence of this trust and funds made available by it shall not be taken into consideration.

(b) Adequacy of Consideration. No party may, through purchase, exchange, or otherwise, deal with or dispose of the corpus or the income of the trust estate for less than adequate consideration in money or money's worth.

(c) Insurance. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of a Settlor, the Trustee or a spouse of either of them.

(d) Borrow. The Trustee shall not allow a Settlor to borrow trust principal or income, directly or indirectly, without adequate interest or security.

(e) Substitute Property. The Trustee shall not allow a Settlor to reacquire or exchange any property of the trust estate by substituting other property with an equivalent value.

(f) Vote. A Settlor, acting as a Trustee, shall not be entitled to vote, directly or indirectly, shares of stock of a controlled corporation, as defined under Section 2036 of the Code, which is held as part of the trust estate.

6.11 Dealing with Fiduciaries. The Trustee may enter into any transaction with the Trustee or beneficiaries of the trusts created hereunder, acting in their individual or in another fiduciary capacity, or with any person or entity related to the Trustee or a beneficiary in any manner, if such transaction is otherwise authorized under this Trust Agreement. Without limiting the generality of the foregoing authorization, the Trustee may enter into any transaction otherwise authorized hereunder on behalf of any trust created hereunder even though the other party to the transaction is: a trust of which a beneficiary or Trustee under this Trust Agreement is a beneficiary or trustee, including, but not limited to, any trust established by this Trust Agreement; an estate of which a beneficiary or Trustee under this Trust Agreement is a representative or beneficiary; or a business or charitable corporation of which a beneficiary or Trustee under this Trust Agreement is a director, officer, employee, or owner.

ARTICLE VII

IRREVOCABILITY

This Trust Agreement and each of its provisions may not be revoked, amended, or modified.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

8.1 Applicable Law. The trust created under this Trust Agreement shall be deemed a Delaware trust and all matters pertaining to the validity, construction, and application of this Trust Agreement or to the administration of the trust created hereunder shall, in all respects, be governed by the laws of the State of Delaware. However, if the Trustee, in its sole discretion, determines that a change of situs would be beneficial to the purposes of the trust established by this Trust Agreement, the Trustee shall have the discretion and authority to change the situs of any such trust to another state. No change of situs shall be authorized herein, however, which would result in a termination of the trust for federal tax purposes. Furthermore, the Trustee shall not be entitled to change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust. Any proceeding involving the Trust must be brought in the State of Delaware for so long as the situs of the Trust shall be the State of Delaware.

8.2 Perpetuities Provision. The trust created hereunder shall be perpetual to the fullest extent permitted by Delaware law. If the trust created hereunder is deemed to be subject to the law of a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust shall terminate in all events upon the expiration of the longest period the property may be held in trust under this Agreement under the law of such jurisdiction (including any application periods in gross, such as 110 years, 360 years, or 1,000 years); provided, however, that if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this Section shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust is determined with reference to the death of the last survivor of a group of individuals in being upon the date of this Trust Agreement, those individuals shall consist of Jim and Jim's Descendants who are in being on the date of this Trust Agreement. Upon termination of a trust pursuant to the provisions of this Section 8.2, the Trustee shall distribute such trust to its income beneficiaries determined at the time of distribution. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes.

In the event any trust created hereunder owns real property, and if such real property is subject to a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then the Trustee shall take such action as is necessary to avoid termination of the trust with respect to that real property interest including, without limitation, selling the real property or contributing the real property to a business entity in exchange for ownership interests in such entity to be owned by the trust.

8.3 Gestation. A child in gestation who is born alive shall be considered a child in being throughout the period of gestation.

8.4 Survivorship. Any person must survive by thirty (30) days for a gift made in this Trust Agreement which directly or indirectly requires such person's survival of another to be effective.

8.5 Release of Powers and Interests. Any person, including a beneficiary and a Trustee, shall have the power to disclaim, release, or restrict, irrevocably, in whole or in part, any interest, right, power, or discretion granted to such person with respect to any trust by signed instrument delivered to the Trustee, or in any other manner permitted by law. Any person designated or appointed as a Trustee may, prior to accepting the trust, by written instrument decline to accept any right, power, or discretion with respect to the trust and may accept the trust without such right, power, or discretion.

8.6 Powers of Appointment.

(a) Capacity in Which Exercisable. Every power of appointment granted to a beneficiary under this Trust Agreement is exercisable by that beneficiary in the beneficiary's individual capacity, notwithstanding the fact that the beneficiary may also be serving as a Trustee of the trust.

(b) Manner of Appointment. Every power of appointment granted herein: (i) shall be personal to the donee of such power and may not be exercised on behalf of the donee by any other person, including an attorney-in-fact, a guardian, or any other court appointed representative, and (ii) may be exercised in whole or in part and in favor of one or more potential beneficiaries to the exclusion of others. Appointment may be outright or in further trust, with all provisions determined by the donee of the power, and may confer a power of appointment upon the beneficiary or others, if within the constraints imposed by any applicable rule against perpetuities and any other law which is applicable to the appointment.

(c) Exercise of Inter Vivos Power. An inter vivos power of appointment granted in this Trust Agreement may be exercised only by a written instrument, executed and acknowledged by the donee and delivered to the Trustee during the donee's lifetime, which specifically refers to the power of appointment and expresses the intention to exercise it. If no such instrument is delivered to the Trustee during the donee's lifetime, upon the donee's death the Trustee may distribute the property subject to the power in the manner provided in this Trust Agreement for distribution in default of exercise.

(d) Determination of the Exercise of a Testamentary Power. The Trustee may rely upon any instrument admitted to probate as a will or codicil in determining whether a testamentary power of appointment granted herein has been exercised. If no will or codicil is brought to the Trustee's attention within ninety (90) days of a death to indicate the exercise of a testamentary power, the Trustee may distribute the property subject to the power according to the terms herein provided for distribution in default of exercise. The Trustee will be protected from liability for its actions as authorized in this subsection (d), but this subsection does not affect a beneficiary's rights in the property subject to the power of appointment.

(e) Tax Consequences. The exercise of a power of appointment may have important tax consequences. The donee of any power of appointment should consult with counsel before exercising such power of appointment.

8.7 Liability of Third Party. No person paying money or delivering property to the Trustee need see to the application of such money or property. No person dealing with the Trustee need inquire into the propriety of any transaction or the Trustee's authority to enter into and consummate the same.

8.8 Use of Words. As used in this Trust Agreement, the masculine, feminine, and neuter gender, and the singular or plural of any word each includes the others unless the context indicates otherwise.

8.9 Unenforceable Provision. If any provision of this Trust Agreement is unenforceable, the remaining provisions shall be given effect, unless to do so would produce an unreasonable result.

8.10 Titles, Headings, and Captions. All titles, headings, and captions used in this Trust Agreement have been included for administrative convenience only and should not be construed in interpreting this Trust Agreement.

8.11 Counterpart Signatures. This document may be executed in counterparts, and all counterparts so executed shall constitute a single document, notwithstanding that the interested parties are not or may not be signatories to the original or to the same counterpart.

8.12 Trust Name. The trusts established under Article II of this Trust Agreement, collectively, shall be known as the "The Dugaboy Investment Trust".

IN WITNESS WHEREOF, the Settlor, the Family Trustee and the Administrative Trustee have hereunto set their hands on the day and year first above written in multiple originals. The Trustees agree to administer the trust estate in accordance with the terms of this Trust Agreement. The Independent Trustee shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee in accordance with Section 5.2 hereof.

Dana Scott Breault 23 Oct 10
DANA SCOTT BREAULT, Settlor

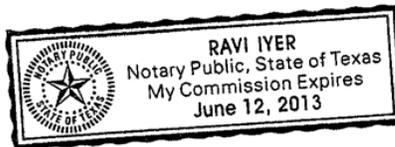
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared DANA SCOTT BREAULT, as Settlor, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 23rd day of October, 2010.

Ravi Iyer

Notary Public



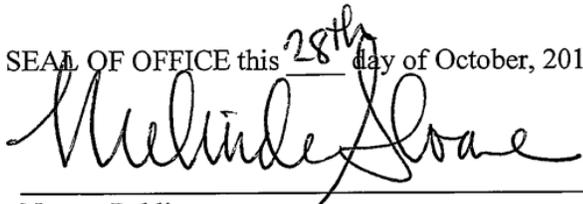


JAMES D. DONDERO, Family Trustee

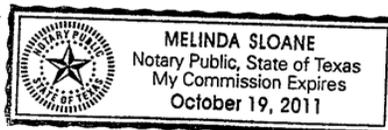
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JAMES D. DONDERO, as Family Trustee, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ^{28th} day of October, 2010.



Notary Public



COMMONWEALTH TRUST COMPANY,
Administrative Trustee

By: Cynthia D M Brown
Name: Cynthia D. M. Brown
Title: President

STATE OF DELAWARE §
 §
COUNTY OF NEW CASTLE §

BEFORE ME, the undersigned authority on this day personally appeared Cynthia D. M. Brown, President, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed as the act of COMMONWEALTH TRUST COMPANY and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 15th day of ~~October~~ November, 2010.

Laura M Owens
Notary Public



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EXHIBIT 71

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	Adversary No.: 21-03005-sgj
	§	
Defendants.	§	

**DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S
FIFTH, SIXTH, AND SEVENTH CLAIMS FOR RELIEF¹**

¹ This Motion to Dismiss is being concurrently filed in Adv. Nos. 21-03003, 21-03007, 21-03006, and 21-03005, Case No. 19-34054-sgj11, as Plaintiff's assertions and Amended Complaints against all Defendants are identical in material respects.

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In the alternative to and contingent upon a denial by the Court of Defendants' Motion to Compel Arbitration (which the Court should not deny), Defendants move to dismiss the Fifth, Sixth, and Seventh Claims for Relief in Plaintiff's Amended Complaint for failure to state claims on which this Court could grant relief under Federal Rule of Civil Procedure 12(b)(6), as incorporated into this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure. In filing this Motion to Dismiss, Defendants do not waive any rights to compel arbitration, as set forth in Defendants' Motion to Compel Arbitration.² Defendants show in support as follows:

I. BACKGROUND

A. The Bankruptcy and Rejection of Executory Contracts

1 Highland Capital Management, L.P. ("Plaintiff") filed a voluntary Chapter 11 bankruptcy petition ("Bankruptcy Petition") on October 16, 2019 ("Petition Date") in the United States Bankruptcy Court for the District of Delaware, and venue was subsequently transferred to this Court on December 4, 2019.³ On November 24, 2020, Plaintiff filed its Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") along with its Disclosure Statement, which the Court approved on November 24, 2020.⁴

2. On January 11, 2021, Plaintiff filed its Second Notice of Executory Contracts and Unexpired Leases to be Assumed by the Plaintiff [then, Debtor] Pursuant to the Plan (the

² *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff's complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

³ Order Transferring Venue, Case 19-12239-Css [Doc. 184].

⁴ Case No. 19-34054-sgj11 [Doc. 1476]

“Assumption Notice”).⁵ The Assumption Notice itemized seventy-one (71) executory contracts to be assumed by the Plaintiff, notably including the Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. (the “LPA”). However, on January 21, 2021, the Debtor entered a Withdrawal Notice, rejecting the LPA along with several other executory contracts,⁶ and confirmed on February 1, 2021, that it had withdrawn the LPA from its list of assumed executory contracts.⁷ On February 22, 2021 (the “Rejection Date”), the Court confirmed the Plan, causing the rejection of the LPA.⁸

B. The Limited Partnership Agreement

3. James Dondero (“Jim Dondero”) is the co-founder of Highland Capital (Plaintiff in this Adversary Proceeding), and served as its President and CEO until January 9, 2020.⁹ The Dugaboy Family Trust (“Dugaboy”) is one of Debtor’s Class A limited partners and holds the majority of the Debtor’s Class A limited partnership interests. LPA, Exhibit A. Jim Dondero’s sister Nancy Dondero serves as the Dugaboy Family Trustee.¹⁰ Jim Dondero is a lifetime beneficiary of Dugaboy.¹¹

4. Dugaboy’s explicit authorization to approve compensation for Jim Dondero - and thus bind the Partnership - comes specifically from the LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The *General Partner* and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered

⁵ Case 19-34054-sgj11 [Doc. 1719].

⁶ Case 19-34054-sgj11 [Doc. 1791, Schedule A].

⁷ Case 19-34054-sgj11 [Doc. 1871].

⁸ Case 19-34054-sgj11 [Doc. 1943].

⁹ Am. Compl. ¶ 11, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 12, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 12, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 12, Adv. No. 21-03005 [Doc. 63].

¹⁰ Am. Compl. ¶ 13, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 14, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 14, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 14, Adv. No. 21-03005 [Doc. 63].

¹¹ Am. Compl. ¶ 12, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 13, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 13, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 13, Adv. No. 21-03005 [Doc. 63].

pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.

Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests. LPA, Exhibit A, line 5.¹²

Based on the Compensation provision and definitions, Dugaboy clearly had the right to approve compensation for the General Partner and its Affiliates. The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“**Affiliate**’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘**control**’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“**Person**’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Jim Dondero was an Affiliate of Strand under the LPA’s definition. It is also undisputed that he controlled Highland Capital Real Estate Partners (“HCRE”), Nexpoint Advisors, L.P. (“Nexpoint”), and Highland Capital Management Services, Inc. (“HCMS”).¹³

Thus, Jim Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

¹² See attached, LPA Exhibit A.

¹³ Am. Compl. ¶ 2, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 2, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 2, Adv. No. 21-03005 [Doc. 63].

C. The Promissory Notes

5. Over the last several years, multiple promissory notes were executed in favor of the Plaintiff to different entities and individuals, which obligations became subject to potential forgiveness as compensation for Jim Dondero that, under the LPA, Dugaboy was charged with approving:

Notes to Jim Dondero (the “Dondero Notes”):

1. A note for \$3,825,000, executed on February 2, 2018, payable on demand.
2. A note for \$2,500,000, executed on August 1, 2018, payable on demand.
3. A note for \$2,500,000, executed on August 13, 2018, payable on demand.¹⁴

Notes to HCRE (the “HCRE Notes”):

1. A note for \$100,000, executed on November 27, 2013, payable on demand.
2. A note for \$2,500,000, executed on October 12, 2017, payable on demand.
3. A note for \$750,000, executed on October 15, 2018, payable on demand.
4. A note for \$900,000, executed on September 25, 2019, payable on demand.
5. A term note for \$6,059,831, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁵

Notes to HCMS (the “HCMS Notes”):

1. A note for \$150,000, executed on March 28, 2018, payable on demand.
2. A note for \$200,000, executed on June 25, 2018, payable on demand.
3. A note for \$400,000, executed on May 29, 2019, payable on demand.
4. A note for \$150,000, executed on June 26, 2019, payable on demand.¹⁶

Note to Nexpoint (the “Nexpoint Note”):

1. A term note for \$30,746,812.33, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁷

¹⁴ Am. Compl. ¶¶ 20-22, Adv. No. 21-03003, Case No. 19-34054-sgj11 [Doc. 79].

¹⁵ Am. Compl. ¶¶ 21-24, Adv. No. 21-03007, Case No. 19-34054-sgj11 [Doc. 63]; According to its Amended Complaint, Plaintiff alleges in ¶ 63 that it has suffered damages under the note “in the amount of at least \$5,012,260.96, as of December 11, 2020,” but in ¶ 64 that it has suffered damages “in the amount of at least \$6,145,466.84 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date...”

¹⁶ Am. Compl. ¶¶ 21-24, Adv. No. 21-03006, Case No. 19-34054-sgj11 [Doc. 68].

¹⁷ Am. Compl. ¶ 21, Adv. No. 21-03005, Case No. 19-34054-sgj11 [Doc. 63]; Plaintiff alleges in ¶ 31 that “as of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03,” and claims the same amount as damages in ¶ 48.

6. Jim Dondero entered into agreement (the “Subsequent Agreements,” or as Plaintiff refers to them, the “Alleged Agreements”) with Nancy Dondero (acting for Dugaboy as its Trustee) that Plaintiff would not demand collection of the Notes unless events had occurred that made fulfillment of conditions subsequent impossible.¹⁸ However, annual term loan payments and annual interest payments on the demand notes were to be (and were) made.¹⁹

7. On December 3, 2020, after the bankruptcy Petition Date, Plaintiff demanded payment from Jim Dondero, HCRE, and HCMS on their respective demand notes due by December 11, 2020.²⁰ On January 7, 2021, Plaintiff made a demand on the Nexpoint term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98,” and a demand on the HCRE term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84.”²¹ Plaintiff has refused to recognize the Subsequent Agreement, calling it a “fiction.”²² Other than annual term and interest payments and some voluntary prepayments on the term notes, Defendants have not paid the Notes.²³

¹⁸ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

¹⁹ *E.g.*, Am. Compl. ¶ 21,27, Adv. No. 21-03005 [Doc. 63], showing the original principal of the note being \$30,746,812.33, but Plaintiff only demanding \$24,471,804.98 in its demand letter; *E.g.*, Am. Compl. ¶ 37,63,64, Adv. No. 21-03007 [Doc. 63], showing the original principal of the note being \$6,059,831, but Plaintiff alleging it was damaged in the amount of at least \$5,012,260.96 as of December 11, 2020, but also in the next paragraph inconsistently alleging it was damaged in the amount of at least \$6,145,466.84.

²⁰ Am. Compl. ¶ 26, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 28, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 28, Adv. No. 21-03006 [Doc. 68].

²¹ Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63]; Am. Compl. ¶ 43, Adv. No. 21-03007 [Doc. 63].

²² Am. Compl. ¶ 3, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 3, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 3, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 3, Adv. No. 21-03005 [Doc. 63].

²³ With respect to the Nexpoint term loans, due to a mistake, the 2020 end-of-year payment was late and the notes should be deemed current, Am. Ans. ¶ 40,41, Adv. Pro. 21-03005 [Doc. 50]; Am. Compl. ¶ 28, Adv. No. 21-03005 [Doc. 55-2], acknowledging payment of \$1,406,111.92.

D. The Adversary Proceedings

8. On January 22, 2021, Plaintiff initiated Adversary Proceedings against Jim Dondero, HCRE, HCMS, and Nexpoint for breach of contract and turnover of property.²⁴ On August 17, 2021, Plaintiff filed Amended Complaints against each Defendant alleging additional claims against Jim Dondero and new claims against Dugaboy and Nancy Dondero. Defendants each filed Amended Answers asserting several affirmative defenses, including that the Subsequent Agreements preclude the respective claims.²⁵

9. In the Fifth Claim of each Amended Complaint,²⁶ Plaintiff asks the Court to declare (a) that limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the LPA, (b) that neither Dugaboy nor Nancy Dondero was authorized under the LPA to enter into the Subsequent Agreement on behalf of the Partnership, (c) that neither Dugaboy nor Nancy Dondero otherwise had the right or authority to enter into the Subsequent Agreement on behalf of the Partnership, and (d) the Subsequent Agreement is null and void.²⁷

10. In the Sixth Claim of each Amended Complaint,²⁸ Plaintiff alleges that if Dugaboy, as a limited partner under the LPA, or Nancy Dondero, as the representative of Dugaboy, had the

²⁴ Am. Compl. ¶ 33, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 47, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 45, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 33, Adv. No. 21-03005 [Doc. 63].

²⁵ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

²⁶ Nancy Dondero is a Defendant on Counts V, VI, and VII in Adv. No. 21-03005, Adv. No. 21-3006, and Adv. No. 21-3007. Nancy Dondero is a Defendant only on Count VII in Adv. No. 21-03003.

²⁷ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63], Plaintiff alleges against Dugaboy and Nancy Dondero; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

²⁸ See note 26, *supra*.

authority to enter into the Subsequent Agreement on behalf of [Plaintiff], then Dugaboy incurred a fiduciary duty of care, and breached said duty by entering into the Subsequent Agreement.²⁹

11. In the Seventh Claim of each Amended Complaint, Plaintiff alleges that Jim and Nancy Dondero were aware that Dugaboy would have fiduciary duties owed to the Plaintiff if acting to bind the Plaintiff per the authorization in the LPA, and aided and abetted Dugaboy's breach of its fiduciary duties by knowingly participating in the authorization of the Subsequent Agreement.³⁰

II. STANDARD OF REVIEW

12. An asserted cause of action must be dismissed when the complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must meet two criteria: (1) it must assert a plausible claim, and (2) it must set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at 1949-50 (citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)). Thus, either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" requires dismissal. *Id.* The plaintiff must allege specific facts and not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). A court may not strain to find inferences favorable to the plaintiff or accept conclusory allegations, unwarranted deduction, or legal conclusion. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

13. To satisfy *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, *Twombly*, at 570. A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court

²⁹ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

³⁰ Am. Compl. ¶ 79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 77, Adv. No. 21-03005 [Doc. 63].

to draw the reasonable inference that the defendant is liable under the alleged claim. *Id.* at 556. Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also “plausibly suggest an entitlement to relief.” *Id.*, *Iqbal*, at 1951.

III. ARGUMENTS AND AUTHORITIES

A. **Plaintiff’s Fifth Claim for Declaratory Relief Under the LPA Should Be Dismissed for Two Reasons.**

1. **Plaintiff’s Fifth Claim Fails Because the Terms of the LPA are so Clear on their Face That There is No Actual Controversy between Parties.**

14. Plaintiff’s claim presents no “actual controversy” because the provisions of the LPA clearly allow Dugaboy to bind the Partnership by approving compensation and there is no controversy that could require a declaration by this Court.

15. Plaintiff argues that Dugaboy was not authorized to enter into the Subsequent Agreement regarding Jim Dondero’s compensation, nor was it authorized to bind the Partnership.³¹ Plaintiff further attached the LPA as “Exhibit 5” to its Amended Complaints and referenced this Court to § 4.2, which states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership *other than as specifically set forth in this Agreement*.³² (emphasis added).

16. Contrary to Plaintiff’s argument, the LPA explicitly authorizes Dugaboy as the Majority Interest to approve compensation for Jim Dondero as previously articulated in this Motion. Approving compensation inherently binds the Partnership in that it exchanges money on behalf of the Partnership for services rendered. Because it is so expressly provided for in the LPA,

³¹ *Id.*

³² Am. Compl. ¶ 43, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 55, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 53, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63].

Plaintiff's contention that Dugaboy could not act to bind the Partnership through compensation agreements amounts to Plaintiff's misinterpretation of the LPA as opposed to an "actual controversy" in need of declaratory relief. This claim is nothing more than Plaintiff's attempt at an end-around to avoid proving the merits of its breach of fiduciary duty claims and essentially asks this Court for an advisory opinion to help Plaintiff do so. Under *Twombly*, Plaintiff's claim for declaratory relief should be dismissed pursuant to Rule 12(b)(6).

2. Debtor Lacks Standing to Assert a Claim for Declaratory Relief Based Upon an Executory Contract It Rejected.

17. There is no authority for "allowing a debtor's estate or a successor-in-interest such as the [creditor's committee or litigation trustee] to pursue claims for post-petition breaches of a rejected contract. Because rejection is an affirmative declaration by the debtor that the estate will not take on the obligations of a prepetition contract made by the debtor, [Plaintiff-Debtor's] rejection of the [LPA] not only relieved the estate of its post-petition performance obligations, but also relieved the estate of its ability to assert claims for post-petition breaches thereof." *Lauter v. Citgo Petroleum Corp.*, CV H-17-2028, 2018 WL 801601, at *15 (S.D. Tex. Feb. 8, 2018). As explained below, as a result, not only does this preclude Debtor's claims for breach of fiduciary duty (see sections B.2., C.5. *infra*), it also precludes Debtor's attempt to obtain declaratory relief.

18. Plaintiff seeks declaratory relief against Dugaboy and Nancy Dondero to determine if either of them were authorized to enter into the Subsequent Agreement under the LPA.³³ Although most causes of action accrue when an injury results from a wrongful act, a cause of action for declaratory relief differs in that it does not accrue until there is an actual controversy between the parties. *In re Estate of Denman*, 362 S.W.3d 134, 144 (Tex. App. -- San Antonio

³³ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2011, no pet.); *Murphey v. Honeycutt*, 199 S.W.2d 298, 299 (holding that declaratory judgment action accrued in a will construction case at the time when an heir committed an act indicating she was operating against the will, not when the will was executed years prior to the heir's act); *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 278 (Tex. App. – El Paso 2021, pet. filed) (holding that in a lease dispute, the actual controversy did not arise-- and the claim did not accrue- when the lease was entered into by the parties, but rather when plaintiff challenged the lease terms at a later date).

19. Here, Plaintiff's declaratory relief claim accrued (if at all) when Jim Dondero asserted the Subsequent Agreement as an affirmative defense. Plaintiff alleges that the actual controversy here is whether or not Dugaboy or Nancy Dondero had authority to enter into the Subsequent Agreement under the rejected LPA. Plaintiff specifically pleads that "[a] bona fide, actual, present dispute exists between the [Plaintiff] and Dugaboy concerning whether Dugaboy was authorized to enter into the Alleged Agreement on the [Plaintiff]'s behalf...[and a] judgment declaring the parties' respective rights and obligations will resolve their dispute."³⁴ Plaintiff did not allege anywhere in its Original Complaint that a dispute regarding Dugaboy's authority to enter the Subsequent Agreement required declaratory relief. Only after Defendants filed their Amended Answers did Plaintiff seek such relief in its Amended Complaint.³⁵ Therefore, this cause of action for declaratory relief accrued when Plaintiff received Defendant's Amended Answers after the bankruptcy began, as that is when facts came into existence that created an actual controversy under the LPA.

20. Section 365 of Title 11 of the United States Code (the "Bankruptcy Code") governs the inclusion and exclusion of executory contracts in bankruptcy. Section 365 vests the power to

³⁴ *Id.*

³⁵ *Id.*

reject or assume any of the Debtor's executory contracts in the trustee, subject to the court's approval. 11 U.S.C. § 365(a). A debtor's rejection of an executory contract constitutes a breach of such contract immediately before the date of the filing of the [bankruptcy] petition. 11 U.S.C. § 365(g)(1). In this case, Plaintiff's act of rejection resulted in a material breach of the LPA that relates back to October 15, 2019 (the "Breach Date") pursuant to the Bankruptcy Code. *See* 11 U.S.C. § 365(g)(1).

21. "Rejection is an affirmative declaration that the estate will not take on the obligations of a pre-petition contract made by the debtor" and "places the obligation to perform outside of the bankruptcy administration." *Lauter*, at *13, citing *Matter of Austin Dev. Co*, 19 F.3d 1077, 1082-83 (5th Cir. 1994); *In re Continental Airlines*, 981 F.2d 1450, 1459 (5th Cir. 1993). "[R]ejection does not change the substantive rights of the parties to the contract, but merely means the bankruptcy estate itself will not become a party to it." *In re Alongi*, 272 B.R. 148, 153 (Bankr. D. Md. 2001) (citing M. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U.Colo.L.Rev. 845 (1988)). As noted above, rejection not only relieves the estate of post-[bankruptcy]petition performance obligations, but also of its ability to assert claims for post-petition breaches thereof. *Lauter*, at *15.

22. The court in *Lauter* looked to the reasoning of Fifth Circuit opinions examining the effects of plaintiffs rejecting executory contracts under § 365. In *In re Continental*, the court reasoned in part that, under § 365, "An agreement cannot 'exist' for one purpose yet take on a 'nonexistent' quality which works for the advantage of one party or the other" when a debtor-plaintiff sought to avoid paying airline pilots under an executory contract it rejected, attempting to treat the contract as terminated. *Id.* at 1460. Likewise, the court in *Matter of Austin* reasoned that a rejection of a lease under § 365 did not terminate the lease, but moved the rights of the parties

affected “outside of the bankruptcy court’s realm because after rejection, the debtor’s estate is no longer involved in the leasehold transaction.” *Id.* at 1083.

23. Following the Fifth Circuit’s application of § 365 in cases such as *In re Continental* and *Matter of Austin*, the court in *Lauter* addressed the impact of a debtor-plaintiff’s attempt to pursue post-petition claims against a defendant whose executory contract had been rejected. The court held that just as in any other contract dispute, a prior material breach by a counterparty relieved the aggrieved party of the duty to perform and deprived the breaching party of the ability to make claims for breach after its own breach. *Id.* at *12-13, 15. After a thorough discussion of § 365, the court ultimately found that the plaintiff lacked standing to pursue claims resulting from a post-petition breach of an executory contract, holding that “the court has not found any authority allowing a debtor’s estate . . . to pursue claims for post-petition breaches of a rejected contract.” *Id.* at *15.

24. Here, Plaintiff asks this Court to interpret and, in effect, determine a breach of the same LPA it rejected and breached prior to the bankruptcy petition date. The LPA was rejected on February 22, 2021 and thus deemed materially breached on October 15, 2019 under § 365(g)(1). Because this cause of action accrued after both rejection and the relation-back breach provision of § 365, Plaintiff’s Fifth Claim for declaratory relief amounts to a post-petition claim arising from a rejected executory contract, which the court in *Lauter* held a Debtor lacks standing to assert in a bankruptcy proceeding. Therefore, this claim should be dismissed pursuant to *Twombly* and Rule 12(b)(6).

B. Plaintiff's Sixth Claim of Breach of Fiduciary Duty Against Dugaboy and Nancy Dondero Fails for Two Reasons.

1. Dugaboy Owes No Fiduciary Duty to Plaintiff as a Consequence of Exercising Its Right to Approve Compensation.

25. Plaintiff alleges that “if Dugaboy, as a limited partner, had the authority to enter into the Alleged Agreement...then Dugaboy would owe the [Plaintiff] a fiduciary duty.”³⁶ The LPA in this case is governed by the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”) except as specifically provided for in the LPA. LPA §§ 1.1,1.2; *see also* Del. Code Ann. Tit. 6, § 17-1102. The DRULPA allows partnership agreements to expand, restrict, or eliminate fiduciary and other legal or equitable duties, provided it may not eliminate the implied contractual duty of good faith and fair dealing. Del. Code Ann. Tit. 6, § 17-1101(d). The DRULPA also specifically permits a partnership agreement to provide the rules for how partners may transact with the partnership. Del. Code Ann. Tit. 6, § 17-107.

26. In Delaware, a limited partner does not owe a fiduciary duty as a consequence of exercising a right of the limited partner under the partnership agreement. *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 864 (Del. Ch. 1999); *In re Est. of Conaway*, 2012 WL 524190, at *3 (Del. Ch. Feb. 15, 2012), *aff'd sub nom. Russell-Conaway v. Frederick-Conaway*, 2012 WL 4478655, 54 A.3d 257 (Del. 2012) (unpublished).

27. In *Bond Purchase*, a limited partner exercised its right under the limited partnership agreement to obtain records of the owners of the partnership for the purpose of making a tender offer for additional interests in the partnership. Although the other partners claimed this request for records was a breach of a fiduciary duty, the court held that “in the absence of any provision in the partnership agreement engrafting duties onto [the limited partner],” “[the limited partner]

³⁶ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

owes no fiduciary duties,” and allowed the limited partner access to the records it sought under the partnership agreement. *Id.* at 864.

28. In *In re Est. of Conaway*, a limited partner withheld consent to transfer another partner’s interest as he was allowed to under the limited partnership agreement. The receiving party alleged a breach of the non-consenting limited partner’s fiduciary duty. The court held that where the limited partner “merely exercised his contracted-for rights under the terms of the [limited partnership agreement],” the limited partner breached no fiduciary duty, assuming there even was one. *Id.* at *3.

29. Just as the limited partners in *Bond Purchase* and *In re Est. of Conaway*, Dugaboy was merely exercising its right to approve compensation pursuant to the LPA when it entered into the Subsequent Agreement. LPA § 3.10(a); § 2.1. Therefore, Dugaboy owes no fiduciary duty to the Plaintiff as a consequence of simply exercising its right under the LPA. While a limited partner who takes on an active role in the management of the entity may thereby assume fiduciary duties, *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (citing cases); *Bond Purchase* at 863-64, merely engaging in actions delegated to the limited partner in the partnership agreement does not constitute participating in the control of a business so as to trigger the assumption of fiduciary duties. Del. Code Ann. Tit. 6, § 17-303(b)(8)(o).

30. Texas has similarly held that “a limited partner does not participate in the control of the business” by taking certain actions listed in the statutes, and such “actions complained of by the plaintiff did not amount to the types of control that could give rise to a duty to the other limited partners.” *Strebel v. Wimberly*, 371 S.W.3d 267, 280 (Tex. App. 2012) (summarizing holding of *AON Properties, Inc. v. Riveraine Corp.*, 1999 WL 12739, at *23 (Tex. App. Jan. 14, 1999)).

31. Here, Dugaboy did not participate in the control of the business because it was taking actions explicitly extended to it in the LPA by approving compensation under § 3.10(a). LPA § 3.10(a); § 2.1. Since the LPA explicitly gives Dugaboy the right to approve such compensation, and Dugaboy was not participating in the control of the business, Dugaboy does not owe a fiduciary duty to Plaintiff. Dugaboy cannot breach a fiduciary duty it does not owe. Further, Nancy Dondero as Trustee owes no fiduciary duty to Plaintiff independently from what Dugaboy owes, as Dugaboy is her principal. Like Dugaboy, Nancy Dondero cannot breach a fiduciary duty she does not owe. Under *Twombly*, Plaintiff's claim for breach of fiduciary duty against Dugaboy and Nancy Dondero should be dismissed pursuant to Rule 12(b)(6).

2. Nancy Dondero Owes No Fiduciary Duty to Debtor.

32. Under Delaware law, a trustee's fiduciary duties of care and loyalty flow to the trust and the beneficiar(ies) of the trust. *Tigani v. Tigani*, 2021 Del. Ch. LEXIS 60, *1, 2021 WL 1197576 (March 30, 2021). A trustee is prohibited from considering her own interests and "all consideration of the interests of third persons." *Id.* at * 38.

33. Plaintiff claims that if Dugaboy had the authority to enter into the Subsequent Agreement, then Ms. Dondero would then somehow owe a fiduciary duty directly to Plaintiff. The Amended Complaint does not allege any facts as to why or how such a fiduciary duty would appear, and there is no legal authority to support such a conclusion. As discussed above, not even Dugaboy owed a fiduciary duty to Plaintiff in determining compensation, as Dugaboy was expressly authorized to do under § 3.10(a) of the LPA. Nancy Dondero, individually, is even further removed from owing any duty to Plaintiff, much less a fiduciary duty. Plaintiff cannot create a legal duty simply by claiming one exists, and its breach of fiduciary duty claim against Nancy Dondero should be dismissed under *Twombly* and Rule 12(b)(6).

3. Debtor Lacks Standing to Assert a Claim for Breach of Fiduciary Duty Based Upon an Executory Contract It Rejected.

34. Plaintiff's Sixth Claim is also barred for the same reasons that discussed in Section A.2 *supra*, and similarly relies on the fact that this cause of action accrued after the LPA was breached on October 15, 2019. In this case, Plaintiff suffered no legal injury – and no cause of action accrued - until the notes were not paid on demand by December 11, 2020.

35. Generally, “a cause of action accrues...when facts come into existence that authorize a claimant to seek judicial remedy.” *Dunmore v. Chicago Title Ins. Co.*, 400 S.W.3d 635, 640 (Tex. App. – Dallas 2013, no pet.) (citing cases). “Breach of fiduciary duty claims generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act *and* resulting injury.” *Dunmore*, at 641 (emphasis added). Further, “[t]he general rule governing when a claim accrues...is the ‘legal injury rule,’ which provides that a claim accrues ‘when a wrongful act causes some legal injury, even if that fact of injury is not discovered until later, and even if all damages have not yet occurred.’” *Id.* (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)). “[A] legal injury [is] an injury giving cause of action by reason of its being an invasion of a Plaintiff's right...be the damage however slight.” *Murphy*, at 270. Although the discussion of when a claim accrues in Texas generally involves application of the discovery rule (which is not applicable to these facts), the concept of “legal injury” is still the cornerstone of an accrual analysis.

36. Here, Plaintiff alleges that Dugaboy and Nancy Dondero breached a fiduciary duty when it entered into the Subsequent Agreement.³⁷ The alleged wrongful act was the Subsequent Agreement itself which Plaintiff alleges breached a fiduciary duty. However, Plaintiff suffered no

³⁷ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

legal injury from the Subsequent Agreement until Defendant did not pay the Notes when demanded (if it even suffered one at all). The Subsequent Agreement simply made the Notes potentially forgivable upon conditions subsequent, which could not have impacted the alleged value of the Notes until the conditions occurred. As a result, the cause of action did not accrue until December 11, 2020, after the Petition Date. Debtor's rejection of the LPA, the alleged source of the fiduciary duties allegedly breached,³⁸ therefore bars pursuit of the Plaintiff's Sixth Claim for the same reasons set forth in Section A.2 *supra*.

C. Plaintiff's Seventh Claim of Aiding and Abetting Breach of Fiduciary Duty against Jim and Nancy Dondero Fails for Several Reasons.

1. Neither Jim nor Nancy Dondero could have Aided and Abetted a Breach of Fiduciary Duty because Dugaboy did Not Owe a Fiduciary Duty to Plaintiff.

37. Plaintiff claims that Jim and Nancy Dondero aided and abetted Dugaboy's alleged breach of fiduciary duty by entering into the Subsequent Agreement. However, aiding and abetting is a fundamentally dependent claim that can only succeed if there is a valid underlying breach of fiduciary duty claim. *In re Draw Another Circle*, 602 B.R. 878, 904 (Bankr. D. Del. 2019) (citing Restatement (Second) of Torts § 876 for the proposition "the derivative nature of an aiding and abetting claim will exist only with the success of the breach of fiduciary duty claim"); *West Fork Advisors LLC v. SunGard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App.-Dallas 2014) (citing Restatement (Second) of Torts § 876(b) (1979)). As previously discussed in Section B.1., Dugaboy did not owe any fiduciary duty to Plaintiff that could have been breached. Therefore, Plaintiff's derivative claim of aiding and abetting against both Jim and Nancy Dondero is legally impossible and should be dismissed under *Twombly* and Rule 12(b)(6).

³⁸ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2. Nancy Dondero Cannot Aid and Abet Herself as Dugaboy Trustee Because Aiding and Abetting Requires More Than One Actor.

38. Even if Dugaboy owed and breached a fiduciary duty to Plaintiff (which it did not), it is legally impossible for Nancy Dondero to have aided and abetted Dugaboy's alleged breach of fiduciary duty by authorizing the Subsequent Agreement as she was acting as Dugaboy in her trustee status. Because there are limited cases on point, an analysis under the Restatement (Second) of Torts § 876 (1979) is compelling because Delaware courts routinely look to the Restatement to fill lacunae in the law. *In re Rural Metro Corp.*, 88 A.3d 54, 98 (Del. Ch. 2014), decision clarified on denial of reargument sub nom. *In re Rural Metro Corp. Stocholders Litig.* (Del. Ch. 2014) (applying the Restatement to an aiding and abetting breach of fiduciary duty analysis). "The Delaware Supreme Court often relies on the Restatement (Second) of Torts." *Id.* at 98. Comparison to cases in other jurisdictions construing law similar to Delaware law is also instructive.

39. The Restatement (Second) § 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with *the other* or pursuant to a common design with him, or (b) knows that *the other's* conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to *the other* in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979), adopted in Delaware by *Patton v. Simone*, Civ. A. 90C-JA-29, 1992 WL 183064 (Del. Super. Ct. June 25, 1992) (emphasis added). Under the Restatement (Second), people act "in concert" with each other when they act "in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." Restatement (Second) of Torts § 876, comment A. Under the Restatement (Second), Nancy

Dondero could not have conceivably acted “in accordance with an agreement” with herself in her Trustee capacity, as she is a singular individual.

40. Delaware has not directly addressed the issue of whether one can aid and abet one's self, but it has applied the Restatement (Second) when analyzing aiding and abetting a breach of fiduciary duty claims, which requires a plaintiff to prove: (1) the existence of a fiduciary relationship, (2) breach of the fiduciary's duty, (3) defendant, who is not a fiduciary, knowingly participated in the breach, and (4) damages to the plaintiff as the result of the concerted action of the fiduciary and the non-fiduciary. *In re USDigital, Inc.*, 443 B.R. 22, 46 (Bankr. D. Del. 2011) (citing elements of aiding and abetting breach of fiduciary duty in Delaware and holding that a director defendant cannot have aided and abetted the same fiduciary duty he allegedly breached in a previous count); *In re Draw*, at 904 (applying Restatement (Second) to the knowing participation element); *Patton*, at *8 (applying Restatement (Second) to aiding and abetting analysis); *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) (applying the Restatement (Second) to knowing participation in aiding and abetting analysis and acknowledging that § 876 has been cited with approval in Delaware in). Again, because Plaintiff is alleging that Nancy Dondero aided and abetted Dugaboy (which was acting through Nancy Dondero), the requirement of a second actor is not met because Nancy Dondero cannot act in concert with herself.

41. Analogously, officers and agents cannot aid and abet their principal or each other in the commission of a tort. *Cornell Glasgow, LLC v La Grange Props., LLC*, 2012 WL 2106945, at *11 (Del. Super. Ct. June 6, 2012); *Amaysing Techs. Corp. v. Cyberair Communications, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts

of the corporation.”). Application of this law to the present circumstances further compels the conclusion that Nancy Dondero cannot aid and abet herself. Texas also has looked to the Restatement (Second) of Torts § 876 for guidance regarding its aiding and abetting doctrine, which states that “[i]t is settled as the law of [the State of Texas] that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with [that] fiduciary and is liable as such.” *In re TOCFHBI, Inc.*, 413 B.R. 523, 534 (Bankr. N.D. Tex. 2009) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 574, 160 S.W.2d (1942)) (emphasis added, citing elements); *W. Fork Advisors, LLC v. SunGuard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App. – Dallas 2014, pet. denied) (looking to Restatement (Second) regarding aiding and abetting analysis). Although also having sparse law regarding whether one can aid and abet one's own self, Texas law still requires a third party in order to prove aiding and abetting a breach of fiduciary duty. For the same reasons mentioned above, Nancy simply cannot aid and abet her own actions as Dugaboy Trustee.

42. Arizona courts have more directly held that under the Restatement (Second), “when [Plaintiffs] fail to allege [agent] took any actions in [their] individual capacity ‘in concert’ with the actions giving rise to the breach of fiduciary duty claim against [insurance company], [plaintiff’s] aiding and abetting claim against [agent] will be dismissed.” *Young v. Liberty Mut. Group, Inc.*, CV-12-2302-PHX-JAT, 2013 WL 840618, at *4 (D. Ariz. Mar. 6, 2013).³⁹ In *Young*, the Court reasoned that “...it does not follow that [agent] must have committed the separate tort of aiding and abetting merely because he was the agent through which [insurance company] breached its duty.” *Id.* at *4. The Court dismissed the claim on the agent’s 12(b)(6) motion.

³⁹ In *Young*, Plaintiff sued both Liberty Mutual for breach of fiduciary duty, and her personal insurance agent for aiding and abetting said breach. Because Plaintiff failed to allege [agent] took any actions in his individual capacity “in concert” with the actions giving rise to Plaintiff’s claim against Liberty Mutual, the aiding and abetting claim was dismissed upon 12(b)(6) motion.

Further, in *Jones v. Colorado Cas. Ins. Co.*, the same Court dismissed a similar claim upon another insurance agent's 12(b)(6) motion, agreeing with the agent's assertion that "one cannot aid and abet one's self." *Jones v. Colorado Cas. Ins. Co.*, CV 12-1968-PHX-JAT, 2013 WL 4759260, at *3 (D. Ariz. Sept. 4, 2013) (dismissing a claim against an insurance agent for aiding and abetting the insurance company's breach of fiduciary duty, determining that in order for there to be harm to a third person, there must be at least two tortfeasors). Just as the insurance agents could not aid and abet themselves as representatives for the insurance companies, Nancy Dondero could not have aided and abetted herself in her capacity as Dugaboy Trustee.

43. Connecticut takes a similar approach in holding that aiding and abetting means to help or compel *another* to act, and that an alleged tortfeasor cannot aid or abet himself, and doing so would yield "circular results." *Bolick v. Alea Group Holdings, Ltd.*, 278 F. Supp. 2d 278, 282 (D. Conn. 2003) (dismissing aiding and abetting claim).⁴⁰ Because Nancy Dondero was acting as Dugaboy in the conduct about which Debtoer complains, she is not a "third party" to an act. It is impossible for Nancy Dondero to aid and abet her own self - as most distinctly stated in *Cornell Glasgow, LLC* and *Bolick* - because aiding and abetting requires the concerted action and scienter of more than one person. Therefore, Plaintiff's Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

3. Plaintiff does Not Plead the Sufficient Scienter Requirement for Aiding and Abetting in its Amended Complaint for Either Jim or Nancy Dondero.

44. In addition to the above infirmities, Plaintiff fails to allege the necessary scienter required to show aiding and abetting for both Jim and Nancy Dondero. Delaware courts

⁴⁰ *Bolick* addressed an employment discrimination case where Plaintiff sued her supervisor for both harassment and aiding and abetting that same harassment. The Court held that to hold the supervisor liable for his wrongful behavior and also aiding and abetting that wrongful behavior is illogical and would yield circular results. Court used dictionary to reference "abettor" as someone who encourages an offender.

acknowledge that an aiding and abetting analysis largely comes down to what constitutes “knowing participation.” *In re Draw*, at 904. The aider and abettor must act “knowingly, intentionally, or with reckless indifference...that is, with an illicit state of mind.” *Id.* The Plaintiff must allege specific facts that show Defendants had “actual knowledge” that their conduct intentionally aided and abetted a breach, not simply that they “knew or should have known.” *Id.* (citing *Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass’n*, CIV. 10-520 JBS KMW, 2011 WL 864421, at *5 (D. Del. Mar. 9, 2011)).

45. In *In re Draw*, a Chapter 11 trustee filed an amended adversary complaint against several members of the company’s board of directors, asserting breach of fiduciary duties and aiding and abetting breaches of fiduciary duties. On the defendant’s 12(b)(6) motion, the court held that plaintiff’s amended complaint failed to allege specific facts showing actual knowledge that [Director] was liable for aiding and abetting, and that plaintiff simply alleged [Director] “knew or should have known” his conduct aided and abetted the breach. *Id.* at 904. The court subsequently dismissed plaintiff’s aiding and abetting claims against that particular director.

46. In *Capitaliza-T*, defendant moved to dismiss plaintiff’s amended complaint under Rule 12(b)(6), citing that it did not contain sufficient factual allegations regarding defendant’s knowledge of breach of fiduciary duty. The court applied the Delaware rule that “at a minimum, the complaint [must] alleged circumstantial facts suggesting that the defendant had knowledge of the specific principal violation.” *Id.* at *5 (citing *Brug v. Enstar Group, Inc.*, 755 F.Supp. 1247, 1256 (D. Del. 1991)). The court held that although plaintiff’s amended complaint contained circumstantial allegations against defendant for aiding and abetting, it was not enough to allege

that defendants “had knowledge of the underlying...breach of fiduciary duty” to survive a 12(b)(6) motion. *Capitaliza-T*, at *7.

47. In this case, Plaintiff simply alleges that “[the Donderos] were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and “[t]he Donderos aided and abetted Dugaboy’s breach of its fiduciary duties...by knowingly participating in the authorization of the...Alleged Agreement.”⁴¹ In its Amended Complaint, Plaintiff references only factors that could be circumstantial at best when describing its Third Claim for relief against Jim Dondero, but never clearly articulates the required specific facts that show “actual knowledge” that he was overtly acting to substantially assist Dugaboy in breaching a fiduciary duty as required by *In re Draw* and *Capitaliza-T*.⁴² Further, Plaintiff makes no specific factual allegations against Nancy Dondero, other than she “[was] aware” of Dugaboy’s fiduciary duties, and that she aided and abetted the breach. Neither claims against Jim nor Nancy Dondero rise to the standard of articulation discussed in *In re Draw* and *Capitaliza-T*. Therefore, Plaintiff’s Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

4. Neither Jim nor Nancy Dondero are Liable for Aiding and Abetting Because Aiding and Abetting Requires More Than One Single Act.

48. As discussed in Section C.3 *supra*, the test for stating an aiding and abetting claim is stringent and focuses of proof of scienter that a party knew it was aiding another party in committing tortious conduct. *In re Draw*, at 904. This would require Plaintiff to show (1) a primary act by Dugaboy (via Nancy) that breached a fiduciary duty (which it cannot), and (2) a

⁴¹Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

⁴² Am. Compl. ¶¶ 3,36,38,39,40,41, Adv. No. 21-03003 [Doc. 73-2]; Am. Compl. ¶¶ 3,50,51,52,53, Adv. No. 21-03007 [Doc. 55-2]; Am. Compl. ¶¶ 3,48,49,50,51, Adv. No. 21-03006 [Doc. 60-2]; Am. Compl. ¶¶ 3,35,36,37,38,39, Adv. No. 21-03005 [Doc. 55-2].

secondary act by each of Jim and Nancy Dondero that shows scienter and knowing participation in subverting a fiduciary duty.

49. Plaintiff cannot show concerted action here on behalf of Jim or Nancy Dondero, because the only singular act that occurred was Dugaboy approving the compensation under the LPA. Plaintiff alleges no other separate act by Nancy Dondero that would have been “in concert” with or “knowingly participating” in anything, as she was acting as the Dugaboy Trustee (discussed above in Section C.2.). Further, Plaintiff shows no other separate act or proof of scienter that Jim Dondero specifically set out to knowingly aid Dugaboy in tortious conduct under *In re Draw*, since Dugaboy engaged in no such conduct. Therefore, Plaintiff’s Seventh Claim fails *Twombly* and must be dismissed under Rule 12(b)(6).

5. Debtor Lacks Standing to Bring an Aiding and Abetting a Breach of Fiduciary Duty Claim Based on an Executory Contract It Rejected.

50. The analysis here is the same as in Argument III.A.2. and B.2, *supra*. Plaintiff argues that Jim and Nancy Dondero aided and abetted Dugaboy’s alleged breach of fiduciary duty by authorizing the Subsequent Agreement, which Plaintiff alleges may have violated the LPA.⁴³ A cause of action for a derivative claim such as aiding and abetting shares accrual and limitations periods with the underlying tort of breach of fiduciary duty. *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 144 (Tex. 2019), *reh’g denied*, (Sept. 6, 2019). “Because a civil conspiracy claim is derivative of an underlying tort, the claim accrues when the underlying tort accrues.” *Id.* at 145. Here, because Plaintiff’s aiding and abetting claims derive from the alleged breach of fiduciary duty claim, the claims share accrual dates.

⁴³ Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

51. Again, Plaintiff was not injured until Jim Dondero did not pay the Notes. This claim did not accrue until December 11, 2020, and is also predicated on allegations that the Subsequent Agreement violates fiduciary duties arising out of the rejected LPA. Once again, Plaintiff is attempting to bring a post-petition claim under the LPA it rejected. Therefore, Plaintiff's Seventh Claim must be dismissed under *Twombly* and Rule 12(b)(6).

IV. CONCLUSION

Dugaboy, Jim Dondero, and Nancy Dondero therefore respectfully request this Court dismiss Plaintiff's Fifth, Sixth, and Seventh Amended Claims in its Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

Dated: September 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez
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EXHIBIT 72

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

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MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James D. Dondero, Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy”) (the “Defendants”) move this Court for an order to stay this adversary proceeding and refer the parties to arbitration, and in further support state the following:

I. STATEMENT OF FACTS

1. On December 24, 2015, Mr. Dondero, on behalf of Strand Advisors, Inc., and Nancy Dondero, on behalf of Dugaboy, executed the Fourth Amended and Restated Agreement (the “LPA”) of Limited Partnership of Highland Capital Management, L.P. (“HCM”).¹ Section 6.14 of the LPA provides for Mandatory Arbitration in the event of a legal dispute between the parties arising from the agreement (“Arbitration Provision”). Section 6.14 specifically states:

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas.

The Arbitration Provision specifically governs the discovery process for arbitration, the authority of the arbitrators, and the costs of arbitration.²

¹ The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. Declaration of Michael P Aigen dated August 30, 2021 (“Aigen Dec.”) at Ex. 1. The signatories to it are: (1) General Partner, Strand Advisors, Inc., a Delaware corporation by James D. Dondero, President; (2) Limited Partner, The Dugaboy Investment Trust by Nancy M. Dondero, its Trustee; (3) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #1 by Lawrence Tonomura, its Trustee; (4) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #2 by Lawrence Tonomura, its Trustee; (5) Limited Partner, Mark K. Okada; and (6) Limited Partner, Hunter Mountain Investment Trust by John Honis, the President of Beacon Mountain 1 LC, Administrator.

² See LPA Section 6.14, which states:

2. In May 2017, NexPoint executed a promissory note in favor of the Debtor, as payee, in the original amount of \$30,746,812.33 (the “Note”). The authority to execute promissory note in favor of the Debtor arises from Article 4 of the LPA because a General Partner has full authority to conduct the business, which includes lending and borrowing money and executing promissory notes. Article 4 states:

In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation:

....

(ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations);

....

(vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrance of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.1;

....

(vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations.

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. . . . Each party shall bear its own attorney’s fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement.

3. In addition, the LPA provides authority for partners to lend money to their Affiliates.

Section 4(e) specifically provides:

The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine: provided, however, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

In addition, Section 3.9(f) of the LPA allows for the partnership to make tax loans to the Founding Partners:

The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

4. Debtor demanded payment on the Note and subsequently filed an adversary proceedings seeking collection, described further below. One of the affirmative defenses asserted in the adversary proceedings is that Debtor is not entitled to demand payment because, prior to the demands for payment, HCM had agreed that it would not collect the Note, and that they would be treated as compensation to the Debtor's founder and then-CEO Jim Dondero, if any of certain conditions subsequent were met.³ Debtor refers to the agreement as the "Alleged Agreement." The condition subsequent was the sale of any of HCM's interests in certain portfolio companies (Cornerstone, Trussway and/or MGM) for a greater amount than their cost.⁴

³ See Defendant NexPoint's First Amended Answer [Ad. No. 21-03005, Dkt. No. 50 at 6 ¶ 42].

⁴ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition of James Dondero Transcript at 212:18-25; 213:1-17.

5. Under Section 4.1(k) of the LPA, the “salaries or other compensation, if any, of the officers and agents of the Partnership [were to] be fixed from time to time by the General Partner.” Additionally, under the LPA, Dugaboy had explicit authorization to approve compensation for Jim Dondero and entities he was affiliated with, and thus bind the Partnership through, LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The General Partner and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.⁵

The Class A shareholders included Strand Advisors, The Dugaboy Investment Trust, Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark and Pamela Okada Family Trust – Exempt Trust #2.⁶ Dugaboy alone comprised 75% of the Class A shareholders,⁷

Nancy Dondero was the Family Trustee of the Dugaboy Trust,⁸ and had the power to act for Dugaboy in this regard.⁹

After the Note was entered into, Mr. Dondero asked Dugaboy (via Ms. Dondero) to approve an agreement that the Note would be forgiven as compensation to Mr. Dondero upon the favorable sale of any or all of the portfolio company interests by HCM, and she did.¹⁰

⁵ Aigen Dec. Ex. 1, LPA at Exhibit A thereof). Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests.

⁶ Aigen Dec. Ex. 1, LPA at Exhibit A thereof.

⁷ *See id.*

⁸ Aigen Dec. Ex. 3, *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

⁹ Aigen Dec. Ex. 4, *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

¹⁰ Aigen Dec Ex. 2, Remote Deposition of James Dondero Transcript at 176-178.

The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“‘*Affiliate*’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘*control*’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“‘*Person*’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Mr. Dondero was an Affiliate of Strand under the LPA’s definition. Thus, Mr. Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

6. On January 22, 2021, Highland Capital Management, L.P. (“Debtor” or “Plaintiff” when describing post-petition actions and HCM when describing pre-petition actions) commenced Adversary Proceeding No. 21-03005 against NexPoint, asserting a state law, non-core breach of contract claim (“Count I”) and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the Note (“Count II”).

7. NexPoint answered the adversary complaint, asserting, inter alia, that Debtor’s claims should be barred, because prior to the demand for payment HCM agreed it would not collect on the Note upon fulfillment of conditions subsequent,¹¹ based upon what the Debtor refers to as the “Alleged Agreement.”

8. On August 23, 2021, the Court entered an order permitting Debtor to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV)*

¹¹ Defendant NexPoint’s First Amended Answer [Ad. No. 21-03005, Dkt. No. 50 6 ¶ 42].

Breach of Fiduciary Duty (“Amended Complaint”) asserting additional claims for relief including: Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550 against Mr. Dondero (“Count III”); Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1) against Mr. Dondero (“Count IV”); Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy (“Count V”); Breach of Fiduciary Duty against Dugaboy (“Count VI”); and Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero (“Count VII”). Debtor seeks avoidance of the Alleged Agreement, declaratory relief, and damages. The Parties agreed that the Defendants would answer or otherwise move against the Amended Complaints on or before September 1, 2021.¹² The new claims, under Counts V, VI, and VII are non-core contract claims that arise from the LPA, containing a broad arbitration provision. Further, Defendants have critical affirmative defenses for the claims for declaratory relief, breach of fiduciary, and aiding and abetting breach of fiduciary duty, that are rooted in non-core state contract law that also arise from the LPA.

9. Although Debtor alleges that it “believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Note,”¹³ there is no doubt that adjudication of the existence and enforceability of the Alleged Agreement affects all of Debtor’s claims under Counts V, VI, and VII for declaratory relief, breach of fiduciary duty and breach of fiduciary duty. These claims pertain to loans made by the Debtor to its Affiliates and compensation for the Debtor’s CEO, all of which are governed by the LPA.¹⁴

¹² See *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* attached as Exhibit C to *Debtor’s Unopposed Motion for Leave to Serve and File Amended Complaint* [Adv. No. 21-03005, Dkt. No. 55-2 at Exhibit C] stipulating to August 30, 2021 which has been extended to September 1, 2021 by the parties via email communication.

¹³ *Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶ 3].

¹⁴ See generally Aigen Dec. Ex. 1, LPA Article 4 and Section 3.10.

10. Defendants request the Court order the parties to arbitration on Counts V, VI, and VII, as provided by the pre-petition LPA entered into by the parties, and stay the adversary proceeding pending arbitration.

II. STANDARD OF REVIEW

11. When deciding whether to grant a motion to compel arbitration, the Fifth Circuit has established a two-step analysis for determining whether parties must arbitrate a particular claim or set of claims under the FAA: (A) there must be an enforceable agreement to arbitrate; and (B) the claims must be arbitrable. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted) (stating “First we must ask if the party has agreed to arbitrate the dispute. . . If so, we then ask if any federal statute or policy renders the claims non-arbitrable.”); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (“A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement.”). Once a party seeking to compel arbitration establishes the asserted claims fall within a valid arbitration agreement, the burden shifts, and the party seeking to avoid arbitration must prove an affirmative defense to the provision’s enforcement, such as waiver. *Venture Cotton Coop.*, 435 S.W.3d at 227.

12. In applying the first portion of the two-step analysis, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (“This determination is generally made on the basis of ‘ordinary state-law principles that govern the formation of contracts.’” (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). The second part of determining whether the parties have agreed to arbitrate—the question of whether the dispute comes within the scope of the agreement—is answered by applying the federal substantive law of arbitrability.” *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009) (citations omitted).

13. Under both Texas and Federal law, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983); *see also Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)). In addition, the Supreme Court has declared that the Federal Arbitration Act, “is a strong congressional declaration of a liberal policy favoring arbitration.” *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 849 (N.D. Tex. 2014) (collecting cases) (“if a valid agreement to arbitrate does exist, the court must observe the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration.”).

III. ARGUMENT

14. This Court should compel arbitration as to Counts V, VI, and VII of the Amended Adversary Complaint because: (1) The claims under Counts V, VI, and VII comprise disputes involving legal rights or remedies arising from the LPA and are governed by an enforceable, and broadly worded, arbitration provision; (2) Counts V, VI, and VII assert noncore claims, and in the Fifth Circuit courts do not have discretion to refuse to compel the arbitration of matters not involving “core” bankruptcy proceedings and should compel arbitration of even core claims if they are not integral to the bankruptcy; and (3) federal and state policy strongly favors arbitration.

15. The Federal Arbitration Act (“FAA”) requires district courts to direct parties to arbitrate issues covered by a valid arbitration agreement. 9 U.S.C. §§ 3, 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “Federal policy strongly favors enforcing arbitration agreements.” *Dean Witter Reynolds*, 470 U.S. at 217; *Moses H. Cone Mem. Hosp*, 460 U.S. at 24. When a party moves to compel arbitration, the FAA requires district courts to order arbitration of arbitrable claims. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (In re*

Sedco, Inc.), 767 F.2d 1140, 1147 (5th Cir. 1985). Because of the strong presumption in favor of arbitration, “a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.” *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724–25 (S.D. Tex. 2013), *aff’d*, 559 F. App’x 417 (5th Cir. 2014) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)); *see also Grant v. Houser*, 469 Fed. Appx. 310, 315 (5th Cir. 2012) (noting the strong presumption in favor of arbitration).

16. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Henry*, 551 S.W.3d at 115 (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d at 174). The Fifth Circuit resolves doubts concerning the scope of matter covered by an arbitration provision in favor of referring arbitration. The court states:

We emphasize that our sole responsibility is to determine whether this dispute is governed by an arbitration clause, not to determine the merits of the dispute. *See Snap-On Tools Corp., v. Mason*, 18 F.3d 1261, 1267 (5th Cir.1994). “We resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration. . . . [A]rbitration should not be denied ‘unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’” *Neal*, 918 F.2d at 37 (internal citations omitted). *See also AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 643, 650 (1986).

Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

A. **This Dispute is Governed by An Enforceable Arbitration Provision Reaching All Legal Rights Arising From the LPA.**

17. Debtor’s claims asserted in Counts V, VI, and VII arise under the LPA, which contains an enforceable and broadly worded arbitration provision. The U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, has already interpreted arbitration provisions with identical scope language (and near-identical scope language) to the Arbitration Provision under the LPA, to be valid

and binding. *See In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 549-50 (Bankr. N.D. Tex. 2019).¹⁵ Importantly, the court made clear that “it would seem to be beyond peradventure that [the arbitration clause] was, at one time, enforceable between the parties, *with regard to any disputes that arose regarding the agreements.*” *Id.* at 552 (emphasis added); *see also id.* at 557 (emphasis added) (“there were valid arbitration agreements *that applied to all disputes* arising out of the [agreements at issue].”). Accordingly, the court concluded that all claims at issue, including claims for declaratory judgment, fell within the scope of the relevant arbitration clauses. *See id.* at 558.

18. The Arbitration Provision here also covers any “unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from this Agreement.*” LPA, Section 6.14 (emphasis added). Such broad language is sufficient to reach collateral matters, including the oral agreement between the parties which involves legal rights arising from LPA.¹⁶ *Buell Door Co.*

¹⁵ The Court’s decision provides the relevant arbitration clause language. The arbitration clause at Section 16(f) of the Sub-Advisory Agreement states:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from* this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .

In re Acis Cap. Mgmt., L.P., 600 B.R. at 550 (emphasis added).

¹⁶ It is important to note that the particular language “arising from” is significant in determining that the Arbitration Provision here is broad. The Fifth Circuit and Texas District Courts have specifically determined that only the phrase “arising under” indicates a narrow arbitration clause, rather than broad. This Court has held:

upon reviewing the above referenced Fifth Circuit cases, the court concludes that the phrase “arising out of” and similar language constitute “broad” arbitration clauses. *Accord Morphis v. Federal Home Loan Mortgage Corp.*, No. 3:02–CV–0210–P, 2002 WL 1461930, *3–4 (N.D.Tex. July 3, 2002) (provision that “any and all disputes between [the parties],” with no limiting clause constituted a broad clause). On the other hand, the phrase “arising under” indicates a “narrow” arbitration clause. *See Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983) (the term “arising under” is relatively narrow) (citation omitted).

v. Architectural Sys., Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, at *6 (N.D. Tex. Aug. 20, 2002) (concluding that the phrase “arising out of” and similar language constitute “broad” arbitration clauses); *see also Elkjer*, 8 F. Supp. at 855 (concluding that the arbitration clause which uses the phrase “arising under or in connection with this [Partnership] Agreement,” is “broad [and] capable of expansive reach” to include statutory claims). “Broad arbitration clauses are not limited to claims which literally ‘arise under [a] contract,’ but rather embrace all disputes between the parties **having a significant relationship** to the contract regardless of their label.” *Id.* at *4 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir. 1998) (emphasis added) (internal citations omitted).

19. In the Fifth Circuit, a “broadly construed arbitration provision may encompass claims arising under a separate agreement.” *See, e.g., Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 393–94 (5th Cir. 2002) (holding that an arbitration provision, which covered “any and all claims. . . arising out of or relating to” an agreement, applied to claims arising under a separate agreement); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 38 (5th Cir. 1990) (holding that an arbitration provision encompassing “any and all disputes between [the parties] . . . reach[ed] all aspects of the parties’ relationship,” including claims arising under a separate agreement); *see also I.D.E.A. Corp. v. WC & R Ints., Inc.*, 545 F. Supp. 2d 600, 606 (W.D. Tex. 2008) (noting a broad arbitration provision may encompass claims arising under a separate agreement). Accordingly, the Arbitration Provision covers the claims regardless if they arise under the LPA or the separate Note because the authority to enter into the Note arises from the LPA which reaches all aspects of the parties’ relationship.

20. Here, the LPA choice of law provision, Section 6.1, provides the “Agreement shall be construed in accordance with and governed by the laws of the state of Delaware. . . .” As a result,

Buell Door Co., 2002 WL 1968223, at *6. Here, the “arising from” language of the Arbitration Provision is similar to “arising out of” and is therefore broad.

Delaware state contract law determines whether the LPA includes a valid agreement to arbitrate. Delaware arbitration law mirrors federal law in that “public policy of Delaware favors arbitration.” *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (citations omitted). Even Debtor’s rejection of the LPA does not absolve Debtor of its obligation to arbitrate. It is well established that the “rejection of a contract, or even breach of it, will not void an arbitration clause. . . . Any different conclusion would allow a party to avoid arbitration at will simply by breaching [or rejecting] the contract.” *Madison Foods v. Fleming Cos., Inc. (In re Fleming Cos, Inc.)*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005) (citations omitted).

21. Moreover, any question about the scope of the arbitration agreement, including the arbitrability of any particular claim, is for the arbitrator. Under the FAA, “parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). “Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . , so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). The Fifth Circuit provides an in-depth explanation of who decides what issues when a contract includes an arbitration provision. *See Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

22. Incorporating rules from an arbitration service provider that themselves delegate the question of arbitrability to the arbitrator clearly and unmistakably expresses the parties’ intent to leave the question of arbitrability to the arbitrator. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). Here, the Arbitration Provision provides that the “arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate,

decide and issue the final award.” The rules of the American Arbitration Association provide that the arbitrator is to decide questions of arbitrability. AAA Commercial Arbitration Rule 7(a). Because the parties’ arbitration delegates decision-making to the arbitrators, where the parties entered an agreement to arbitrate, questions of scope and arbitrability should be left to the arbitrator.

B. The Claims Asserted In Counts V, VI, and VII Are Arbitrable Because they Are Non-Core and Arise Under the LPA.

23. Under the LPA, the Court must compel arbitration on Counts V, VI, and VII of the Amended Complaint, because all of the claims are non-core claims arising from the rights and obligations under the LPA. Bankruptcy courts have no discretion to refuse to compel the arbitration of non-core matters. *See, e.g., Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *7 (S.D. Tex. Dec. 18, 2015) (citation omitted) (quoting “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings”). More specifically, under Fifth Circuit precedent, a bankruptcy court only has discretion to refuse to compel arbitration of an arbitrable claim where: (1) “the proceeding derives exclusively from the provisions of the bankruptcy code;” and (2) “arbitration of the proceeding would conflict with the purposes of [the bankruptcy code].” *See Matter of Nat’l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 242 (Bankr. N.D. Tex. 2010). “Importantly, however, ‘*a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings*’ under 28 U.S.C. § 157(b).” *In re Cain*, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (emphasis added) (citation omitted) (stating “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings.”); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. at 560 (in the *Acis* case—unlike here—the claims at issue were “an integral part of determining . . . proofs of claim,” resulting in the court denying the motion to compel arbitration).

24. For claims that are “derivative of the pre-petition legal or equitable rights possessed by a debtor” it is beyond dispute that “it is ‘universally accepted’ that such issues are arbitrable.” *In re Cain*, 585 B.R. at 137 (citing *Nat’l Gypsum Co.*, 118 F.3d at 1066, 1069). In other words, for non-core proceedings, a court “must give effect to the terms of any applicable arbitration clauses.” *In re Daisytek, Inc.*, 323 B.R. 180, 188 (N.D. Tex. 2005).

1. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count V Because Debtor’s Proposed Declaratory Relief Claim Is A Non-Core Claim Arising From The LPA.**

25. Debtor’s declaratory relief claim simply seeks declarations concerning the extent of limited partner (including Dugaboy’s) authority under the LPA, including authority to enter into the Alleged Agreement on behalf of the Partnership.¹⁷ This is a legal dispute arising from LPA, a pre-petition contract, thus coming within the Arbitration Provision and governed by state contract law. Courts generally agree that claims for declaratory judgment which could also exist outside of bankruptcy are non-core proceedings.¹⁸ *See, e.g., In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La. 2007)(“That the doctors’ claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims.”)

26. Therefore, the Court lacks discretion to refuse to compel arbitration on Count V asserting Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 260 (5th Cir. 1996) (district court did not abuse

¹⁷ *See Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶¶ 67-70].

¹⁸ *See also In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 222–23 (C.D. Cal. 2014)(“That court found a trustee’s claim for declaratory relief as to the ownership of similar tax refunds non-core because it was a “dispute between private parties” and arose out of a pre-bankruptcy tax sharing agreement governed by state contract law); *see also In re SFD @ Hollywood, LLC*, 414 B.R. 794, 797 (Bankr. S.D. Fla. 2009)(“This proceeding [for declaratory judgment] could also exist outside of bankruptcy. Accordingly, this is a non-core proceeding in which the Court cannot enter a final order, absent consent of the district court and the parties.”); *see also Sunterra Corp. v. Perini Bldg. Co.*, No. 204CV00784MCEEFB, 2008 WL 11512082, at *4 (E.D. Cal. June 12, 2008)(“The new causes of action--strict liability, negligence, breach of contract, professional negligence, and declaratory relief--would also exist independently of bankruptcy laws and are similarly “non-core” proceedings.”).

discretion in refusing to consider plaintiffs' request for declaratory relief where order granting defendant's motion to compel arbitration disposed of same issues raised in declaratory judgment action); *see also Austin Cap. Mgmt., Ltd. v. Bd. of Trustees of Texas Iron Workers' Pension Fund*, No. A-09-CA-351 LY, 2009 WL 10699390, at *8 (W.D. Tex. July 30, 2009) (finding action seeking declaratory relief arbitrable); *see also Info. Sys. Audit & Control Ass'n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017) (stating that permitting a party to obtain declaratory relief from a court when there is a valid arbitration agreement is "essentially the same relief as that otherwise reserved for the arbitrator. It would make little sense to include such an expansive loophole in what is otherwise a sweeping arbitration provision.").

2. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count VI And VII Because Debtor's Proposed Claims Asserting Breach Of Fiduciary Duty And Aiding And Abetting Breach Of Fiduciary Duty Are Non-Core Claims Arising From The LPA.**

27. Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero for entering into the Alleged Agreement, must be arbitrated because they are non-core claims that arise under the LPA. It is well established that state law claims, such as breach of fiduciary duty and aiding and abetting breach of fiduciary duty, are non-core claims. *See, e.g., In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017) ("Courts within the Fifth Circuit have consistently found that post-confirmation suits by plan trustees based on state law claims are only within the 'related to' (and not 'core') bankruptcy jurisdiction of a federal court."); *see also Brickley for CryptoMetrics, Inc. Creditors' Tr. v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 829–30 (W.D. Tex. 2017) (stating post-confirmation claims for breach of fiduciary duty and state law claims are "related to" claims); *see also Mirant Corp. v. The S. Co.*, 337 B.R. 107, 120 (N.D. Tex. 2006).

28. The breach of fiduciary duty claims under Count VI and aiding and abetting breach of fiduciary duty under Count VII are—and by their own terms—premised on Dugaboy's authority to

bind the Debtor under the LPA.¹⁹ The Debtor challenges whether the LPA affords the right to Dugaboy to approve such compensation, thus, any evaluation of the breach of fiduciary duty-related claims must first entail an analysis of the LPA, making construction of the LPA – the agreement containing the arbitration clause, a predicate to the analysis of the breach of fiduciary duty claims. Thus, Counts VI and VII involve unresolved legal disputes between the parties—including the Debtor and Mr. Dondero, Nancy Dondero, and Dugaboy, who are all parties and/or officers/directors/partners/employees/agents/affiliates/representatives of a General or Limited Partner—concerning legal duties to the Partnership that would not exist outside of the LPA.

29. The Fifth Circuit makes clear that where, as here, the breach of fiduciary duty (or aiding and abetting fiduciary duty) claim is interwoven with the partnership agreement containing an arbitration clause, the fiduciary claims will be subject to arbitration. *See Coffman v. Provost * Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 732 (E.D. Tex. 2001), *aff'd sub nom. Coffman v. Provost Umphrey LLP*, 33 Fed. Appx. 705 (5th Cir. 2002) (“Even if it is conceivable that Plaintiff could maintain a claim for breach of fiduciary duty without the Partnership Agreements, that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause . . . the Partnership Agreements will determine whether a fiduciary duty was breached—whether that duty arises from the common law or from the contract itself. . . . For these reasons, the court finds Plaintiff’s breach of fiduciary duty claim to be subject to arbitration.”); *see also Omni Pinnacle, LLC v. ECC Operating Services, Inc.*, 255 F. App’x 24, 25-26 (5th Cir. 2007) (internal quotation marks

¹⁹ *See Amended Complaint* [Adv. No. 21-03005, Dkt. No. 63 at ¶ 73] (“If Dugaboy had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy breached its fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.”); *id.* ¶¶ 76–77 (the Donderos “were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and the Donderos “aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.”)

omitted) (“A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”).

30. Because breach of fiduciary duty and aiding and abetting breach of fiduciary duty are non-core state-law claims that could exist outside of bankruptcy, the reviewing court lacks discretion to refuse enforcement of an otherwise-applicable arbitration agreement as to these claims. *See In re McCollum*, 621 B.R. 655, 659 (Bankr. N.D. Miss. 2020) (finding that breaching its fiduciary duty “is a state law contract claim which arose prepetition, could exist outside the bankruptcy case, and is tangential to the bankruptcy case. It does not invoke a substantive right created by bankruptcy law and is a non-core claim.”); *In re Gaughf*, 19-50947-KMS, 2020 WL 1271595, at *4 (Bankr. S.D. Miss. Mar. 12, 2020) (“Aiding and Abetting Count is non-core.”). Additionally, claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty do not reference the Bankruptcy Code or any right conferred by the Code. *See In re McCollum*, 621 B.R. at 659. Therefore, the Court lacks discretion to refuse to compel arbitration on Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero.

31. That Nancy Dondero is not personally a party to the LPA does not impair her right to enforce the arbitration agreement it contains. Debtor alleges misconduct by her and a signatory to the LPA relating to fiduciary duties Debtor alleges arise out of the LPA. There are two circumstances under which a nonsignatory can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory; or (2) when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). Both circumstances are implicated by Debtor’s allegations against Nancy Dondero.

32. First, non-signatories are entitled to invoke an arbitration agreement when the claim against the non-signatory arises from the contract with an arbitration provision. *See, e.g., Bidas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)) (“[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a nonsignatory.”); *see also Amegy Bank Nat. Ass’n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 450–51 (S.D. Tex. 2012) (citing *Grigson*, 210 F.3d at 527). Because Debtor charges Nancy Dondero with breaching fiduciary duties (and aiding and abetting breaches of such duties) that arise out of the LPA, she falls precisely within the ambit of cases like *Bidas*, and *Grigson* and *Amegy*.

33. Second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract—here the allegations are made against Nancy Dondero (a non-signatory) and Dugaboy (a signatory) to the LPA—the non-signatory may compel arbitration on the claims. *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming that “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.”); *see also Grigson*, 210 F.3d at 526 (“a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff”).

C. The Court Should Stay All Claims Pending Arbitration.

34. The claims that the Court refers to arbitration must be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. *See In re Gandy*, 299 F.3d 489, 494–95 (5th Cir. 2002) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (“A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement”). Further,

bankruptcy courts generally do not have discretion to decline to stay, pending arbitration, proceedings involving non-core matters. *Id.* at 495. Accordingly, the Court should stay each of the Debtor's claims against Defendants pending arbitration.

35. Should the Court not refer arbitration on every claim, in the alternative, the Court should stay the entire adversary proceeding pending arbitration. Permitting any claims to continue herein, while some or all claims are subject to arbitration would be unnecessarily expensive and duplicative. The Court has the inherent power to grant a discretionary stay of a proceeding pending arbitration when there are issues common to the arbitration and the court proceeding and those issues may be decided by the arbitrator. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (stating that the power to stay proceedings is incidental to power "inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *see also In re Divine Ripe, L.L.C.*, 538 B.R. 300, 309 (Bankr. S.D. Tex. 2015) (same).

IV. CONCLUSION

WHEREFORE, for the reasons above, Defendants respectfully request that this Court compel arbitration on Counts V, VI, and VII, and order a stay of the proceedings pending arbitration.

Dated: September 1, 2021

Respectfully submitted,

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

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EXHIBIT 73

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03006-sgj
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

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MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James D. Dondero, Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy”) (the “Defendants”) move this Court for an order to stay this adversary proceeding and refer the parties to arbitration, and in further support state the following:

I. STATEMENT OF FACTS

1. On December 24, 2015, Mr. Dondero, on behalf of Strand Advisors, Inc., and Nancy Dondero, on behalf of Dugaboy, executed the Fourth Amended and Restated Agreement (the “LPA”) of Limited Partnership of Highland Capital Management, L.P. (“HCM”).¹ Section 6.14 of the LPA provides for Mandatory Arbitration in the event of a legal dispute between the parties arising from the agreement (“Arbitration Provision”). Section 6.14 specifically states:

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas.

The Arbitration Provision specifically governs the discovery process for arbitration, the authority of the arbitrators, and the costs of arbitration.²

¹ The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. Declaration of Michael P Aigen dated August 30, 2021 (“Aigen Dec.”) at Ex. 1. The signatories to it are: (1) General Partner, Strand Advisors, Inc., a Delaware corporation by James D. Dondero, President; (2) Limited Partner, The Dugaboy Investment Trust by Nancy M. Dondero, its Trustee; (3) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #1 by Lawrence Tonomura, its Trustee; (4) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #2 by Lawrence Tonomura, its Trustee; (5) Limited Partner, Mark K. Okada; and (6) Limited Partner, Hunter Mountain Investment Trust by John Honis, the President of Beacon Mountain 1 LC, Administrator.

² See LPA Section 6.14, which states:

2. In 2018, HCMS executed a series of demand Notes in favor of the Debtor (the “Notes”). The authority to execute promissory note in favor of the Debtor arises from Article 4 of the LPA because a General Partner has full authority to conduct the business, which includes lending and borrowing money and executing promissory notes. Article 4 states:

In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation:

....

(ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations);

....

(vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.1;

....

(vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations.

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. . . . Each party shall bear its own attorney’s fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement.

3. In addition, the LPA provides authority for partners to lend money to their Affiliates.

Section 4(e) specifically provides:

The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine: provided, however, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

In addition, Section 3.9(f) of the LPA allows for the partnership to make tax loans to the Founding Partners:

The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

4. Debtor demanded payment on the Notes and subsequently filed an adversary proceedings seeking collection, described further below. One of the affirmative defenses asserted in the adversary proceedings is that Debtor is not entitled to demand payment because, prior to the demands for payment, HCM had agreed that it would not collect the Notes, and that they would be treated as compensation to the Debtor's founder and then-CEO Jim Dondero, if any of certain conditions subsequent were met.³ Debtor refers to the agreement as the "Alleged Agreement." The condition subsequent was the sale of any of HCM's interests in certain portfolio companies (Cornerstone, Trussway and/or MGM) for a greater amount than their cost.⁴

³ See *Highland Capital Management Services, Inc.'s First Amended Answer to Plaintiff's Complaint* [Ad. No. 21-03006, Dkt. No. 34 at 8 ¶ 56].

⁴ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition of James Dondero Transcript at 212: 18-25; 213: 1-17.

5. Under Section 4.1(k) of the LPA, the “salaries or other compensation, if any, of the officers and agents of the Partnership [were to] be fixed from time to time by the General Partner.” Additionally, under the LPA, Dugaboy had explicit authorization to approve compensation for Jim Dondero and entities he was affiliated with, and thus bind the Partnership through, LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The General Partner and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.⁵

The Class A shareholders included Strand Advisors, The Dugaboy Investment Trust, Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark and Pamela Okada Family Trust – Exempt Trust #2.⁶ Dugaboy alone comprised 75% of the Class A shareholders,⁷

Nancy Dondero was the Family Trustee of the Dugaboy Trust,⁸ and had the power to act for Dugaboy in this regard.⁹

After the Notes were entered into, Mr. Dondero asked Dugaboy (via Ms. Dondero) to approve an agreement that the Notes would be forgiven as compensation to Mr. Dondero upon the favorable sale of any or all of the portfolio company interests by HCM, and she did.¹⁰

⁵ Aigen Dec. Ex. 1, LPA at Exhibit A thereof). Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests.

⁶ Aigen Dec. Ex. 1, LPA at Exhibit A thereof.

⁷ *See id.*

⁸ Aigen Dec. Ex. 3, *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

⁹ Aigen Dec. Ex. 4, *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

¹⁰ Aigen Dec Ex. 2, Remote Deposition of James Dondero Transcript at 176-178.

The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“‘*Affiliate*’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘*control*’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“‘*Person*’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Mr. Dondero was an Affiliate of Strand under the LPA’s definition. Thus, Mr. Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

6. On January 22, 2021, Highland Capital Management, L.P. (“Debtor” or “Plaintiff” when describing post-petition actions and HCM when describing pre-petition actions) commenced Adversary Proceeding No. 21-03006 against HCMS, asserting a state law, non-core breach of contract claim (“Count I”) and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the Notes (“Count II”).

7. HCMS answered the adversary complaint, asserting, inter alia, that Debtor’s claims should be barred, because prior to the demand for payment HCM agreed it would not collect on the Notes upon fulfillment of conditions subsequent,¹¹ based upon what the Debtor refers to as the “Alleged Agreement.”

8. On August 23, 2021, the Court entered an order permitting Debtor to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV)*

¹¹ *Highland Capital Management Services, Inc.’s First Amended Answer to Plaintiff’s Complaint* [Ad. No. 21-03006, Dkt. No. 34 at 8 ¶ 56].

Breach of Fiduciary Duty (“Amended Complaint”) asserting additional claims for relief including: Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550 against Mr. Dondero (“Count III”); Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1) against Mr. Dondero (“Count IV”); Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy (“Count V”); Breach of Fiduciary Duty against Dugaboy (“Count VI”); and Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero (“Count VII”). Debtor seeks avoidance of the Alleged Agreement, declaratory relief, and damages. The Parties agreed that the Defendants would answer or otherwise move against the Amended Complaints on or before September 1, 2021.¹² The new claims, under Counts V, VI, and VII are non-core contract claims that arise from the LPA, containing a broad arbitration provision. Further, the Defendants have critical affirmative defenses for the claims for declaratory relief, breach of fiduciary, and aiding and abetting breach of fiduciary duty, that are rooted in non-core state contract law that also arise from the LPA.

9. Although Debtor alleges that it “believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the notes,”¹³ there is no doubt that adjudication of the existence and enforceability of the Alleged Agreement affects all of Debtor’s claims under Counts V, VI, and VII for declaratory relief, breach of fiduciary duty and breach of fiduciary duty. These claims pertain to loans made by the Debtor to its Affiliates and compensation for the Debtor’s CEO, all of which are governed by the LPA.¹⁴

¹² See *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* attached as Exhibit C to *Debtor’s Unopposed Motion for Leave to Serve and File Amended Complaint* [Adv. No. 21-03006, Dkt. No. 60-2 at Exhibit C] stipulating to August 30, 2021 which has been extended to September 1, 2021 by the parties via email communication.

¹³ *Amended Complaint* [Adv. No. 21-03006, Dkt. No. 68 at ¶ 3].

¹⁴ See generally Aigen Dec. Ex. 1, LPA Article 4 and Section 3.10.

10. Defendants request the Court order the parties to arbitration on Counts V, VI, and VII, as provided by the pre-petition LPA entered into by the parties, and stay the adversary proceeding pending arbitration.

II. STANDARD OF REVIEW

11. When deciding whether to grant a motion to compel arbitration, the Fifth Circuit has established a two-step analysis for determining whether parties must arbitrate a particular claim or set of claims under the FAA: (A) there must be an enforceable agreement to arbitrate; and (B) the claims must be arbitrable. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted) (stating “First we must ask if the party has agreed to arbitrate the dispute. . . If so, we then ask if any federal statute or policy renders the claims non-arbitrable.”); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (“A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement.”). Once a party seeking to compel arbitration establishes the asserted claims fall within a valid arbitration agreement, the burden shifts, and the party seeking to avoid arbitration must prove an affirmative defense to the provision’s enforcement, such as waiver. *Venture Cotton Coop.*, 435 S.W.3d at 227.

12. In applying the first portion of the two-step analysis, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (“This determination is generally made on the basis of ‘ordinary state-law principles that govern the formation of contracts.’” (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). The second part of determining whether the parties have agreed to arbitrate—the question of whether the dispute comes within the scope of the agreement—is answered by applying the federal substantive law of arbitrability.” *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009) (citations omitted).

13. Under both Texas and Federal law, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983); *see also Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)). In addition, the Supreme Court has declared that the Federal Arbitration Act, “is a strong congressional declaration of a liberal policy favoring arbitration.” *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 849 (N.D. Tex. 2014) (collecting cases) (“if a valid agreement to arbitrate does exist, the court must observe the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration.”).

III. ARGUMENT

14. This Court should compel arbitration as to Counts V, VI, and VII of the Amended Adversary Complaint because: (1) The claims under Counts V, VI, and VII comprise disputes involving legal rights or remedies arising from the LPA and are governed by an enforceable, and broadly worded, arbitration provision; (2) Counts V, VI, and VII assert noncore claims, and in the Fifth Circuit courts do not have discretion to refuse to compel the arbitration of matters not involving “core” bankruptcy proceedings and should compel arbitration of even core claims if they are not integral to the bankruptcy; and (3) federal and state policy strongly favors arbitration.

15. The Federal Arbitration Act (“FAA”) requires district courts to direct parties to arbitrate issues covered by a valid arbitration agreement. 9 U.S.C. §§ 3, 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “Federal policy strongly favors enforcing arbitration agreements.” *Dean Witter Reynolds*, 470 U.S. at 217; *Moses H. Cone Mem. Hosp*, 460 U.S. at 24. When a party moves to compel arbitration, the FAA requires district courts to order arbitration of arbitrable claims. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (In re*

Sedco, Inc.), 767 F.2d 1140, 1147 (5th Cir. 1985). Because of the strong presumption in favor of arbitration, “a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.” *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724–25 (S.D. Tex. 2013), *aff’d*, 559 F. App’x 417 (5th Cir. 2014) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)); *see also Grant v. Houser*, 469 Fed. Appx. 310, 315 (5th Cir. 2012) (noting the strong presumption in favor of arbitration).

16. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Henry*, 551 S.W.3d at 115 (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d at 174). The Fifth Circuit resolves doubts concerning the scope of matter covered by an arbitration provision in favor of referring arbitration. The court states:

We emphasize that our sole responsibility is to determine whether this dispute is governed by an arbitration clause, not to determine the merits of the dispute. *See Snap-On Tools Corp., v. Mason*, 18 F.3d 1261, 1267 (5th Cir.1994). “We resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration. . . . [A]rbitration should not be denied ‘unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’” *Neal*, 918 F.2d at 37 (internal citations omitted). *See also AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 643, 650 (1986).

Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

A. **This Dispute is Governed by An Enforceable Arbitration Provision Reaching All Legal Rights Arising From the LPA.**

17. Debtor’s claims asserted in Counts V, VI, and VII arise under the LPA, which contains an enforceable and broadly worded arbitration provision. The U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, has already interpreted arbitration provisions with identical scope language (and near-identical scope language) to the Arbitration Provision under the LPA, to be valid

and binding. See *In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 549-50 (Bankr. N.D. Tex. 2019).¹⁵ Importantly, the court made clear that “it would seem to be beyond peradventure that [the arbitration clause] was, at one time, enforceable between the parties, *with regard to any disputes that arose regarding the agreements.*” *Id.* at 552 (emphasis added); see also *id.* at 557 (emphasis added) (“there were valid arbitration agreements *that applied to all disputes* arising out of the [agreements at issue].”). Accordingly, the court concluded that all claims at issue, including claims for declaratory judgment, fell within the scope of the relevant arbitration clauses. See *id.* at 558.

18. The Arbitration Provision here also covers any “unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from this Agreement.*” LPA, Section 6.14 (emphasis added). Such broad language is sufficient to reach collateral matters, including the oral agreement between the parties which involves legal rights arising from LPA.¹⁶ *Buell Door Co.*

¹⁵ The Court’s decision provides the relevant arbitration clause language. The arbitration clause at Section 16(f) of the Sub-Advisory Agreement states:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from* this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .

In re Acis Cap. Mgmt., L.P., 600 B.R. at 550 (emphasis added).

¹⁶ It is important to note that the particular language “arising from” is significant in determining that the Arbitration Provision here is broad. The Fifth Circuit and Texas District Courts have specifically determined that only the phrase “arising under” indicates a narrow arbitration clause, rather than broad. This Court has held:

upon reviewing the above referenced Fifth Circuit cases, the court concludes that the phrase “arising out of” and similar language constitute “broad” arbitration clauses. *Accord Morphis v. Federal Home Loan Mortgage Corp.*, No. 3:02–CV–0210–P, 2002 WL 1461930, *3–4 (N.D.Tex. July 3, 2002) (provision that “any and all disputes between [the parties],” with no limiting clause constituted a broad clause). On the other hand, the phrase “arising under” indicates a “narrow” arbitration clause. See *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983) (the term “arising under” is relatively narrow) (citation omitted).

v. Architectural Sys., Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, at *6 (N.D. Tex. Aug. 20, 2002) (concluding that the phrase “arising out of” and similar language constitute “broad” arbitration clauses); *see also Elkjer*, 8 F. Supp. at 855 (concluding that the arbitration clause which uses the phrase “arising under or in connection with this [Partnership] Agreement,” is “broad [and] capable of expansive reach” to include statutory claims). “Broad arbitration clauses are not limited to claims which literally ‘arise under [a] contract,’ but rather embrace all disputes between the parties **having a significant relationship** to the contract regardless of their label.” *Id.* at *4 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir. 1998) (emphasis added) (internal citations omitted).

19. In the Fifth Circuit, a “broadly construed arbitration provision may encompass claims arising under a separate agreement.” *See, e.g., Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 393–94 (5th Cir. 2002) (holding that an arbitration provision, which covered “any and all claims. . . arising out of or relating to” an agreement, applied to claims arising under a separate agreement); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 38 (5th Cir. 1990) (holding that an arbitration provision encompassing “any and all disputes between [the parties] . . . reach[ed] all aspects of the parties’ relationship,” including claims arising under a separate agreement); *see also I.D.E.A. Corp. v. WC & R Ints., Inc.*, 545 F. Supp. 2d 600, 606 (W.D. Tex. 2008) (noting a broad arbitration provision may encompass claims arising under a separate agreement). Accordingly, the Arbitration Provision covers all of the claims regardless if they arise under the LPA or the separate Notes because the authority to enter into the Notes arises from the LPA which reaches all aspects of the parties’ relationship.

Buell Door Co., 2002 WL 1968223, at *6. Here, the “arising from” language of the Arbitration Provision is similar to “arising out of” and is therefore broad.

20. Here, the LPA choice of law provision, Section 6.1, provides the “Agreement shall be construed in accordance with and governed by the laws of the state of Delaware. . . .” As a result, Delaware state contract law determines whether the LPA includes a valid agreement to arbitrate. Delaware arbitration law mirrors federal law in that “public policy of Delaware favors arbitration.” *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (citations omitted). Even Debtor’s rejection of the LPA does not absolve Debtor of its obligation to arbitrate. It is well established that the “rejection of a contract, or even breach of it, will not void an arbitration clause. . . . Any different conclusion would allow a party to avoid arbitration at will simply by breaching [or rejecting] the contract.” *Madison Foods v. Fleming Cos., Inc. (In re Fleming Cos, Inc.)*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005) (citations omitted).

21. Moreover, any question about the scope of the arbitration agreement, including the arbitrability of any particular claim, is for the arbitrator. Under the FAA, “parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). “Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . , so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). The Fifth Circuit provides an in-depth explanation of who decides what issues when a contract includes an arbitration provision. *See Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

22. Incorporating rules from an arbitration service provider that themselves delegate the question of arbitrability to the arbitrator clearly and unmistakably expresses the parties’ intent to leave the question of arbitrability to the arbitrator. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). Here, the Arbitration Provision provides that the “arbitration

will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award.” The rules of the American Arbitration Association provide that the arbitrator is to decide questions of arbitrability. AAA Commercial Arbitration Rule 7(a). Because the parties’ arbitration delegates decision-making to the arbitrators, where the parties entered an agreement to arbitrate, questions of scope and arbitrability should be left to the arbitrator.

B. The Claims Asserted In Counts V, VI, and VII Are Arbitrable Because they Are Non-Core and Arise Under the LPA.

23. Under the LPA, the Court must compel arbitration on Counts V, VI, and VII of the Amended Complaint, because all of the claims are non-core claims arising from the rights and obligations under the LPA. Bankruptcy courts have no discretion to refuse to compel the arbitration of non-core matters. *See, e.g., Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *7 (S.D. Tex. Dec. 18, 2015) (citation omitted) (quoting “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings”). More specifically, under Fifth Circuit precedent, a bankruptcy court only has discretion to refuse to compel arbitration of an arbitrable claim where: (1) “the proceeding derives exclusively from the provisions of the bankruptcy code;” and (2) “arbitration of the proceeding would conflict with the purposes of [the bankruptcy code].” *See Matter of Nat’l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 242 (Bankr. N.D. Tex. 2010). “Importantly, however, ***a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings*** under 28 U.S.C. § 157(b).” *In re Cain*, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (emphasis added) (citation omitted) (stating “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings.”); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. at 560 (in the *Acis* case—unlike here—the

claims at issue were “an integral part of determining . . . proofs of claim,” resulting in the court denying the motion to compel arbitration).

24. For claims that are “derivative of the pre-petition legal or equitable rights possessed by a debtor” it is beyond dispute that “it is ‘universally accepted’ that such issues are arbitrable.” *In re Cain*, 585 B.R. at 137 (citing *Nat’l Gypsum Co.*, 118 F.3d at 1066, 1069). In other words, for non-core proceedings, a court “must give effect to the terms of any applicable arbitration clauses.” *In re Daisytek, Inc.*, 323 B.R. 180, 188 (N.D. Tex. 2005).

1. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count V Because Debtor’s Proposed Declaratory Relief Claim Is A Non-Core Claim Arising From The LPA.**

25. Debtor’s declaratory relief claim simply seeks declarations concerning the extent of limited partner (including Dugaboy’s) authority under the LPA, including authority to enter into the Alleged Agreement on behalf of the Partnership.¹⁷ This is a legal dispute arising from LPA, a pre-petition contract, thus coming within the Arbitration Provision and governed by state contract law. Courts generally agree that claims for declaratory judgment which could also exist outside of bankruptcy are non-core proceedings.¹⁸ *See, e.g., In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La. 2007)(“That the doctors’ claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims.”)

¹⁷ *See Amended Complaint* [Adv. No. 21-03006, Dkt. No. 68 at ¶¶ 81-84].

¹⁸ *See also In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 222–23 (C.D. Cal. 2014)(“That court found a trustee’s claim for declaratory relief as to the ownership of similar tax refunds non-core because it was a “dispute between private parties” and arose out of a pre-bankruptcy tax sharing agreement governed by state contract law); *see also In re SFD @ Hollywood, LLC*, 414 B.R. 794, 797 (Bankr. S.D. Fla. 2009)(“This proceeding [for declaratory judgment] could also exist outside of bankruptcy. Accordingly, this is a non-core proceeding in which the Court cannot enter a final order, absent consent of the district court and the parties.”); *see also Sunterra Corp. v. Perini Bldg. Co.*, No. 204CV00784MCEEFB, 2008 WL 11512082, at *4 (E.D. Cal. June 12, 2008)(“The new causes of action--strict liability, negligence, breach of contract, professional negligence, and declaratory relief--would also exist independently of bankruptcy laws and are similarly “non-core” proceedings.”).

26. Therefore, the Court lacks discretion to refuse to compel arbitration on Count V asserting Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 260 (5th Cir. 1996) (district court did not abuse discretion in refusing to consider plaintiffs’ request for declaratory relief where order granting defendant’s motion to compel arbitration disposed of same issues raised in declaratory judgment action); *see also Austin Cap. Mgmt., Ltd. v. Bd. of Trustees of Texas Iron Workers’ Pension Fund*, No. A-09-CA-351 LY, 2009 WL 10699390, at *8 (W.D. Tex. July 30, 2009) (finding action seeking declaratory relief arbitrable); *see also Info. Sys. Audit & Control Ass’n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017) (stating that permitting a party to obtain declaratory relief from a court when there is a valid arbitration agreement is “essentially the same relief as that otherwise reserved for the arbitrator. It would make little sense to include such an expansive loophole in what is otherwise a sweeping arbitration provision.”).

2. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count VI And VII Because Debtor’s Proposed Claims Asserting Breach Of Fiduciary Duty And Aiding And Abetting Breach Of Fiduciary Duty Are Non-Core Claims Arising From The LPA.**

27. Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero for entering into the Alleged Agreement, must be arbitrated because they are non-core claims that arise under the LPA. It is well established that state law claims, such as breach of fiduciary duty and aiding and abetting breach of fiduciary duty, are non-core claims. *See, e.g., In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017) (“Courts within the Fifth Circuit have consistently found that post-confirmation suits by plan trustees based on state law claims are only within the ‘related to’ (and not ‘core’) bankruptcy jurisdiction of a federal court.”); *see also Brickley for CryptoMetrics, Inc. Creditors’ Tr. v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 829–30 (W.D. Tex. 2017)

(stating post-confirmation claims for breach of fiduciary duty and state law claims are “related to” claims); *see also Mirant Corp. v. The S. Co.*, 337 B.R. 107, 120 (N.D. Tex. 2006).

28. The breach of fiduciary duty claims under Count VI and aiding and abetting breach of fiduciary duty under Count VII are—and by their own terms—premised on Dugaboy’s authority to bind the Debtor under the LPA.¹⁹ The Debtor challenges whether the LPA affords the right to Dugaboy to approve such compensation, thus, any evaluation of the breach of fiduciary duty-related claims must first entail an analysis of the LPA, making construction of the LPA – the agreement containing the arbitration clause, a predicate to the analysis of the breach of fiduciary duty claims. Thus, Counts VI and VII involve unresolved legal disputes between the parties—including the Debtor and Mr. Dondero, Nancy Dondero, and Dugaboy, who are all parties and/or officers/directors/partners/employees/agents/affiliates/representatives of a General or Limited Partner—concerning legal duties to the Partnership that would not exist outside of the LPA.

29. The Fifth Circuit makes clear that where, as here, the breach of fiduciary duty (or aiding and abetting fiduciary duty) claim is interwoven with the partnership agreement containing an arbitration clause, the fiduciary claims will be subject to arbitration. *See Coffman v. Provost * Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 732 (E.D. Tex. 2001), *aff’d sub nom. Coffman v. Provost Umphrey LLP*, 33 Fed. Appx. 705 (5th Cir. 2002) (“Even if it is conceivable that Plaintiff could maintain a claim for breach of fiduciary duty without the Partnership Agreements, that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause . . . the Partnership Agreements will determine whether a fiduciary duty was breached—whether that

¹⁹ *See Amended Complaint* [Adv. No. 21-03006, Dkt. No. 68 at ¶ 87] (“If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.”); *id.* ¶¶ 90-91 (the Donderos “were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and the Donderos “aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.”)

duty arises from the common law or from the contract itself. . . . For these reasons, the court finds Plaintiff’s breach of fiduciary duty claim to be subject to arbitration.”); *see also Omni Pinnacle, LLC v. ECC Operating Services, Inc.*, 255 F. App’x 24, 25-26 (5th Cir. 2007) (internal quotation marks omitted) (“A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”).

30. Because breach of fiduciary duty and aiding and abetting breach of fiduciary duty are non-core state-law claims that could exist outside of bankruptcy, the reviewing court lacks discretion to refuse enforcement of an otherwise-applicable arbitration agreement as to these claims. *See In re McCollum*, 621 B.R. 655, 659 (Bankr. N.D. Miss. 2020) (finding that breaching its fiduciary duty “is a state law contract claim which arose prepetition, could exist outside the bankruptcy case, and is tangential to the bankruptcy case. It does not invoke a substantive right created by bankruptcy law and is a non-core claim.”); *In re Gaughf*, 19-50947-KMS, 2020 WL 1271595, at *4 (Bankr. S.D. Miss. Mar. 12, 2020) (“Aiding and Abetting Count is non-core.”). Additionally, claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty do not reference the Bankruptcy Code or any right conferred by the Code. *See In re McCollum*, 621 B.R. at 659. Therefore, the Court lacks discretion to refuse to compel arbitration on Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero.

31. That Nancy Dondero is not personally a party to the LPA does not impair her right to enforce the arbitration agreement it contains. Debtor alleges misconduct by her and a signatory to the LPA relating to fiduciary duties Debtor alleges arise out of the LPA. There are two circumstances under which a nonsignatory can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory; or (2) when the signatory to the contract containing an arbitration clause

raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). Both circumstances are implicated by Debtor’s allegations against Nancy Dondero.

32. First, non-signatories are entitled to invoke an arbitration agreement when the claim against the non-signatory arises from the contract with an arbitration provision. *See, e.g., Bidas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)) (“[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a nonsignatory.”); *see also Amegy Bank Nat. Ass’n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 450–51 (S.D. Tex. 2012) (citing *Grigson*, 210 F.3d at 527). Because Debtor charges Nancy Dondero with breaching fiduciary duties (and aiding and abetting breaches of such duties) that arise out of the LPA, she falls precisely within the ambit of cases like *Bidas*, and *Grigson* and *Amegy*.

33. Second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract—here the allegations are made against Nancy Dondero (a non-signatory) and Dugaboy (a signatory) to the LPA—the non-signatory may compel arbitration on the claims. *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming that “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.”); *see also Grigson*, 210 F.3d at 526 (“a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff”).

C. **The Court Should Stay All Claims Pending Arbitration.**

34. The claims that the Court refers to arbitration must be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. See *In re Gandy*, 299 F.3d 489, 494–95 (5th Cir. 2002) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (“A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement”). Further, bankruptcy courts generally do not have discretion to decline to stay, pending arbitration, proceedings involving non-core matters. *Id.* at 495. Accordingly, the Court should stay each of the Debtor’s claims against Defendants pending arbitration.

35. Should the Court not refer arbitration on every claim, in the alternative, the Court should stay the entire adversary proceeding pending arbitration. Permitting any claims to continue herein, while some or all claims are subject to arbitration would be unnecessarily expensive and duplicative. The Court has the inherent power to grant a discretionary stay of a proceeding pending arbitration when there are issues common to the arbitration and the court proceeding and those issues may be decided by the arbitrator. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (stating that the power to stay proceedings is incidental to power “inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); see also *In re Divine Ripe, L.L.C.*, 538 B.R. 300, 309 (Bankr. S.D. Tex. 2015) (same).

IV. **CONCLUSION**

WHEREFORE, for the reasons above, Defendants respectfully request that this Court compel arbitration on Counts V, VI, and VII, and order a stay of the proceedings pending arbitration.

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez _____

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EXHIBIT 74

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03006-sgj
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§ § § § § § § § § §	
Defendants.	§	



APPENDIX IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James Dondero, Nancy Dondero and The Dugaboy Investment Trust file this Appendix in Support of their Motion to Compel Arbitration and Stay Litigation and request the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Motion to Compel Arbitration and Stay Litigation, dated September 1, 2021	App. 1-3
1	Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.	App. 4-40
2	Excerpts from the Transcript of the Remote Deposition of James Dondero on May 28, 2021, Adversary Proceeding No. 21-3003	App. 41-54
3	Acceptance of Appointment of Family Trustee, executed by Nancy Marie Dondero on October 13, 2015	App. 55-60
4	Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees, The Dugaboy Investment, dated November 15, 2010	App. 61-97

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez

Exhibit A

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JAMES DONDERO AND NANCY DONDERO

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03006-sgj
HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC., JAMES DONDERO,	§	
NANCY DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION**

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendants James Dondero and Nancy Dondero, and I submit this Declaration in support of the *Motion to Compel*

Arbitration and Stay Litigation being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts of the May 28, 2021 Remote Deposition of James Dondero Transcript at 176-178; 212:18-25; 213:1-17.

4. Attached as **Exhibit 3** is a true and correct copy of the *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

5. Attached as **Exhibit 4** is a true and correct copy of *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

Dated: September 1, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“**Class B Limited Partner**” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“**Class B Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“**Class B NAV Ratio Trigger Period**” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“**Class C Limited Partner**” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“**Class C Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“**Class C NAV Ratio Trigger Period**” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“**Code**” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“**Contribution Note**” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“**Default Loan**” has the meaning set forth in Section 3.1(c)(i).

“**Defaulting Partner**” has the meaning set forth in Section 3.1(c).

“**Delaware Act**” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“**Effective Date**” means the date first recited above.

“**Fiscal Year**” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however, any* action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

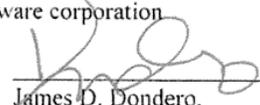
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

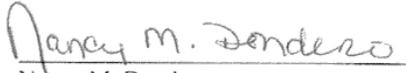
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

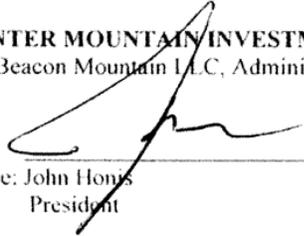
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain LLC, Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>CLASS A PARTNERS</u>		
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20_, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___ % Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

Exhibit 2

1 Dondero - 5-28-2021
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 In re:)
6)
6 HIGHLAND CAPITAL) Case No.
MANAGEMENT, LP,) 19-34054 L.P.
7) Chapter 11
Debtor,)
8 -----)
9 HIGHLAND CAPITAL MANAGEMENT,)
LP,)
10 Plaintiff,) Adversary No.
11 vs.) 21-03003-sgi
12 JAMES D. DONDERO,)
13 Defendant.)

14
15 REMOTE DEPOSITION OF
16 JAMES DONDERO
17
18 Pages 103 - 282
19 Dallas, Texas
20 Friday, 28th day of May, 2021
21
22

23 Job No. 194690
24 Reported by:
25 Daniel J. Skur, Notary Public and CSR

1 Dondero - 5-28-2021

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7

8 28th day of May, 2021

9 9:33 a.m. - 1:59 p.m.

10

11

12 Remote Deposition of JAMES DONDERO,
13 located in Dallas, Texas, before Daniel J.
14 Skur, Notary Public and Certified Shorthand
15 Reporter in and for the State of Texas
16 located in Waxahachie, Texas.

17

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1 Dondero - 5-28-2021

2 A P P E A R A N C E S:

3 Pachulski Stang Ziehl & Jones
4 Attorney(s) for Debtor
780 Third Avenue

5 New York, New York 10017

6 BY: John Morris, Esq.

7 Gregory Demo, Esq.

8
9 Stinson
Attorney(s) for The Witness
3102 Oak Lawn Avenue

10 Dallas, Texas 75219

11 BY: Deborah Deitsch-Perez

12 Michael Aigen, Esq.

13 Paul Lackey, Esq.

14
15 Sidley Austin
16 Attorney(s) for The Committee
2021 McKinney Avenue

17 Dallas, Texas 75201

18 BY: Paige Montgomery, Esq.

19

20

21 ALSO PRESENT:

22 Davor Rukavina, NexPoint

23 La Asia Canty

24

25

1 Dondero - 5-28-2021

2

3 IT IS HEREBY STIPULATED AND AGREED
4 by and between the attorneys for the respective
5 parties herein, that filing and sealing be and
6 the same are hereby waived.

7 IT IS FURTHER STIPULATED AND AGREED
8 that all objections, except as to the form of
9 the question, shall be reserved to the
10 time of the trial.

11 IT IS FURTHER STIPULATED AND AGREED
12 that the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath, with the same force and
15 effect as if signed and sworn to before the
16 Court.

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1 Dondero - 5-28-2021
2 P R O C E E D I N G S
3 R E M O T E O R A L D E P O S I T I O N O F
4 J A M E S D O N D E R O

5 (REPORTER NOTE: This deposition is
6 being conducted remotely in accordance with
7 the Current Emergency Order regarding the
8 COVID-19 State of Disaster.

9 Today's date is the 28th day of
10 May, 2021. The time is 9:33 a.m. Daylight
11 Savings Time. The witness is located in
12 Dallas, Texas.)

13 JAMES DONDERO,
14 having been duly cautioned and sworn to tell
15 the truth, the whole truth and nothing but the
16 truth, testified as follows:

17 (9:33 A.M.)

18 EXAMINATION

19 BY MR. MORRIS:

20 Q. Good morning, Mr. Dondero.

21 A. Morning.

22 Q. It's John Morris, again, from
23 Pachulski on behalf of the debtor. We're here
24 for your deposition today.

25 Do you understand that?

1 Dondero - 5-28-2021

2 BY MR. MORRIS:

3 Q. Mr. Dondero, can you describe for
4 me -- withdrawn.

5 Did you discuss with your sister
6 Nancy, the agreement that's referred to in
7 paragraph 40?

8 A. The agreement to subsequent
9 conditions, yes, absolutely. But this
10 agreement that's on the screen, I've never --
11 I've never -- I've never shown her this
12 document or talked to her about it.

13 Q. I'm not asking about the document.
14 I'm not asking about the document. I'm asking
15 about the agreement that's referred to in
16 paragraph 40.

17 Do you understand that?

18 A. Yes. And, yes, we had several
19 conversations about it.

20 Q. Okay. Can you describe for me
21 everything you remember about your discussions
22 with Nancy concerning the agreement that's
23 referred to in paragraph 40?

24 A. That the loans that were in place
25 would be forgiven upon a monetization -- the

1 Dondero - 5-28-2021
2 favorable monetization of certain large or
3 liquid assets on the Highland balance sheet;
4 and the three that were focused on was MGM,
5 Trussway, and Cornerstone.

6 Q. Did she say anything in response?

7 A. Just, "How much are we talking
8 about?" And I told her it was about 9 million
9 in aggregate, and -- and I told her that it
10 was -- that the forgiveness or the compensation
11 was compliant regarding any credit covenants or
12 Hunter Mountain covenants --

13 Q. Do you recall any --

14 A. -- that -- that if it were to be
15 forgiven, that additional compensation would be
16 compliant or permitted and really not material
17 relative to any outstanding credit agreements
18 that Highland had or agreements with Hunter
19 Mountain.

20 Q. Is this something that you discussed
21 with her, or is this just information that
22 you're giving me?

23 A. This is what I discussed -- that's
24 almost the entirety of the conversation. It
25 happened over a couple different conversations,

1 Dondero - 5-28-2021

2 but...

3 Q. Did anybody participate in any of
4 the conversations you're describing other than
5 you and your sister?

6 A. I don't believe it was necessary, it
7 didn't include anybody else.

8 Q. Okay. Again, I'm not here to
9 question. I'm just looking for facts,
10 Mr. Dondero.

11 So nobody participated in any of
12 these conversations that you can recall other
13 than you and Nancy; is that correct?

14 A. Correct, that I -- yes, there was
15 never a third party involved in our
16 conversations. I don't know -- I don't think
17 she discussed it with anybody else, but I don't
18 know.

19 Q. Did -- was the agreement subject to
20 any negotiation? Did she make any
21 counterproposal of any kind?

22 A. No. No, I -- again, I believe both
23 of our views at the time was that it was
24 immaterial to Highland overall or any other
25 agreements.

1 Dondero - 5-28-2021

2 three assets would trigger the conditions
3 subsequent?

4 A. Correct.

5 Q. Okay. And who decided whether the
6 asset was sold on a favorable basis?

7 Who made that decision, under your
8 agreement with Nancy?

9 A. It was just defined relative to
10 cost, so it was just -- it was just a
11 factual -- there's nothing to decide. It would
12 just be a factual answer.

13 Q. So, I just want to make sure I
14 understand.

15 Your agreement with Nancy was that
16 --

17 A. Yes.

18 Q. -- that -- all right. Withdrawn.

19 Your agreement with Nancy in January
20 or February 2019, was that if any of MGM,
21 Cornerstone, or Trussway was sold at cost, the
22 debtor would forgive your obligations under the
23 three notes.

24 Do I have that right?

25 MS. DEITSCH-PEREZ: Object to the

1 Dondero - 5-28-2021

2 form.

3 A. If any of them were sold above cost,
4 it would -- monetization would trigger the --
5 the three notes -- forgiveness of the three
6 notes, yes.

7 BY MR. MORRIS:

8 Q. Okay. And I just want to see if I
9 can understand: Did you and Nancy discuss in
10 January or February 2019 how much above cost
11 the sale would have to be in order for the
12 debtor to forgive your obligations under the
13 three notes?

14 MS. DEITSCH-PEREZ: Object to the
15 form.

16 A. No. It just had to be above cost,
17 not a amount above cost.

18 BY MR. MORRIS:

19 Q. Okay.

20 A. Because just monetizing it -- just
21 monetizing it and getting liquidity for an
22 illiquid investment, even if it was at cost, is
23 good. So something above cost is great. And
24 those are all big assets, and the notes were
25 small.

1 Dondero - 5-28-2021

2 C E R T I F I C A T E
3 STATE OF TEXAS)
4 COUNTY OF ELLIS)

5 I, Daniel J. Skur, a Notary Public
6 within and for the State of Texas, do
7 hereby certify:

8 That JAMES DONDERO, the witness whose
9 deposition is hereinbefore set forth, was
10 duly sworn by me and that such deposition
11 is a true record of the testimony given by
12 such witness.

13 That pursuant to Rule 30 of the Federal
14 Rules of Civil Procedure, signature of the
15 witness was not reserved by the witness or
16 other party before the conclusion of the
17 deposition;

18 I further certify that I am not
19 related to any of the parties to this
20 action by blood or marriage; and that I am
21 in no way interested in the outcome of this
22 matter.

23 IN WITNESS WHEREOF, I have hereunto
24 set my hand this 28th day of May, 2021.

25

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Daniel J. Skur
Notary Public, State of Texas.
My Commission Expires 7/7/2022
TSG Reporting, Inc.
228 East 45th Street, Suite 810
New York, New York
(877) 702-9580

Dondero - 5-28-2021

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name:

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

In re:)	
HIGHLAND CAPITAL	)	Case No.
MANAGEMENT, LP,	)	19-34054 L.P.
Debtor,	)	Chapter 11
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, LP,)	
Plaintiff,	)	Adversary No.
vs.	)	21-03003-sgi
JAMES D. DONDERO,)	
Defendant.)	
Dep. Date: 05/28/2021		
Deponent: JAMES DONDERO		

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

CORRECTIONS:

Pg.	LN.	Now Reads	Should Read	Reason
140	4	THE WITNESS	MR. MORRIS	3
140	6	THE WITNESS	MR. MORRIS	3
140	8	THE WITNESS	MR. MORRIS	3
140	11	THE WITNESS	MR. MORRIS	3
140	13	THE WITNESS	MR. MORRIS	3
140	14	MR. MORRIS	THE WITNESS	3
140	15	THE WITNESS	MR. MORRIS	3
177	3	liquid	illiquid	3

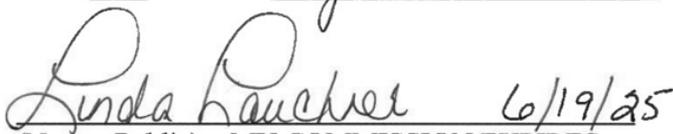
181	25		Add to end (after yes): as long as the conditions subsequent could still be met.	1
182	13	focused	focus	3
188	11		Add to end (after monetized); or were monetized for less than cost.	1



 JAMES DONDERO

SUBSCRIBED AND SWORN BEFORE ME

THIS 29th DAY OF June, 2021.


 (Notary Public) MY COMMISSION EXPIRES: 6/19/25

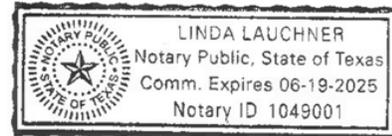


Exhibit 3

THE DUGABOY INVESTMENT TRUST
James D. Dondero, Primary Beneficiary

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

Re: The Dugaboy Investment Trust

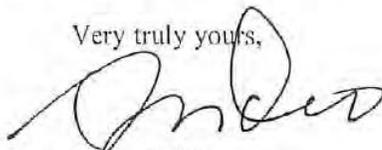
Dear Ms. Breault,

I, James D. Dondero, am writing to inform you that on October 12, 2015, I received notice from Grant James Scott that he will cease to serve as Family Trustee of The Dugaboy Investment Trust (the "**Trust**") and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust.

Pursuant to the attached Resignation of Family Trustee from Grant James Scott, I appoint Nancy Marie Dondero as the successor Family Trustee of the Trust.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.2 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with notice of my appointment of a successor Family Trustee.

Very truly yours,



James D. Dondero

THE DUGABOY INVESTMENT TRUST
Grant James Scott, Family Trustee

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

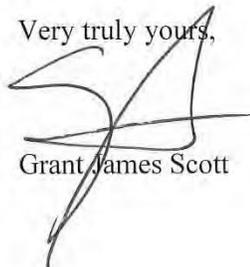
Re: The Dugaboy Investment Trust

Dear Ms. Breault,

I, Grant James Scott, am writing to inform you that as of October 12, 2015, I will cease to serve as Family Trustee of The Dugaboy Investment Trust (the “**Trust**”) and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust pursuant to the attached Resignation of Family Trustee.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.1 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with written notice of my resignation.

Very truly yours,

A handwritten signature in black ink, appearing to be 'G. Scott', written over the typed name 'Grant James Scott'.

Grant James Scott

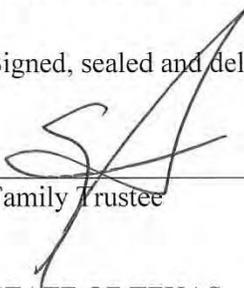
RESIGNATION OF FAMILY TRUSTEE

I, **GRANT JAMES SCOTT**, do hereby acknowledge that I voluntarily tender my resignation as Family Trustee of The Dugaboy Investment Trust pursuant to that Trust Agreement, dated November 15, 2010 by, between and among Dana Scott Breault, as Settlor, and Common Wealth Trust Company, as Administrative Trustee.

This resignation shall take effect immediately upon the execution hereof and delivery of a written acknowledged instrument wherein NANCY MARIE DONDERO accepts the trust and the position of Family Trustee.

IN WITNESS WHEREOF, I hereby sign my Resignation as Family Trustee of the above trust.

Signed, sealed and delivered in the presence of:



Family Trustee

10/12/2015
Date

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **GRANT JAMES SCOTT** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]



Notary Public's Signature

Expiration: January 15, 2019

ACCEPTANCE OF APPOINTMENT OF FAMILY TRUSTEE

I, **NANCY MARIE DONDERO**, appointed as Family Trustee under Article V, Section 5.2(a)(i) of The Dugaboy Investment Trust, dated November 15, 2010 (the "Trust"), hereby acknowledge and accept the position of Family Trustee of the Trust and hereby agree to faithfully perform all the duties and adopt all of the obligations imposed.

Signed this 13th day of October, 2015.

Nancy Marie Dondero

NANCY MARIE DONDERO
Family Trustee

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **NANCY MARIE DONDERO** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]

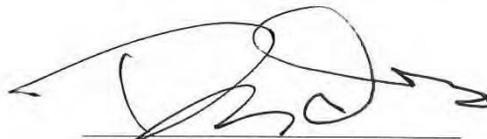
Micaela Sue Allen

Notary Public's Signature

Expiration: January 15, 2019

ACKNOWLEDGEMENT OF DELIVERY

I, JAMES D. DONDERO, acknowledge that this Acceptance of Appointment of Family Trustee by NANCY MARIE DONDERO was delivered to and received by me on October __, 2015.

A handwritten signature in black ink, appearing to read "James D. Dondero", written over a horizontal line.

James D. Dondero

Exhibit 4

TRUST AGREEMENT

Between

DANA SCOTT BREAUTL,
Settlor

and

JAMES D. DONDERO and
COMMONWEALTH TRUST COMPANY,
Trustees

THE DUGABOY INVESTMENT TRUST

WINSTEAD PC
DALLAS, TEXAS

THE DUGABOY INVESTMENT TRUST

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THE DUGABOY INVESTMENT TRUST

AGREEMENT OF TRUST made and entered into at Dallas, Texas, this ____ day of October, 2010, by and between DANA SCOTT BREault, as Settlor, and JAMES D. DONDERO, and COMMONWEALTH TRUST COMPANY, as Trustees.

ARTICLE I

DEFINITIONS

The following terms, as used in this Trust Agreement, have the meanings set forth below, unless another meaning is clearly indicated by context or circumstances:

1.1 Settlor. "Settlor" means DANA SCOTT BREault.

1.2 Jim. "Jim" means JAMES D. DONDERO.

1.3 Trustees. The initial Trustee of each trust created hereunder is JAMES D. DONDERO. "Trustee" means any person or entity serving as Trustee, whether original or successor and whether one or more in number. "Administrative Trustee" means COMMONWEALTH TRUST COMPANY in its capacity as Administrative Trustee, and any successor Administrative Trustee appointed in accordance with Section 5.2(c). "Independent Trustee" means GRANT JAMES SCOTT, III, (upon his acceptance as set forth in Section 5.2(b)) in his capacity as Trustee, and any successor Independent Trustee appointed in accordance with Section 5.2(b). "Family Trustee" means JAMES D. DONDERO in his capacity as Trustee, and any successor Family Trustee appointed in accordance with Section 5.2(a). The rights, powers, duties, and obligations, of the Family Trustee, Independent Trustee and Administrative Trustee are to be exercised and allocated pursuant to Section 6.2 of this Trust Agreement.

1.4 Children. "Children" means REESE AVRY DONDERO, JAMESON DRUE DONDERO, and any other child born to or adopted by Jim after the date of this Trust Agreement. "Child" means one of the Children.

1.5 Descendants. "Descendants" means the legitimate children of the person designated and the legitimate lineal descendants of such children, and includes any person adopted before attaining age fifteen (15) and the adopted person's legitimate lineal descendants. A posthumous child shall be considered as living at the death of his parent.

1.6 Code. "Code" means the Internal Revenue Code of 1986, as amended, and corresponding provisions of future federal tax law.

1.7 Per Stirpes. "Per Stirpes," when used with respect to a distribution of property among a class of beneficiaries, shall mean by representation; that is, the Descendants of a deceased ancestor take the share such ancestor would have received had he or she been living, and the issue of a living ascendant would not take in competition with such ascendant. The per

stirpital allocation shall commence with the most senior generation that has a living representative.

ARTICLE II

FUNDING

Settlor has transferred to the Trustee, without consideration, One Thousand and No/100 Dollars (\$1,000.00) which shall be administered and distributed in accordance with the terms of this Trust Agreement. Settlor and others may transfer to the Trustee properties acceptable to them, to be added to the trust estate. The Trustee shall administer the initial trust estate pursuant to the terms of Section 3.1.

ARTICLE III

DISTRIBUTION OF PRINCIPAL AND INCOME

3.1 Trust for Jim. The trust for the benefit of Jim shall be administered and distributed upon the following terms:

(a) Distributions to Jim. The Family Trustee may distribute to Jim so much of the net income and principal of the trust as the Family Trustee deems necessary to provide for Jim's maintenance, support and health. Undistributed income shall be accumulated and added to principal. In exercising its discretion, the Family Trustee shall take into account the following factors:

- (i) Jim is the primary beneficiary of the trust.
- (ii) The Family Trustee shall take into consideration in determining Jim's needs any other income or resources known upon reasonable inquiry by the Family Trustee to be available to Jim for these purposes.
- (iii) Settlor's intention to assist or enable Jim to obtain and furnish a home commensurate with his standard of living.
- (iv) Settlor's intention to assist or enable Jim to obtain capital to enter a business or profession.
- (v) Any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust

(b) Distributions by Independent Trustee. The Independent Trustee may, in its sole and absolute discretion, distribute to Jim so much of the income and principal of the trust as the Independent Trustee shall deem appropriate or advisable. It is Settlor's intention to give the Independent Trustee the broadest discretion possible in determining the amount and timing of distributions of income and principal hereunder and Settlor recognizes that the Independent Trustee may, in the exercise of its discretion, determine

to distribute the entire trust estate to Jim or to make no distributions to Jim during Jim's disability or for so long as Jim shall have a judgment outstanding, or for so long as any distribution might be lost to Jim's creditors. It is also Settlor's intention and desire for the Independent Trustee to consider any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust in determining the amount of distributions to be made to Jim under this subsection (b).

(c) Inter Vivos Special Power of Appointment. During Jim's lifetime, he shall have a special power to appoint any part or all of the trust estate to any individual or entity, except that no appointment shall be made to Jim, his creditors, his estate, or the creditors of his estate. Valid appointments may be in such amounts and proportions and upon such terms and conditions as Jim shall determine and evidence by written instrument delivered to the Trustee which specifically refers to this power of appointment and expresses the intention to exercise it; provided that such power of appointment shall not extend to any life insurance policies insuring Jim's life that constitute a part of the trust estate; and provided further that Jim shall not have a power to appoint by deed to or for the benefit of Jim or any individual or entity if such appointment has the effect of satisfying Jim's contractual or legal obligations. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.1(c).

(d) Independent Trustee's Power to Grant Testamentary General Power of Appointment. Except as otherwise provided herein, the Independent Trustee, by signed acknowledged instrument delivered to Jim, may grant Jim a testamentary general power of appointment (as defined in Sections 2041 of the Code) over part or all of the trust estate, provided, however, that such power of appointment shall only be effective in an amount up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless Jim's will provides otherwise by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of the trust estate over which the power is exercisable. As used in this section, the term "Net Death Taxes" shall mean the aggregate death taxes (including, without limitation, Federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to Jim's estate.

(i) If Jim has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (d) above, the amount that Jim may appoint under subsection (d) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of Jim's death, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers

together shall be no greater than the amount otherwise appointable under subsection (d) above.

(ii) The scope and terms of the power shall be defined in the instrument. Before such a power is exercised by Jim and the exercise becomes effective, the Independent Trustee may, in a similar manner, revoke or alter the power which was granted. This power shall not apply if the trust has an inclusion ratio of zero for generation-skipping transfer tax purposes. Jim shall not have a general power of appointment over any part of the trust estate unless such power is specifically granted to Jim by the Independent Trustee pursuant to this subsection.

(e) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon Jim's death. Upon termination of the trust, the Trustee shall distribute the balance of the trust estate as follows:

(i) Pursuant to General Testamentary Power of Appointment. This paragraph (i) shall apply if, but only if, the Independent Trustee grants Jim a general testamentary power of appointment pursuant to subsection (d) above and the Independent Trustee has not revoked the grant of that general power prior to the date of Jim's death. In that event, if Jim validly exercises such general testamentary power of appointment, the Trustee shall distribute so much of the trust estate then remaining as is validly appointed by Jim pursuant to such power in accordance with the terms of such appointment.

(ii) Special Testamentary Power of Appointment. This paragraph (ii) shall apply to so much of the trust estate then remaining as is not distributed pursuant to paragraph (i) above. The Trustee shall distribute the trust estate to such one or more individuals and entities, in such amounts and proportions and upon such terms and conditions, as Jim appoints by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, Jim may not appoint to Jim, Jim's estate, Jim's creditors, or creditors of Jim's estate.

(iii) Alternative Disposition. The remaining and unappointed trust estate shall be held in trust or distributed as follows:

(1) If one or more of Jim's Descendants are then living, the Trustee shall divide the trust estate into separate equal shares, one for each then living Child and one for the then living Descendants, collectively, of each deceased Child with one or more Descendants then living. The Trustee shall administer a share for each Child in a separate trust for the primary benefit of the Child and for the Child's Descendants pursuant to Section 3.2 hereof. The Trustee shall administer a share for the Descendants of each deceased Child pursuant to Section 3.3 hereof.

(2) If none of Jim's Descendants is then living, the trust estate shall be administered or distributed in accordance with Section 3.4 hereof.

3.2 Trust for Child. All property directed to be administered in a separate trust for a Child under this Section 3.2 shall be administered and distributed for the Child's benefit upon the following terms:

(a) Distributions to Child. The Trustee may distribute to the Child so much of the net income and principal of the trust as the Trustee deems necessary to provide for the Child's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Child's standard of living at the creation of the trust.

(ii) The Child is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Child's needs, any other income or resources known upon reasonable inquiry by it to be available to the Child for these purposes.

(iv) Settlor's intention to enable or assist each Child to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Child's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Child's motivation to provide for her own needs in life.

(b) Distributions to Child's Descendants. The Trustee may distribute to the Child's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Child, acting in the Child's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of the Descendants of the Children, in such amounts and proportions and upon such terms and conditions, as the Child shall direct; provided that the Child shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Child. This power of appointment may be exercised subject to such terms and conditions as the Child shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.2(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon the death of the Child. Upon termination, the Trustee shall distribute the trust estate then remaining, or any part thereof, to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Child shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Child may not appoint to the Child, the Child's creditors, estate, or creditors of the Child's estate. The trust property not appointed by the Child in accordance with this special power of appointment shall be administered by the Trustees for the Child's then living Descendants pursuant to Section 3.3 hereof. If there are no Descendants of the Child then living, the Trustee shall distribute the remaining trust estate to Jim's then living Descendants, Per Stirpes. If any property is distributable to a person for whose benefit a trust which was established under this Trust Agreement is then being administered, the property shall be added to that trust and administered according to its terms. If no Descendant of Jim is then living, the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.3 Trusts for Descendants. The Trustee shall divide property which is to be administered under this Section 3.3 for the Descendants of a deceased Child, among such

Descendants, Per Stirpes. The Trustee shall administer each share created for a Descendant of a deceased Child (the "Beneficiary") in a separate trust for the Beneficiary's benefit upon the following terms:

(a) Distributions. The Trustee shall distribute to the Beneficiary so much of the net income and principal of the trust as the Trustee deems necessary for the Beneficiary's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Beneficiary's standard of living at the creation of the trust.

(ii) The Beneficiary is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Beneficiary's needs, any other income or resources known upon reasonable inquiry by it to be available to the Beneficiary for these purposes.

(iv) Settlor's intention to enable or assist each Beneficiary to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Beneficiary's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Beneficiary's motivation to provide for his or her own needs in life.

(b) Distributions to Beneficiary's Descendants. The Trustee may distribute to the Beneficiary's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in

life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Beneficiary, acting in the Beneficiary's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of Jim's Descendants in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall direct; provided that the Beneficiary shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Beneficiary. Furthermore, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. This power of appointment may be exercised subject to such terms and conditions as the Beneficiary shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.3(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate at the death of the Beneficiary. Upon termination, and except as otherwise provided pursuant to Section 3.5 hereof, the Trustee shall distribute the trust estate then remaining, or any part thereof to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. The trust property not effectively appointed by the Beneficiary in accordance with this special power of appointment or pursuant to Section 3.5 hereof shall be distributed, Per Stirpes, to: the Beneficiary's Descendants living at the termination of the trust; or if there are no such Descendants then living, to the then living Descendants of the Child who was the parent of the Beneficiary; or if there are no such Descendants then living, to Jim's then living Descendants. If any property is distributable under this subsection to a Child, such property shall be added to the Child's Trust and administered pursuant to the terms of Section 3.2. If any property is distributable under this subsection to a Descendant of Jim (other than a Child), such property shall be administered in trust for such Descendant's benefit pursuant to the terms of this Section 3.3. If no Descendant of Jim is then living,

the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.4 Contingent Distribution. If Jim and Jim's Descendants are all are deceased and no other disposition of the trust estate is called for in this Trust Agreement, the trust estate then remaining shall be distributed to those persons other than creditors and Settlor who, under the laws of Texas in force at that time, would have taken the personal property of Jim had he died intestate, a single person without Descendants, domiciled in the State of Texas, the moment after the event causing the distribution hereunder, the shares and proportions of taking to be determined by Texas laws.

3.5 General Power of Appointment for Certain Beneficiaries.

(a) Except as provided in subsection (c) below, any provision of this Trust Agreement to the contrary notwithstanding, at the death of any individual ("such beneficiary") at whose death the generation-skipping transfer tax would, but for the provisions of this section, be applicable with respect to any trust created under this Trust Agreement, the Trustees shall pay out of the principal of such trust such amount as such beneficiary, by express provision referring to this Trust Agreement and this power of appointment in his or her will, appoints, to or among such beneficiary's creditors, up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless such beneficiary's will otherwise provides by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of such trust over which such power is exercisable. The foregoing provisions of this section shall be effective only if the Trustees make a determination that the generation-skipping transfer tax would not be applicable with respect to the amount of such trust over which such power is exercisable. As used in this section, the term "Net Death Taxes" shall mean "the aggregate death taxes (including, without limitation, federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to the estate of such beneficiary."

(b) If under the will of any individual or individuals and/or any other trust instrument or instruments, such beneficiary has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (a) above, the amount such beneficiary may appoint under subsection (a) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of death of such beneficiary, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers together shall be no greater than the amount otherwise appointable under subsection (a) above.

(c) The provisions of this section shall not apply to the trust administered for Jim under Section 3.1.

3.6 Postponement of Distribution. Upon termination of any trust established hereunder, if any property is distributable to a beneficiary who is then under age twenty-five (25), or who, because of age, physical or mental weakness, or for any other reason is, in the sole discretion of the Trustee, unable to manage the property, the Trustee shall retain such property in a separate trust for the benefit of that beneficiary, until he or she attains age twenty-five (25) and in the sole discretion of the Trustee becomes able to manage the property. At that time, the remaining trust property shall be distributed to the beneficiary and the separate trust shall terminate. During the term of the trust, the Trustee shall distribute to the beneficiary so much of the net income and principal as the Trustee deems necessary to provide for the beneficiary's health, support, maintenance and education. If the beneficiary dies before the termination of the trust, the then remaining trust estate shall be distributed to the beneficiary's estate.

ARTICLE IV

PROVISIONS AFFECTING DISTRIBUTION

4.1 Withdrawal Right. Jim shall have the right, following a contribution to Jim's trust, to make a withdrawal in accordance with the provisions of this section unless the transferor indicates otherwise when making the transfer. A separate withdrawal right shall attach to each separate contribution of properties to Jim's trust. If a transferor is married at the time of contribution to the Trustee, then solely for purposes of the withdrawal rights granted in this Section 4.1, unless the transferor notifies the Trustee in writing to the contrary, such contribution shall be treated as two separate contributions having been made one-half (1/2) by the transferor and one-half (1/2) by the transferor's spouse, regardless of whether the property contributed is community property and regardless of whether they elect to treat such contribution as having been made one-half by each of them for Federal gift tax purposes. Any person making a contribution to Jim's trust may give the Trustee written instructions that no withdrawal right is to be granted, or that alternative withdrawal rights are to be granted with respect to the contribution being made.

(a) Amount That May Be Withdrawn. When a contribution is made, Jim may withdraw the lesser of the following amounts:

(i) the maximum present interest exclusion amount permitted, under Section 2503(b) of the Code, or any similar succeeding statute (such amount being \$12,000 at the date of execution of this Trust Agreement), less the cumulative value of all previous known gifts to or for the benefit of Jim by the same transferor during the same calendar year which would qualify for the present interest exclusion; or

(ii) the remainder determined by subtracting Jim's cumulative rights of withdrawal with respect to any other gifts from any transferor that are either

currently outstanding or that have previously lapsed (but not including the present right of withdrawal) during the same calendar year from the greater of (1) Five Thousand Dollars (\$5,000), or (2) Five Percent (5%) of the total value of Jim's trust determined as of the date the current withdrawal power is to lapse (such value may be estimated by the Trustee), or (3) any greater withdrawal power, the lapse of which would not constitute a release of such power under Sections 2041(b)(2) and 2514(e) of the Code or any similar subsequent statute; or

(iii) the value of the contribution that is subject to the withdrawal right.

(b) Withdrawal Period and Notice. Unless directed to the contrary by the transferor, the Trustee shall promptly provide Jim with written notice of the date of the contribution, the name of the transferor, the value of the properties contributed, and the value of Jim's withdrawal right. Withdrawals may be made at any time for a period of thirty (30) days following Jim's receipt of the notice of the existence of the withdrawal right. During any period that Jim lacks legal capacity, Jim's guardian or other legal representative, other than Settlor, may exercise Jim's withdrawal right on Jim's behalf. If Jim does not exercise the withdrawal right before the expiration of that period, the unexercised right shall lapse. For purposes of this section, the term "contribution" means any cash or other property which is transferred to the Trustee as part of the trust estate. The value of any contribution to the trust estate shall be its value for federal gift tax purposes.

(c) Payment of Withdrawal Amount. If Jim exercises his withdrawal right, payment of the amount due shall be made in cash immediately upon receipt by the Trustee of a demand in writing from Jim or his guardian or other legal representative, other than Settlor. Upon the exercise of a withdrawal right, payment shall be made, first, from any gifts made to Jim's trust prior to the exercise of such withdrawal right, but during the same calendar year in which the withdrawal right is exercised, and shall be charged against the trust. Should such gift or gifts not consist of sufficient cash to satisfy the exercised withdrawal right, the Trustee shall use other liquid assets of Jim's trust for such purpose. Should Jim's trust not contain sufficient liquid assets to satisfy an exercised withdrawal right when made, the Trustee shall borrow funds in order to satisfy the demand and shall, if necessary, pledge trust property to secure the loan.

(d) Distributions During Withdrawal Period. If any contribution is made subject to a withdrawal right, the Trustee shall not make any distributions under any other provision of the Trust Agreement which would prevent the Trustee from being able to satisfy fully any unexpired right of withdrawal.

(e) Lapse of Withdrawal Right. In the event Jim allows a withdrawal right granted under this Section 4.1 to lapse with respect to a contribution, or any portion thereof, the Trustee is authorized to characterize such lapse as a "release" for purposes of Section 678(a) of the Code.

4.2 Restriction Upon Alienation. No beneficiary may anticipate, by assignment or otherwise, his beneficial interest in the principal or income of the trust estate; nor may any beneficiary sell, transfer, encumber, or in any way charge his interest in trust income or principal prior to actually receiving it. Neither the income nor the principal of any trust established hereunder shall be subject to any execution, garnishment, attachment, bankruptcy, claims for alimony or support, other legal proceeding of any character, legal sequestration, levy or sale, or in any other event or manner be applicable or subject, voluntarily or involuntarily, to the payment of a beneficiary's debts. The Trustee shall make distributions to or for each beneficiary according to the terms hereof, notwithstanding any purported sale, assignment, hypothecation, transfer, attachment, or judicial process. The provisions of this section shall not limit or detract from any power of appointment or withdrawal right granted to any beneficiary herein.

4.3 Distributions Constitute Separate Property. Settlor intends to make a gift to each beneficiary hereunder of only that portion of the income and principal of each trust that is in fact distributed to such beneficiary. Inasmuch as the amounts actually distributed to a beneficiary hereunder constitute the gift Settlor contemplated making, such distributions, whether they be income or principal, shall constitute the separate property of such beneficiary and not the community property of such beneficiary. Furthermore, it is Settlor's intention that no beneficiary shall have any interest in any undistributed income or principal until the distribution of such income or principal and, accordingly, such undistributed income and principal shall not be deemed the community property of any such beneficiary and that beneficiary's spouse.

4.4 Method of Payment. The Trustee, in its discretion, may make distributions to any beneficiary, including a beneficiary who is under a physical, mental, or legal disability (minority or other), in any one or more of the following ways: directly to the beneficiary without the intervention of any legal guardian or other legal representative; as expenditures in the beneficiary's behalf; to the guardian, committee, conservator, or other similar official acting for the beneficiary; to a custodian for the beneficiary under a Uniform Transfers to Minors Act or Uniform Gifts to Minors Act; to a relative of the beneficiary or to any suitable person with whom the beneficiary resides or who has care or custody of the beneficiary; and in all ways provided by law for gifts or other transfers to or for minors or other persons under disability. In each case, receipt by the beneficiary or other person to whom payment is made or a distribution entrusted shall be a complete discharge of the Trustee with respect thereto. The Trustee may act upon such evidence as it deems appropriate and reliable in determining a beneficiary's ability to manage property and identifying a proper recipient of trust funds hereunder.

4.5 Evidence of Need. In exercising its discretion under this Trust Agreement, the Trustee shall be entitled to rely upon the written certification of a beneficiary or of another as to the nature and extent of a beneficiary's needs, and the adequacy of the beneficiary's resources apart from the trust to meet those needs. The Trustee may, but shall not be required to, make inquiry into the accuracy of the information it receives

4.6 Termination of Small Trust. Notwithstanding any provision of this Trust Agreement to the contrary, the Trustee may at any time terminate any trust when in its judgment the trust is so small that it would be inadvisable or uneconomical to continue the trust administration. In the event of termination, the Trustee shall distribute the trust to the income

beneficiaries of the trust determined at the time of distribution in the proportions to which they are entitled to receive income. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes. Distribution of trust funds in the manner herein provided shall relieve the Trustee of any further responsibility with respect to such funds. This section shall not apply to a Trustee with respect to any trust of which such Trustee is a beneficiary, or if Trustee has duty to support the beneficiary or to any Trustee who may be removed and replaced by a beneficiary of the trust unless the successor trustee must be a corporate fiduciary or someone who is not related or subordinate to the beneficiary within the meaning of Section 672(c) of the Code. The provisions of this section shall not limit or detract from any withdrawal right granted to any beneficiary herein.

4.7 Generation-Skipping Transfer Taxes and Payment. It is Settlor's intent that the trusts created hereunder be exempt from Generation-Skipping Transfer Taxes. If, however, the Trustee considers any distribution or termination of an interest or power in a trust to be a taxable distribution (a "Distribution") or a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination or Direct Skip. In the case of a Distribution, the Trustee may increase the amount to be distributed by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part by reason of property held in trust under a Settlor's will or codicil, and in part by reason of other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the Distribution, Termination, or Direct Skip hereunder, taking into consideration deductions, exemptions, credits and other factors which the Trustee deems appropriate. The Trustee may, but need not make any equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions or Terminations or Direct Skips.

ARTICLE V

THE TRUSTEE

5.1 Resignation of Trustee. The Trustee may resign as to any one or more of the trusts created hereunder by giving written notice to Settlor, if living; otherwise to the current income beneficiary of the trust.

5.2 Appointment and Succession of Trustees.

(a) Generally.

(i) Family Trustee. Jim is the initial Family Trustee of all trusts created hereunder. If Jim ceases to act as Family Trustee, or if any successor Family Trustee fails or ceases to act, Jim may appoint a successor Family Trustee within thirty (30) days of a vacancy arising. If Jim is deceased or if Jim otherwise fails to appoint a successor, GRANT JAMES SCOTT, III is appointed as successor Family Trustee. If GRANT JAMES SCOTT, III fails or ceases to act as Family Trustee, or if any other Family Trustee fails or ceases to act, and a successor is not appointed by Jim as provided above, JOHN WILLIAM HONIS is appointed as successor Family Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Family Trustee, and a successor is not appointed by Jim as provided above, the Family Trustee last serving shall appoint a successor Family Trustee. If a successor Family Trustee is not appointed within sixty (60) days of a vacancy arising, the successor Family Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(ii) Independent Trustee. GRANT JAMES SCOTT, III is appointed as the initial Independent Trustee and shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee wherein GRANT JAMES SCOTT, III accepts the trust and the position of Independent Trustee. If GRANT JAMES SCOTT, III, fails or ceases to act, or if any other Independent Trustee fails or ceases to act, Jim may appoint a successor within thirty days (30) of the vacancy arising; provided that Jim shall not serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of Section 672(c) of the Code. If a successor is not so appointed, JOHN WILLIAM HONIS is appointed Independent Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Independent Trustee, and a successor is not appointed by Jim as provided above, the Independent Trustee last serving may appoint the successor Independent Trustee. If a successor Independent Trustee is not so appointed within sixty (60) days of a vacancy arising, a successor Independent Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(iii) Administrative Trustee. COMMONWEALTH TRUST COMPANY is the initial Administrative Trustee. If COMMONWEALTH TRUST COMPANY fails or ceases to serve, Jim may appoint a successor Administrative Trustee within thirty days (30) of the vacancy arising. If a successor is not so appointed, the Family Trustee may appoint a successor Administrative Trustee within sixty (60) days of the vacancy arising. If a successor is not so appointed, a successor shall be appointed in the same manner as provided for the Family Trustee under subsection (a) above. The selection of the Administrative Trustee can have a substantial impact on the situs of the trust, which should be considered in appointing a successor Administrative Trustee.

Notwithstanding any other provision in the Trust Agreement to the contrary, no Administrative Trustee may be appointed under this paragraph if the appointment of such Administrative Trustee would change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust

The Administrative Trustee shall act in a fiduciary capacity but shall not be a Trustee or co-Trustee except to the extent and for the limited purposes described in Section 6.2. Accordingly, no reference in this Trust Agreement to the "Trustee" or "co-Trustee" shall include, or be deemed to refer to, the Administrative Trustee. Notwithstanding the foregoing, the same individual or bank or trust company may serve simultaneously as both a Trustee or co-Trustee and as Administrative Trustee for any trust created hereunder. The initial Administrative Trustee and each successor may resign at any time and may be removed at any time by the Family Trustee.

For services rendered as Administrative Trustee under this Agreement, any Administrative Trustee shall be entitled to reasonable compensation for his, her or its services, as well as be entitled to reimbursement for all expenses reasonably incurred in performing his, her or its duties hereunder. Any Administrative Trustee may receive (or retain) payment in accordance with its schedule or rates as published from time to time and as in effect at the time such compensation becomes payable, unless otherwise agreed in writing with the Family Trustee.

No termination fee shall be charged upon removal or resignation of an Administrative Trustee. However, such Administrative Trustee shall be entitled to reasonable compensation for time and materials for additional services over and above Administrative Trustee's normal duties in transferring trust assets and administration of the trust to the new Administrative Trustee.

(b) Successor Trustee. If a named or appointed successor Trustee fails or ceases to serve and no other successor is named or appointed pursuant to subsection (a) hereof, a majority in number of the beneficiaries to whom the Trustee is to or may distribute income at that time may appoint the successor Trustee, and each shall have a reasonable time in which to act. If a successor Trustee is not so appointed, any beneficiary of a trust may secure the appointment of a successor Trustee by a court of competent jurisdiction at the expense of the trust estate.

(c) Manner of Appointment; Permissible Trustees. Appointment, other than by a court, shall be by a signed, acknowledged instrument delivered to the appointed Trustee. An appointment may be made before a vacancy arises, to become effective in the event of the vacancy with the last such instrument to control. The successor Trustee appointed by Jim or a Trustee may be one or more persons and/or entities; provided that neither Settlor nor Jim shall serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of

Section 672(c) of the Code. Any other successor Trustee shall be a trust company or a bank in the United States having trust powers with not less than Fifty Million Dollars unimpaired capital and surplus. A successor Trustee shall have a reasonable time after a vacancy occurs in which to accept the office by signed, acknowledged instrument delivered to those making the appointment, if living, or to the then current beneficiaries to whom the Trustees are to or may make distributions.

5.3 Removal of Trustee. Jim shall have the power to remove the Trustee of any trust created hereunder, without cause. If Jim is deceased or if Jim is incapacitated within the meaning of Section 5.11 hereof, the primary beneficiary (or, if more than one, a majority of the primary beneficiaries) of a trust may remove any Trustee without cause. Removal shall be effected by delivering to the Trustee a signed acknowledged instrument which is effective thirty (30) days from its receipt (unless a shorter period is agreed to by the Trustee).

5.4 Succession of Corporate Trustee. If any corporate Trustee before or after qualification changes its name, becomes consolidated or merged with another corporation, or otherwise reorganizes, any resulting corporation which succeeds to the fiduciary business of such corporate Trustee shall become a Trustee hereunder in lieu of such corporate Trustee.

5.5 Trustee's Fees. Jim and Jim's Descendants shall not receive a fee for serving as Trustee. Any other Trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities, taking into account the value and nature of the trust estate and the time and work involved. The Trustee shall be reimbursed for reasonable costs and expenses incurred in connection with its fiduciary duties hereunder.

5.6 Bond. The Trustee shall not be required to furnish bond or other security.

5.7 Liability of Trustee.

(a) Generally. A Trustee other than a corporate trustee shall only be liable for willful misconduct or gross negligence, and shall not be liable for breach of fiduciary duty by virtue of mistake or error in judgment.

(b) Administrative Trustee. Every act done, power exercised or obligation assumed by the Administrative Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Administrative Trustee acting in a fiduciary capacity and not otherwise, and every person, firm, corporation or other entity contracting or otherwise dealing with the Administrative Trustee shall look only to the funds and property of the trust fund for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Administrative Trustee shall not be individually liable therefor even though the Administrative Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of the trust fund.

The decision of the Administrative Trustee hereunder with respect to the exercise or nonexercise by such Administrative Trustee of any power hereunder, or the time or

manner of the exercise thereof, made in good faith, shall fully protect such Administrative Trustee and shall be final, conclusive and binding upon all persons interested in the Trust or the income therefrom. To the extent permitted under applicable law, the Administrative Trustee acting hereunder shall not be responsible for any error of judgment or mistake of fact or law, absent bad faith or willful misconduct.

The Administrative Trustee shall be liable hereunder only for the Administrative Trustee's bad faith or willful misconduct proved by clear and convincing evidence in the court then having primary jurisdiction over the trust. The Administrative Trustee shall not be personally liable for making any delegation that is authorized under this Agreement, nor for any action taken without the Administrative Trustee's express agreement, nor for any failure to act absent willful misconduct. The Administrative Trustee shall not be liable for relying absolutely on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Administrative Trustee by any entity in which the trust fund holds an ownership interest; and (ii) the opinions of counsel or any accountant to any trust.

Prior to the death of Settlor, the Administrative Trustee shall be under no duty to inform any person having a beneficial interest in any trust created hereunder of the existence of any such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust. Following the death of Settlor, the Administrative Trustee shall be under no duty to inform any person, other than the primary beneficiary of each trust hereunder, having a beneficial interest in any trust created hereunder of the existence of such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust.

While not required, the same procedure used to settle the Administrative Trustee's accounts may also be employed to obtain the conclusive consent by the beneficiaries to the Administrative Trustee's specific conduct of any other particular matter. The Administrative Trustee and each former Administrative Trustee shall be indemnified and held harmless by each trust created hereunder against any threatened, pending or completed action, claim, demand, suit or proceeding, whether civil, criminal, administrative or investigative, falling within the exculpatory provisions of this Section or to which the Administrative Trustee is made a party, or threatened to be made a party, by reason of serving as Administrative Trustee if the Administrative Trustee acted in good faith, subject to the limitations set forth above. Such indemnification shall include expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually incurred by the Administrative Trustee in connection with such action, claim, demand, suit or proceeding. The cost of indemnification shall be apportioned against the various trusts created hereunder as the Administrative Trustee reasonably considers appropriate, taking into account the nature of the claims involved.

The Administrative Trustee shall not have any fiduciary responsibility to observe, monitor or evaluate the actions of any Trustee or other fiduciary and shall not be liable to any party for the failure to seek to attempt to prevent a breach of trust, or failure to remedy a breach of trust, or in a recurring situation to request instructions from a court

having jurisdiction over the trust. In no event shall any Administrative Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

Any Successor Administrative Trustee shall be deemed vested with all the duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Administrative Trustee. No Successor Administrative Trustee shall be personally liable for any act or failure to act of any predecessor Administrative Trustee or any other Trustee. The Successor Administrative Trustee may accept the account rendered and the property delivered by the predecessor Administrative Trustee as a full and complete discharge to the predecessor Administrative Trustee, without incurring any liability for so doing.

5.8 Predecessor Fiduciary. No successor Trustee shall be obligated or required to inquire into the acts, omissions, or accounts of any prior trustee or to bring any action against any prior trustee to compel redress of any breach of trust or for any other reason. In no event shall a successor Trustee be liable for any act or omission of any prior Trustee. A successor Trustee may accept the account rendered and the property received from a prior Trustee as a full and complete discharge to the prior Trustee without incurring any liability for doing so. A successor Trustee shall have all of the powers and discretions conferred in the governing instrument upon the original trustee.

5.9 Periodic Accounting. The Trustee may from time to time render an informal account, statement or report of its administration of each separate trust hereunder to each beneficiary who during the period covered by the account was entitled absolutely to a current payment of income or principal from the trust, or, if there is no such beneficiary, to such beneficiaries who are entitled absolutely or in the discretion of the Trustee to a payment of income or principal from the trust. If any beneficiary or legal representative or parent of a beneficiary who is not of full age or legal capacity to whom any such account is rendered shall not, within ninety (90) days after the mailing of such statement, have notified the Trustee in writing of its disapproval of the same, such statement shall be deemed to be approved

No Administrative Trustee shall be required to file or render periodic accounts in or to any court other than for good cause shown. No Administrative Trustee shall be required to give any bond.

Within 90 days following the close of each calendar year, if information is available, and if not within 30 days after it is delivered to the Administrative Trustee, and within 90 days after the removal or resignation of the Administrative Trustee, the Administrative Trustee may deliver an accounting to each primary beneficiary. The accounting shall be a written accounting of the trusts hereunder during such year or during the period from the close of the last preceding year to the date of such removal or resignation and shall set forth all investments, receipts, distributions, expenses and other transactions of each such trust and show all cash, securities, and other property held as a part of each such trust at the end of such year or as of the date of such removal or resignation, as the case may be. The accountings referred to in this Section shall be deemed to be an account stated, accepted and approved by all of the beneficiaries of each trust for which an

accounting is rendered, and the Administrative Trustee shall be relieved and discharged, as if such accounting had been settled and allowed by a final judgment or decree of a court of competent jurisdiction, unless protested by written notice to the Administrative Trustee, within 60 days of mailing thereof, by the person designated to receive such accounting. The Administrative Trustee shall have the right, at the expense of the trust, to apply at any time to a court of competent jurisdiction for judicial settlement of any account of the Administrative Trustee whether or not previously settled as herein provided or for the determination of any question of construction or for instructions. In any such action or proceeding it shall be necessary to join as parties solely the Administrative Trustee and the Settlor (although the Administrative Trustee may also join such other parties as it may deem appropriate), and any judgment or decree entered therein shall be conclusive and binding on all persons at any time interested in the trust.

5.10 Beneficiary under Disability. A parent, custodian, or guardian of any beneficiary who is under the disability of minority or, in the Trustee's opinion, any other legal, physical, or mental disability, may, in carrying out the provisions of this Trust Agreement, act and receive notice in the beneficiary's stead, and sign any instrument for the beneficiary.

5.11 Incapacity of Individual Trustee. In the event a Trustee other than a corporate Trustee becomes unable to discharge his duties as Trustee hereunder by reason of accident, physical or mental illness or deterioration, or other cause, and does not resign, then upon certification by two medical doctors affirming that each has examined the Trustee and that each has concluded, based on such examination, that he is unable to discharge his duties hereunder, the Trustee shall cease to serve, as if he had resigned, effective the date of the certification.

ARTICLE VI

TRUST ADMINISTRATION

6.1 General Powers. Subject to any limitation stated elsewhere in this Trust Agreement, and the division of powers contained in Section 6.2, the Trustee shall have, in addition to all powers granted to trustees by the common law and by Delaware statutes, as amended from time to time, the following powers with respect to each trust established hereunder:

(a) Retain Property. To retain any property received from any source, including any corporate Trustee's securities, regardless of lack of diversification, risk, or nonproductivity.

(b) Invest. To invest the trust estate in any kind of property, including common trust funds administered by a corporate Trustee or by others, without being limited by any statute or any rule of law dealing with the character, risk, productivity, diversification of, or otherwise concerning, investments by trustees.

(c) Sell. By public offering or private negotiation, to sell, exchange, assign, transfer, or otherwise dispose of all or any real or personal trust property and give options

for these purposes, for such price and on such terms, with such covenants of warranty and such security for deferred payment as the Trustee deems proper. To partition between the trust and any other owner, as the Trustee deems proper, any property in which the trust owns an undivided interest.

(d) Lease. To lease trust property for terms within or extending beyond the term of the trust, for any purpose.

(e) Real Estate. To operate, maintain, repair, rehabilitate, alter, erect, improve, or remove any improvements on real estate; to subdivide real estate; to grant easements, give consents, and enter into contracts relating to real estate or its use; and to release or dedicate any interest in real estate.

(f) Borrow. To borrow money for any purpose either from the banking department of any corporate Trustee or from others; to encumber or hypothecate trust property by mortgage, deed of trust, or otherwise; and to maintain, renew, or extend any indebtedness upon such terms as the Trustee deems appropriate.

(g) Loans. To lend money to any person or entity, including, but not limited to, a beneficiary hereunder, but not including a Settlor or a Trustee (other than a beneficiary serving as Trustee) hereunder, or a spouse of theirs, upon such terms and with such security as the Trustee deems advisable.

(h) Conserve Estate. To take any action to conserve the trust estate.

(i) Litigation. To commence or defend at the expense of the trust such litigation with respect to the trust estate as the Trustee deems advisable.

(j) Claims. To collect, pay, contest, compromise, settle, renew, or abandon any claims or demands of or against the trust estate without court authority on whatever terms the Trustee deems advisable.

(k) Abandon Property. To abandon any property or interest in property belonging to the trust when, in the Trustee's discretion, such abandonment is in the best interest of the trust and its beneficiaries.

(l) Documents. To execute contracts, notes, conveyances, and other instruments containing covenants, representations, or warranties binding upon and creating a charge against the trust estate or containing provisions excluding personal liability, or any other written instrument of any character appropriate to any of the powers or duties conferred upon the Trustee.

(m) Agents. To employ attorneys, auditors, investment advisors, depositaries, and agents with or without discretionary powers, to employ a bank with trust powers as agent for the purpose of performing any ministerial duties incident to the administration, and to pay all expenses and fees so incurred.

(n) Securities. To engage in all actions necessary to the effective administration of securities including, but not limited to, the authority to: vote securities in person or by proxy; engage in a voting trust or voting agreement; and consent to or participate in mergers, consolidations, sales of assets, recapitalizations, reorganizations, dissolutions, or other alterations of corporate structure affecting securities held in the trust.

(o) Nominee. To hold securities and other property in bearer form or in the name of a trustee or nominee with or without disclosure of any fiduciary relationship.

(p) Additional Property. To receive additional property from any source and add it to the trust estate.

(q) Insurance. To carry insurance of such kinds and in such amounts as the Trustee deems advisable, except for insurance on the life of a Settlor, the Trustee, or a spouse of theirs. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of Settlor, the Trustee, or a spouse of theirs.

(r) Business Powers.

(i) In General. To engage in any lawful business including, but not limited to, the power to continue at the risk of the trust estate the operation of any business which may become a part of the trust estate, and to sell, liquidate, or otherwise terminate any business interest, including, but not limited to, the fulfillment of any agreement for the disposition of any such business interest.

(ii) Closely Held Businesses. This trust may be funded with, or subsequently purchase or otherwise acquire, securities or other financial interests in one or more closely held businesses (each of which is hereinafter referred to as the "business").

(1) Exoneration from Liability. It is realized that the business may not be the type of investment in which fiduciaries would normally invest estate or trust funds. Nonetheless, the Trustees shall incur no liability for any loss which may be sustained by reason of the retention, operation or sale of the business or the exercise of any power conferred upon the Trustees with respect to the business.

(2) Management Powers. The Family Trustee shall have the exclusive duty to deal with and manage the business. In addition to any power granted by law or elsewhere in this document, the Family Trustee shall have the following powers:

(A) To retain and continue the business or any interest therein for such time as the Family Trustee considers advisable;

(B) To operate or participate in the operation of the business in the form of a corporation, limited liability company, partnership or proprietorship;

(C) To direct, control, supervise, manage, operate or participate in the operation of the business; to serve as an officer and director of the business; and to receive from the business compensation for his services in addition to his compensation as a Family Trustee;

(D) To delegate all or any part of his power to supervise, manage or operate the business to such persons as he may select, including any director, officer or employee of the business;

(E) To engage, compensate and discharge such managers, employees, agents, attorneys, accountants, consultants or other representatives as he considers advisable, including anyone who may be a beneficiary or fiduciary of this Trust;

(F) To invest or employ in the business, or to use as collateral for loans to the business, such other estate or trust funds as he considers advisable;

(G) To sell, liquidate or otherwise dispose of all or any part of the business at such time or times, for such prices and upon such terms and conditions as he considers advisable, and to sell the business to anyone who is a beneficiary or a fiduciary of this Trust; and

(3) Exclusion from Powers. Neither Commonwealth Trust Company nor any successor Administrative Trustee shall have any power, duty and/or responsibility in connection with the operation, control, supervision, management and participation of the business.

(s) Income and Principal. To determine, in accordance with the provisions of Delaware law, what constitutes income and principal of the trust estate, the manner in which expenses and other charges shall be allocated between these accounts, and whether or not to establish reserves for depreciation or depletion, and to add undistributed income to principal.

(t) Tax Elections. To exercise any tax option or election permitted by law as the Trustee determines, in its sole discretion, even though the effect is to treat beneficiaries hereunder differently, or to favor some at the expense of others. The Trustee may, but need not, make such compensating adjustments among beneficiaries with respect thereof as it deems appropriate considering the nature of the tax election and the amounts involved.

(u) Reliance. To rely upon any notice, certificate, affidavit, or other document or evidence believed by the Trustee to be genuine and accurate, in making any payment or distribution. The Trustee shall incur no liability for a disbursement or distribution made in good faith and without actual notice or knowledge of a changed condition or status affecting any person's interest in the trust or any other matter.

(v) Commingling. To commingle and invest as one fund, or make joint investments with, the principal of two or more separate trusts established hereunder, with each trust having an undivided interest therein.

(w) Division and Distribution. To make all allocations, distributions, or divisions contemplated by this Trust Agreement; to allocate, distribute and divide different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or trusts, in cash or in kind, or both, without regard to the income tax basis of specific property allocated to any beneficiary or trust, even though shares may as a result be composed differently, and to determine the value of any property so allocated, divided or distributed.

(x) Withholding of Distribution. To withhold from distribution all or any part of the trust property as long as the Trustee, in its discretion, determines that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the trust.

(y) Mineral Powers. To retain or acquire interests in oil, gas, or other mineral resources; to execute as to those interests any agreements, assignments, contracts, deeds, grants or leases for any term (even though the term may extend beyond the termination of the trust); to manage, control, operate, explore, mine, develop, or take any action for the production, recovery, sale, treatment, storage, or transportation of any such interest; to drill, rework, or recomplete wells of any type; to conduct or participate in secondary recovery operations; to enter into agreements for pooling or unitization; and to install, operate, or participate in the operation of any plant, mine, or other facility.

(z) Environmental Hazards. To use and expend the trust income and principal to (i) take all appropriate action to prevent, identify, or respond to actual or threatened violations of any environmental law or regulation for which the Trustee may have responsibility, including the authority to conduct environmental assessments, audits, and site monitoring to determine compliance with any environmental law or regulation; (ii) take all appropriate remedial action to contain, cleanup, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; and (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards.

(aa) Miscellaneous Powers. Generally to do and perform any and all acts, things, or deeds which, in the discretion of the Trustee, may be necessary or proper for the protection, preservation, and promotion of the trust properties and estate.

6.2 Division of Powers. The powers and duties granted under this Trust Agreement shall be divided among the Trustees as follows:

(a) Administrative Trustee. The Administrative Trustee shall have the following exclusive duties, which shall all be carried out in the State of Delaware or such other jurisdiction as the Trustee shall, from time to time, select as the situs of the trust:

(i) To maintain bank accounts, brokerage accounts and other custody accounts which receive trust income and contributions and from which trust expenditures and distributions are disbursed.

(ii) To maintain storage of tangible personalty and evidence of intangible trust property.

(iii) To maintain trust records.

(iv) To maintain an office for Trustee meetings and other trust business.

(v) To originate, facilitate and review trust accountings, reports and other communications with the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vi) To respond to inquiries concerning the trust from the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vii) To execute documents with respect to trust account transactions.

(viii) To retain accountants, attorneys, investment counsel, agents and other advisers in connection with the performance of its duties under this Section 6.2.

(b) Independent Trustee. The Independent Trustee shall have all of the powers and duties specifically assigned to the Independent Trustee under this Trust Agreement. These powers may only be exercised by the Independent Trustee.

(c) Family Trustee. The Family Trustee shall possess and exercise all of the powers and duties of the Trustee not specifically granted to the Administrative Trustee or the Independent Trustee under this Trust Agreement, including those specifically assigned to the Family Trustee. Without limiting the generality of the foregoing, the Family Trustee shall exercise all Trustee authority and have all Trustee responsibility with respect to the investment of the trust estate. If there is no Family Trustee serving,

however, all of the powers and duties of the Trustee, including those assigned to the Family Trustee, shall be exercised and discharged by the Independent Trustee.

6.3 Merger of Trusts. If at any time a Trustee of any trust created pursuant to this Trust Agreement shall also be acting as Trustee of any other trust created by trust instrument or by will for the benefit of the same beneficiary or beneficiaries and upon substantially the same terms and conditions, the Trustee is authorized and empowered, if in the Trustee's discretion such action is in the best interest of the beneficiary or beneficiaries of the trust created hereunder, to transfer and merge all of the assets then held under such trust created pursuant to this Trust Agreement to and with such other trust and thereupon and thereby to terminate the trust created pursuant to this Trust Agreement. The Trustee is further authorized to accept the assets of the other trust which may be transferred to the Trustee of the trust created hereunder and to administer and distribute such assets and properties so transferred in accordance with the provisions of this Trust Agreement. If the component trusts differ as to contingent beneficiaries and the contingency occurs, the funds may be distributed in such shares as the Trustee, in the Trustee's sole discretion, shall deem necessary to create a fair ratio between the various sets of remaindermen. If any trust created in this Trust Agreement is merged with any trust created under any other instrument, such merged trust shall not continue beyond the date on which the earliest maximum term of the trusts so merged would, without regard to such merger, have been required to expire. Settlor further directs that, as to any property at any time a part of any trust estate (including a merged trust) as to which under the laws of any state applicable to said property that trust is required to be terminated at any time prior to its normal termination date, the trust as to that particular property shall terminate at the time required by the laws of said state.

6.4 Certain Powers and Rights Limited. Settlor intends that the trust created under Section 3.1 hereof shall not be included in Jim's gross estate for estate tax purposes unless the Independent Trustee grants Jim a general power of appointment pursuant to paragraph 3.1(d). All issues applicable to the trust shall be resolved accordingly.

6.5 GST Inclusion Ratio. If property not having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio equal to zero. If property having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio not equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio not equal to zero.

6.6 Out-of-State Properties. If any trust property is situated in a jurisdiction in which the Trustee is unable or unwilling to act, the Trustee may appoint an ancillary trustee for such jurisdiction and may confer upon the ancillary trustee such powers and discretions, exercisable without court order, to act with respect to such property as the Trustee deems proper. The ancillary trustee shall be responsible to the Trustee for all property it administers. The Trustee

may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.7 Management of Real Property. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof), acting alone, shall make any and all decisions regarding: (i) the acquisition, retention and disposal of real estate; (ii) the operation, maintenance, repair, rehabilitation, alteration, construction, erection, improvement, or removal of any improvements on real estate; (iii) the subdivision of real estate; (iv) the granting of easements, giving of consents, and entering into contracts relating to real estate or its use; (v) the release or dedication of any interest in real estate; and (vi) the payment of taxes, utilities, and maintenance expenses attributable to real estate owned by any trust created hereunder. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof) may, in its discretion, either exercise such powers or appoint an ancillary trustee to exercise such powers. The Trustee may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.8 No Court Supervision. The Trustee shall not be required to qualify before or be appointed by any court; nor shall the Trustee be required to obtain the order or approval of any court in the exercise of any power or discretion.

6.9 Division of Trusts. The Trustee may divide any trust established by this Trust Agreement into two or more separate trusts as provided in this section. Settlor exonerates the Trustee from any liability arising from the exercise or failure to exercise any powers granted herein, provided the Trustee acts in good faith.

(a) Division and Funding of Separate Trusts. The Trustee may divide any trust established by this Trust Agreement, at any time, into two or more separate trusts so that the generation-skipping transfer tax inclusion ratio as defined in Section 2642(a) of the Code for each trust shall be either zero or one. Any such division shall be accomplished in accordance with applicable regulations under Chapter 13 of the Code.

(b) Administration of Separate Trusts. Such separate trusts shall have the identical provisions as the original trust. However, with respect to each separate trust, the Trustee may: (1) make different tax elections, (2) expend principal and exercise any other discretionary powers with respect to such separate trusts differently, (3) invest such separate trusts differently, and (4) take all other actions consistent with such trusts being separate trusts.

(c) Powers of Appointment. The donee of any power of appointment with respect to a trust so divided may exercise such power of appointment differently with respect to the separate trusts created by the division.

6.10 Limitation of Powers. The following limitations, affecting the administration of the trusts created hereunder, apply notwithstanding any other provision of this Trust Agreement. For purposes of this Section 6.10, the term "Settlor" shall include any individual who contributes property to the Trustee to be added to the trust estate.

(a) Support Duty. Distributions from the trust estate shall not be made which discharge, in whole or in part, the personal legal obligations of a Settlor or a Trustee from time to time existing, to support or educate any of the trust beneficiaries. When determining these legal obligations, the existence of this trust and funds made available by it shall not be taken into consideration.

(b) Adequacy of Consideration. No party may, through purchase, exchange, or otherwise, deal with or dispose of the corpus or the income of the trust estate for less than adequate consideration in money or money's worth.

(c) Insurance. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of a Settlor, the Trustee or a spouse of either of them.

(d) Borrow. The Trustee shall not allow a Settlor to borrow trust principal or income, directly or indirectly, without adequate interest or security.

(e) Substitute Property. The Trustee shall not allow a Settlor to reacquire or exchange any property of the trust estate by substituting other property with an equivalent value.

(f) Vote. A Settlor, acting as a Trustee, shall not be entitled to vote, directly or indirectly, shares of stock of a controlled corporation, as defined under Section 2036 of the Code, which is held as part of the trust estate.

6.11 Dealing with Fiduciaries. The Trustee may enter into any transaction with the Trustee or beneficiaries of the trusts created hereunder, acting in their individual or in another fiduciary capacity, or with any person or entity related to the Trustee or a beneficiary in any manner, if such transaction is otherwise authorized under this Trust Agreement. Without limiting the generality of the foregoing authorization, the Trustee may enter into any transaction otherwise authorized hereunder on behalf of any trust created hereunder even though the other party to the transaction is: a trust of which a beneficiary or Trustee under this Trust Agreement is a beneficiary or trustee, including, but not limited to, any trust established by this Trust Agreement; an estate of which a beneficiary or Trustee under this Trust Agreement is a representative or beneficiary; or a business or charitable corporation of which a beneficiary or Trustee under this Trust Agreement is a director, officer, employee, or owner.

ARTICLE VII

IRREVOCABILITY

This Trust Agreement and each of its provisions may not be revoked, amended, or modified.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

8.1 Applicable Law. The trust created under this Trust Agreement shall be deemed a Delaware trust and all matters pertaining to the validity, construction, and application of this Trust Agreement or to the administration of the trust created hereunder shall, in all respects, be governed by the laws of the State of Delaware. However, if the Trustee, in its sole discretion, determines that a change of situs would be beneficial to the purposes of the trust established by this Trust Agreement, the Trustee shall have the discretion and authority to change the situs of any such trust to another state. No change of situs shall be authorized herein, however, which would result in a termination of the trust for federal tax purposes. Furthermore, the Trustee shall not be entitled to change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust. Any proceeding involving the Trust must be brought in the State of Delaware for so long as the situs of the Trust shall be the State of Delaware.

8.2 Perpetuities Provision. The trust created hereunder shall be perpetual to the fullest extent permitted by Delaware law. If the trust created hereunder is deemed to be subject to the law of a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust shall terminate in all events upon the expiration of the longest period the property may be held in trust under this Agreement under the law of such jurisdiction (including any application periods in gross, such as 110 years, 360 years, or 1,000 years); provided, however, that if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this Section shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust is determined with reference to the death of the last survivor of a group of individuals in being upon the date of this Trust Agreement, those individuals shall consist of Jim and Jim's Descendants who are in being on the date of this Trust Agreement. Upon termination of a trust pursuant to the provisions of this Section 8.2, the Trustee shall distribute such trust to its income beneficiaries determined at the time of distribution. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes.

In the event any trust created hereunder owns real property, and if such real property is subject to a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then the Trustee shall take such action as is necessary to avoid termination of the trust with respect to that real property interest including, without limitation, selling the real property or contributing the real property to a business entity in exchange for ownership interests in such entity to be owned by the trust.

8.3 Gestation. A child in gestation who is born alive shall be considered a child in being throughout the period of gestation.

8.4 Survivorship. Any person must survive by thirty (30) days for a gift made in this Trust Agreement which directly or indirectly requires such person's survival of another to be effective.

8.5 Release of Powers and Interests. Any person, including a beneficiary and a Trustee, shall have the power to disclaim, release, or restrict, irrevocably, in whole or in part, any interest, right, power, or discretion granted to such person with respect to any trust by signed instrument delivered to the Trustee, or in any other manner permitted by law. Any person designated or appointed as a Trustee may, prior to accepting the trust, by written instrument decline to accept any right, power, or discretion with respect to the trust and may accept the trust without such right, power, or discretion.

8.6 Powers of Appointment.

(a) Capacity in Which Exercisable. Every power of appointment granted to a beneficiary under this Trust Agreement is exercisable by that beneficiary in the beneficiary's individual capacity, notwithstanding the fact that the beneficiary may also be serving as a Trustee of the trust.

(b) Manner of Appointment. Every power of appointment granted herein: (i) shall be personal to the donee of such power and may not be exercised on behalf of the donee by any other person, including an attorney-in-fact, a guardian, or any other court appointed representative, and (ii) may be exercised in whole or in part and in favor of one or more potential beneficiaries to the exclusion of others. Appointment may be outright or in further trust, with all provisions determined by the donee of the power, and may confer a power of appointment upon the beneficiary or others, if within the constraints imposed by any applicable rule against perpetuities and any other law which is applicable to the appointment.

(c) Exercise of Inter Vivos Power. An inter vivos power of appointment granted in this Trust Agreement may be exercised only by a written instrument, executed and acknowledged by the donee and delivered to the Trustee during the donee's lifetime, which specifically refers to the power of appointment and expresses the intention to exercise it. If no such instrument is delivered to the Trustee during the donee's lifetime, upon the donee's death the Trustee may distribute the property subject to the power in the manner provided in this Trust Agreement for distribution in default of exercise.

(d) Determination of the Exercise of a Testamentary Power. The Trustee may rely upon any instrument admitted to probate as a will or codicil in determining whether a testamentary power of appointment granted herein has been exercised. If no will or codicil is brought to the Trustee's attention within ninety (90) days of a death to indicate the exercise of a testamentary power, the Trustee may distribute the property subject to the power according to the terms herein provided for distribution in default of exercise. The Trustee will be protected from liability for its actions as authorized in this subsection (d), but this subsection does not affect a beneficiary's rights in the property subject to the power of appointment.

(e) Tax Consequences. The exercise of a power of appointment may have important tax consequences. The donee of any power of appointment should consult with counsel before exercising such power of appointment.

8.7 Liability of Third Party. No person paying money or delivering property to the Trustee need see to the application of such money or property. No person dealing with the Trustee need inquire into the propriety of any transaction or the Trustee's authority to enter into and consummate the same.

8.8 Use of Words. As used in this Trust Agreement, the masculine, feminine, and neuter gender, and the singular or plural of any word each includes the others unless the context indicates otherwise.

8.9 Unenforceable Provision. If any provision of this Trust Agreement is unenforceable, the remaining provisions shall be given effect, unless to do so would produce an unreasonable result.

8.10 Titles, Headings, and Captions. All titles, headings, and captions used in this Trust Agreement have been included for administrative convenience only and should not be construed in interpreting this Trust Agreement.

8.11 Counterpart Signatures. This document may be executed in counterparts, and all counterparts so executed shall constitute a single document, notwithstanding that the interested parties are not or may not be signatories to the original or to the same counterpart.

8.12 Trust Name. The trusts established under Article II of this Trust Agreement, collectively, shall be known as the "The Dugaboy Investment Trust".

IN WITNESS WHEREOF, the Settlor, the Family Trustee and the Administrative Trustee have hereunto set their hands on the day and year first above written in multiple originals. The Trustees agree to administer the trust estate in accordance with the terms of this Trust Agreement. The Independent Trustee shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee in accordance with Section 5.2 hereof.

Dana Scott Breault 23 Oct 10
DANA SCOTT BREAULT, Settlor

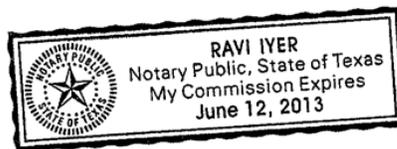
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared DANA SCOTT BREAULT, as Settlor, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 23rd day of October, 2010.

Ravi Iyer

Notary Public



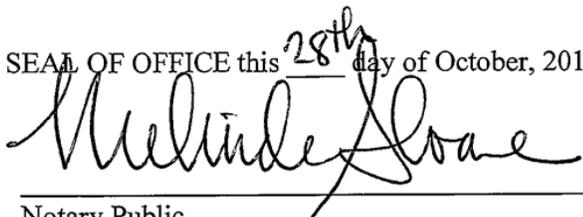


JAMES D. DONDERO, Family Trustee

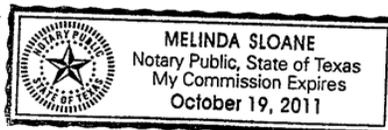
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JAMES D. DONDERO, as Family Trustee, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ^{28th} day of October, 2010.



Notary Public



COMMONWEALTH TRUST COMPANY,
Administrative Trustee

By: Cynthia D M Brown
Name: Cynthia D. M. Brown
Title: President

STATE OF DELAWARE §
 §
COUNTY OF NEW CASTLE §

BEFORE ME, the undersigned authority on this day personally appeared Cynthia D. M. Brown, President, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed as the act of COMMONWEALTH TRUST COMPANY and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 15th day of ~~October~~ November 2010.

Laura M Owens
Notary Public



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EXHIBIT 75

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03006-sgj
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S
FIFTH, SIXTH, AND SEVENTH CLAIMS FOR RELIEF¹**

¹ This Motion to Dismiss is being concurrently filed in Adv. Nos. 21-03003, 21-03007, 21-03006, and 21-03005, Case No. 19-34054-sgj 11, as Plaintiff's assertions and Amended Complaints against all Defendants are identical in material respects.

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Restatement (Second) of Torts § 876 (1979).....17, 18

Restatement (Second) of Torts § 876, comment A.....18

In the alternative to and contingent upon a denial by the Court of Defendants' Motion to Compel Arbitration (which the Court should not deny), Defendants move to dismiss the Fifth, Sixth, and Seventh Claims for Relief in Plaintiff's Amended Complaint for failure to state claims on which this Court could grant relief under Federal Rule of Civil Procedure 12(b)(6), as incorporated into this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure. In filing this Motion to Dismiss, Defendants do not waive any rights to compel arbitration, as set forth in Defendants' Motion to Compel Arbitration.² Defendants show in support as follows:

I. BACKGROUND

A. The Bankruptcy and Rejection of Executory Contracts

1 Highland Capital Management, L.P. ("Plaintiff") filed a voluntary Chapter 11 bankruptcy petition ("Bankruptcy Petition") on October 16, 2019 ("Petition Date") in the United States Bankruptcy Court for the District of Delaware, and venue was subsequently transferred to this Court on December 4, 2019.³ On November 24, 2020, Plaintiff filed its Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") along with its Disclosure Statement, which the Court approved on November 24, 2020.⁴

2. On January 11, 2021, Plaintiff filed its Second Notice of Executory Contracts and Unexpired Leases to be Assumed by the Plaintiff [then, Debtor] Pursuant to the Plan (the

² *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff's complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

³ Order Transferring Venue, Case 19-12239-Css [Doc. 184].

⁴ Case No. 19-34054-sgj11 [Doc. 1476]

“Assumption Notice”).⁵ The Assumption Notice itemized seventy-one (71) executory contracts to be assumed by the Plaintiff, notably including the Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. (the “LPA”). However, on January 21, 2021, the Debtor entered a Withdrawal Notice, rejecting the LPA along with several other executory contracts,⁶ and confirmed on February 1, 2021, that it had withdrawn the LPA from its list of assumed executory contracts.⁷ On February 22, 2021 (the “Rejection Date”), the Court confirmed the Plan, causing the rejection of the LPA.⁸

B. The Limited Partnership Agreement

3. James Dondero (“Jim Dondero”) is the co-founder of Highland Capital (Plaintiff in this Adversary Proceeding), and served as its President and CEO until January 9, 2020.⁹ The Dugaboy Family Trust (“Dugaboy”) is one of Debtor’s Class A limited partners and holds the majority of the Debtor’s Class A limited partnership interests. LPA, Exhibit A. Jim Dondero’s sister Nancy Dondero serves as the Dugaboy Family Trustee.¹⁰ Jim Dondero is a lifetime beneficiary of Dugaboy.¹¹

4. Dugaboy’s explicit authorization to approve compensation for Jim Dondero - and thus bind the Partnership - comes specifically from the LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The *General Partner* and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered

⁵ Case 19-34054-sgj11 [Doc. 1719].

⁶ Case 19-34054-sgj11 [Doc. 1791, Schedule A].

⁷ Case 19-34054-sgj11 [Doc. 1871].

⁸ Case 19-34054-sgj11 [Doc. 1943].

⁹ Am. Compl. ¶ 11, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 12, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 12, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 12, Adv. No. 21-03005 [Doc. 63].

¹⁰ Am. Compl. ¶ 13, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 14, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 14, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 14, Adv. No. 21-03005 [Doc. 63].

¹¹ Am. Compl. ¶ 12, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 13, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 13, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 13, Adv. No. 21-03005 [Doc. 63].

pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.

Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests. LPA, Exhibit A, line 5.¹²

Based on the Compensation provision and definitions, Dugaboy clearly had the right to approve compensation for the General Partner and its Affiliates. The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“**Affiliate**’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘**control**’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“**Person**’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Jim Dondero was an Affiliate of Strand under the LPA’s definition. It is also undisputed that he controlled Highland Capital Real Estate Partners (“HCRE”), Nexpoint Advisors, L.P. (“Nexpoint”), and Highland Capital Management Services, Inc. (“HCMS”).¹³

Thus, Jim Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

¹² See attached, LPA Exhibit A.

¹³ Am. Compl. ¶ 2, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 2, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 2, Adv. No. 21-03005 [Doc. 63].

C. The Promissory Notes

5. Over the last several years, multiple promissory notes were executed in favor of the Plaintiff to different entities and individuals, which obligations became subject to potential forgiveness as compensation for Jim Dondero that, under the LPA, Dugaboy was charged with approving:

Notes to Jim Dondero (the “Dondero Notes”):

1. A note for \$3,825,000, executed on February 2, 2018, payable on demand.
2. A note for \$2,500,000, executed on August 1, 2018, payable on demand.
3. A note for \$2,500,000, executed on August 13, 2018, payable on demand.¹⁴

Notes to HCRE (the “HCRE Notes”):

1. A note for \$100,000, executed on November 27, 2013, payable on demand.
2. A note for \$2,500,000, executed on October 12, 2017, payable on demand.
3. A note for \$750,000, executed on October 15, 2018, payable on demand.
4. A note for \$900,000, executed on September 25, 2019, payable on demand.
5. A term note for \$6,059,831, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁵

Notes to HCMS (the “HCMS Notes”):

1. A note for \$150,000, executed on March 28, 2018, payable on demand.
2. A note for \$200,000, executed on June 25, 2018, payable on demand.
3. A note for \$400,000, executed on May 29, 2019, payable on demand.
4. A note for \$150,000, executed on June 26, 2019, payable on demand.¹⁶

Note to Nexpoint (the “Nexpoint Note”):

1. A term note for \$30,746,812.33, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁷

¹⁴ Am. Compl. ¶¶ 20-22, Adv. No. 21-03003, Case No. 19-34054-sgj11 [Doc. 79].

¹⁵ Am. Compl. ¶¶ 21-24, Adv. No. 21-03007, Case No. 19-34054-sgj11 [Doc. 63]; According to its Amended Complaint, Plaintiff alleges in ¶ 63 that it has suffered damages under the note “in the amount of at least \$5,012,260.96, as of December 11, 2020,” but in ¶ 64 that it has suffered damages “in the amount of at least \$6,145,466.84 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date...”

¹⁶ Am. Compl. ¶¶ 21-24, Adv. No. 21-03006, Case No. 19-34054-sgj11 [Doc. 68].

¹⁷ Am. Compl. ¶ 21, Adv. No. 21-03005, Case No. 19-34054-sgj11 [Doc. 63]; Plaintiff alleges in ¶ 31 that “as of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03,” and claims the same amount as damages in ¶ 48.

6. Jim Dondero entered into agreement (the “Subsequent Agreements,” or as Plaintiff refers to them, the “Alleged Agreements”) with Nancy Dondero (acting for Dugaboy as its Trustee) that Plaintiff would not demand collection of the Notes unless events had occurred that made fulfillment of conditions subsequent impossible.¹⁸ However, annual term loan payments and annual interest payments on the demand notes were to be (and were) made.¹⁹

7. On December 3, 2020, after the bankruptcy Petition Date, Plaintiff demanded payment from Jim Dondero, HCRE, and HCMS on their respective demand notes due by December 11, 2020.²⁰ On January 7, 2021, Plaintiff made a demand on the Nexpoint term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98,” and a demand on the HCRE term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84.”²¹ Plaintiff has refused to recognize the Subsequent Agreement, calling it a “fiction.”²² Other than annual term and interest payments and some voluntary prepayments on the term notes, Defendants have not paid the Notes.²³

¹⁸ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

¹⁹ *E.g.*, Am. Compl. ¶ 21,27, Adv. No. 21-03005 [Doc. 63], showing the original principal of the note being \$30,746,812.33, but Plaintiff only demanding \$24,471,804.98 in its demand letter; *E.g.*, Am. Compl. ¶ 37,63,64, Adv. No. 21-03007 [Doc. 63], showing the original principal of the note being \$6,059,831, but Plaintiff alleging it was damaged in the amount of at least \$5,012,260.96 as of December 11, 2020, but also in the next paragraph inconsistently alleging it was damaged in the amount of at least \$6,145,466.84.

²⁰ Am. Compl. ¶ 26, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 28, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 28, Adv. No. 21-03006 [Doc. 68].

²¹ Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63]; Am. Compl. ¶ 43, Adv. No. 21-03007 [Doc. 63].

²² Am. Compl. ¶ 3, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 3, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 3, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 3, Adv. No. 21-03005 [Doc. 63].

²³ With respect to the Nexpoint term loans, due to a mistake, the 2020 end-of-year payment was late and the notes should be deemed current, Am. Ans. ¶ 40,41, Adv. Pro. 21-03005 [Doc. 50]; Am. Compl. ¶ 28, Adv. No. 21-03005 [Doc. 55-2], acknowledging payment of \$1,406,111.92.

D. The Adversary Proceedings

8. On January 22, 2021, Plaintiff initiated Adversary Proceedings against Jim Dondero, HCRE, HCMS, and Nexpoint for breach of contract and turnover of property.²⁴ On August 17, 2021, Plaintiff filed Amended Complaints against each Defendant alleging additional claims against Jim Dondero and new claims against Dugaboy and Nancy Dondero. Defendants each filed Amended Answers asserting several affirmative defenses, including that the Subsequent Agreements preclude the respective claims.²⁵

9. In the Fifth Claim of each Amended Complaint,²⁶ Plaintiff asks the Court to declare (a) that limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the LPA, (b) that neither Dugaboy nor Nancy Dondero was authorized under the LPA to enter into the Subsequent Agreement on behalf of the Partnership, (c) that neither Dugaboy nor Nancy Dondero otherwise had the right or authority to enter into the Subsequent Agreement on behalf of the Partnership, and (d) the Subsequent Agreement is null and void.²⁷

10. In the Sixth Claim of each Amended Complaint,²⁸ Plaintiff alleges that if Dugaboy, as a limited partner under the LPA, or Nancy Dondero, as the representative of Dugaboy, had the

²⁴ Am. Compl. ¶ 33, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 47, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 45, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 33, Adv. No. 21-03005 [Doc. 63].

²⁵ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

²⁶ Nancy Dondero is a Defendant on Counts V, VI, and VII in Adv. No. 21-03005, Adv. No. 21-3006, and Adv. No. 21-3007. Nancy Dondero is a Defendant only on Count VII in Adv. No. 21-03003.

²⁷ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63], Plaintiff alleges against Dugaboy and Nancy Dondero; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

²⁸ See note 26, *supra*.

authority to enter into the Subsequent Agreement on behalf of [Plaintiff], then Dugaboy incurred a fiduciary duty of care, and breached said duty by entering into the Subsequent Agreement.²⁹

11. In the Seventh Claim of each Amended Complaint, Plaintiff alleges that Jim and Nancy Dondero were aware that Dugaboy would have fiduciary duties owed to the Plaintiff if acting to bind the Plaintiff per the authorization in the LPA, and aided and abetted Dugaboy's breach of its fiduciary duties by knowingly participating in the authorization of the Subsequent Agreement.³⁰

II. STANDARD OF REVIEW

12. An asserted cause of action must be dismissed when the complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must meet two criteria: (1) it must assert a plausible claim, and (2) it must set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at 1949-50 (citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)). Thus, either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" requires dismissal. *Id.* The plaintiff must allege specific facts and not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). A court may not strain to find inferences favorable to the plaintiff or accept conclusory allegations, unwarranted deduction, or legal conclusion. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

13. To satisfy *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, *Twombly*, at 570. A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court

²⁹ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

³⁰ Am. Compl. ¶ 79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 77, Adv. No. 21-03005 [Doc. 63].

to draw the reasonable inference that the defendant is liable under the alleged claim. *Id.* at 556. Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also “plausibly suggest an entitlement to relief.” *Id.*, *Iqbal*, at 1951.

III. ARGUMENTS AND AUTHORITIES

A. **Plaintiff’s Fifth Claim for Declaratory Relief Under the LPA Should Be Dismissed for Two Reasons.**

1. **Plaintiff’s Fifth Claim Fails Because the Terms of the LPA are so Clear on their Face That There is No Actual Controversy between Parties.**

14. Plaintiff’s claim presents no “actual controversy” because the provisions of the LPA clearly allow Dugaboy to bind the Partnership by approving compensation and there is no controversy that could require a declaration by this Court.

15. Plaintiff argues that Dugaboy was not authorized to enter into the Subsequent Agreement regarding Jim Dondero’s compensation, nor was it authorized to bind the Partnership.³¹ Plaintiff further attached the LPA as “Exhibit 5” to its Amended Complaints and referenced this Court to § 4.2, which states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership *other than as specifically set forth in this Agreement.*³² (emphasis added).

16. Contrary to Plaintiff’s argument, the LPA explicitly authorizes Dugaboy as the Majority Interest to approve compensation for Jim Dondero as previously articulated in this Motion. Approving compensation inherently binds the Partnership in that it exchanges money on behalf of the Partnership for services rendered. Because it is so expressly provided for in the LPA,

³¹ *Id.*

³² Am. Compl. ¶ 43, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 55, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 53, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63].

Plaintiff's contention that Dugaboy could not act to bind the Partnership through compensation agreements amounts to Plaintiff's misinterpretation of the LPA as opposed to an "actual controversy" in need of declaratory relief. This claim is nothing more than Plaintiff's attempt at an end-around to avoid proving the merits of its breach of fiduciary duty claims and essentially asks this Court for an advisory opinion to help Plaintiff do so. Under *Twombly*, Plaintiff's claim for declaratory relief should be dismissed pursuant to Rule 12(b)(6).

2. Debtor Lacks Standing to Assert a Claim for Declaratory Relief Based Upon an Executory Contract It Rejected.

17. There is no authority for "allowing a debtor's estate or a successor-in-interest such as the [creditor's committee or litigation trustee] to pursue claims for post-petition breaches of a rejected contract. Because rejection is an affirmative declaration by the debtor that the estate will not take on the obligations of a prepetition contract made by the debtor, [Plaintiff-Debtor's] rejection of the [LPA] not only relieved the estate of its post-petition performance obligations, but also relieved the estate of its ability to assert claims for post-petition breaches thereof." *Lauter v. Citgo Petroleum Corp.*, CV H-17-2028, 2018 WL 801601, at *15 (S.D. Tex. Feb. 8, 2018). As explained below, as a result, not only does this preclude Debtor's claims for breach of fiduciary duty (see sections B.2., C.5. *infra*), it also precludes Debtor's attempt to obtain declaratory relief.

18. Plaintiff seeks declaratory relief against Dugaboy and Nancy Dondero to determine if either of them were authorized to enter into the Subsequent Agreement under the LPA.³³ Although most causes of action accrue when an injury results from a wrongful act, a cause of action for declaratory relief differs in that it does not accrue until there is an actual controversy between the parties. *In re Estate of Denman*, 362 S.W.3d 134, 144 (Tex. App. -- San Antonio

³³ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2011, no pet.); *Murphey v. Honeycutt*, 199 S.W.2d 298, 299 (holding that declaratory judgment action accrued in a will construction case at the time when an heir committed an act indicating she was operating against the will, not when the will was executed years prior to the heir's act); *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 278 (Tex. App. – El Paso 2021, pet. filed) (holding that in a lease dispute, the actual controversy did not arise-- and the claim did not accrue- when the lease was entered into by the parties, but rather when plaintiff challenged the lease terms at a later date).

19. Here, Plaintiff's declaratory relief claim accrued (if at all) when Jim Dondero asserted the Subsequent Agreement as an affirmative defense. Plaintiff alleges that the actual controversy here is whether or not Dugaboy or Nancy Dondero had authority to enter into the Subsequent Agreement under the rejected LPA. Plaintiff specifically pleads that "[a] bona fide, actual, present dispute exists between the [Plaintiff] and Dugaboy concerning whether Dugaboy was authorized to enter into the Alleged Agreement on the [Plaintiff]'s behalf...[and a] judgment declaring the parties' respective rights and obligations will resolve their dispute."³⁴ Plaintiff did not allege anywhere in its Original Complaint that a dispute regarding Dugaboy's authority to enter the Subsequent Agreement required declaratory relief. Only after Defendants filed their Amended Answers did Plaintiff seek such relief in its Amended Complaint.³⁵ Therefore, this cause of action for declaratory relief accrued when Plaintiff received Defendant's Amended Answers after the bankruptcy began, as that is when facts came into existence that created an actual controversy under the LPA.

20. Section 365 of Title 11 of the United States Code (the "Bankruptcy Code") governs the inclusion and exclusion of executory contracts in bankruptcy. Section 365 vests the power to

³⁴ *Id.*

³⁵ *Id.*

reject or assume any of the Debtor's executory contracts in the trustee, subject to the court's approval. 11 U.S.C. § 365(a). A debtor's rejection of an executory contract constitutes a breach of such contract immediately before the date of the filing of the [bankruptcy] petition. 11 U.S.C. § 365(g)(1). In this case, Plaintiff's act of rejection resulted in a material breach of the LPA that relates back to October 15, 2019 (the "Breach Date") pursuant to the Bankruptcy Code. *See* 11 U.S.C. § 365(g)(1).

21. "Rejection is an affirmative declaration that the estate will not take on the obligations of a pre-petition contract made by the debtor" and "places the obligation to perform outside of the bankruptcy administration." *Lauter*, at *13, citing *Matter of Austin Dev. Co*, 19 F.3d 1077, 1082-83 (5th Cir. 1994); *In re Continental Airlines*, 981 F.2d 1450, 1459 (5th Cir. 1993). "[R]ejection does not change the substantive rights of the parties to the contract, but merely means the bankruptcy estate itself will not become a party to it." *In re Alongi*, 272 B.R. 148, 153 (Bankr. D. Md. 2001) (citing M. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U.Colo.L.Rev. 845 (1988)). As noted above, rejection not only relieves the estate of post-[bankruptcy]petition performance obligations, but also of its ability to assert claims for post-petition breaches thereof. *Lauter*, at *15.

22. The court in *Lauter* looked to the reasoning of Fifth Circuit opinions examining the effects of plaintiffs rejecting executory contracts under § 365. In *In re Continental*, the court reasoned in part that, under § 365, "An agreement cannot 'exist' for one purpose yet take on a 'nonexistent' quality which works for the advantage of one party or the other" when a debtor-plaintiff sought to avoid paying airline pilots under an executory contract it rejected, attempting to treat the contract as terminated. *Id.* at 1460. Likewise, the court in *Matter of Austin* reasoned that a rejection of a lease under § 365 did not terminate the lease, but moved the rights of the parties

affected “outside of the bankruptcy court’s realm because after rejection, the debtor’s estate is no longer involved in the leasehold transaction.” *Id.* at 1083.

23. Following the Fifth Circuit’s application of § 365 in cases such as *In re Continental* and *Matter of Austin*, the court in *Lauter* addressed the impact of a debtor-plaintiff’s attempt to pursue post-petition claims against a defendant whose executory contract had been rejected. The court held that just as in any other contract dispute, a prior material breach by a counterparty relieved the aggrieved party of the duty to perform and deprived the breaching party of the ability to make claims for breach after its own breach. *Id.* at *12-13, 15. After a thorough discussion of § 365, the court ultimately found that the plaintiff lacked standing to pursue claims resulting from a post-petition breach of an executory contract, holding that “the court has not found any authority allowing a debtor’s estate . . . to pursue claims for post-petition breaches of a rejected contract.” *Id.* at *15.

24. Here, Plaintiff asks this Court to interpret and, in effect, determine a breach of the same LPA it rejected and breached prior to the bankruptcy petition date. The LPA was rejected on February 22, 2021 and thus deemed materially breached on October 15, 2019 under § 365(g)(1). Because this cause of action accrued after both rejection and the relation-back breach provision of § 365, Plaintiff’s Fifth Claim for declaratory relief amounts to a post-petition claim arising from a rejected executory contract, which the court in *Lauter* held a Debtor lacks standing to assert in a bankruptcy proceeding. Therefore, this claim should be dismissed pursuant to *Twombly* and Rule 12(b)(6).

B. Plaintiff's Sixth Claim of Breach of Fiduciary Duty Against Dugaboy and Nancy Dondero Fails for Two Reasons.

1. Dugaboy Owes No Fiduciary Duty to Plaintiff as a Consequence of Exercising Its Right to Approve Compensation.

25. Plaintiff alleges that “if Dugaboy, as a limited partner, had the authority to enter into the Alleged Agreement...then Dugaboy would owe the [Plaintiff] a fiduciary duty.”³⁶ The LPA in this case is governed by the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”) except as specifically provided for in the LPA. LPA §§ 1.1,1.2; *see also* Del. Code Ann. Tit. 6, § 17-1102. The DRULPA allows partnership agreements to expand, restrict, or eliminate fiduciary and other legal or equitable duties, provided it may not eliminate the implied contractual duty of good faith and fair dealing. Del. Code Ann. Tit. 6, § 17-1101(d). The DRULPA also specifically permits a partnership agreement to provide the rules for how partners may transact with the partnership. Del. Code Ann. Tit. 6, § 17-107.

26. In Delaware, a limited partner does not owe a fiduciary duty as a consequence of exercising a right of the limited partner under the partnership agreement. *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 864 (Del. Ch. 1999); *In re Est. of Conaway*, 2012 WL 524190, at *3 (Del. Ch. Feb. 15, 2012), *aff'd sub nom. Russell-Conaway v. Frederick-Conaway*, 2012 WL 4478655, 54 A.3d 257 (Del. 2012) (unpublished).

27. In *Bond Purchase*, a limited partner exercised its right under the limited partnership agreement to obtain records of the owners of the partnership for the purpose of making a tender offer for additional interests in the partnership. Although the other partners claimed this request for records was a breach of a fiduciary duty, the court held that “in the absence of any provision in the partnership agreement engrafting duties onto [the limited partner],” “[the limited partner]

³⁶ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

owes no fiduciary duties,” and allowed the limited partner access to the records it sought under the partnership agreement. *Id.* at 864.

28. In *In re Est. of Conaway*, a limited partner withheld consent to transfer another partner’s interest as he was allowed to under the limited partnership agreement. The receiving party alleged a breach of the non-consenting limited partner’s fiduciary duty. The court held that where the limited partner “merely exercised his contracted-for rights under the terms of the [limited partnership agreement],” the limited partner breached no fiduciary duty, assuming there even was one. *Id.* at *3.

29. Just as the limited partners in *Bond Purchase* and *In re Est. of Conaway*, Dugaboy was merely exercising its right to approve compensation pursuant to the LPA when it entered into the Subsequent Agreement. LPA § 3.10(a); § 2.1. Therefore, Dugaboy owes no fiduciary duty to the Plaintiff as a consequence of simply exercising its right under the LPA. While a limited partner who takes on an active role in the management of the entity may thereby assume fiduciary duties, *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (citing cases); *Bond Purchase* at 863-64, merely engaging in actions delegated to the limited partner in the partnership agreement does not constitute participating in the control of a business so as to trigger the assumption of fiduciary duties. Del. Code Ann. Tit. 6, § 17-303(b)(8)(o).

30. Texas has similarly held that “a limited partner does not participate in the control of the business” by taking certain actions listed in the statutes, and such “actions complained of by the plaintiff did not amount to the types of control that could give rise to a duty to the other limited partners.” *Strebel v. Wimberly*, 371 S.W.3d 267, 280 (Tex. App. 2012) (summarizing holding of *AON Properties, Inc. v. Riveraine Corp.*, 1999 WL 12739, at *23 (Tex. App. Jan. 14, 1999)).

31. Here, Dugaboy did not participate in the control of the business because it was taking actions explicitly extended to it in the LPA by approving compensation under § 3.10(a). LPA § 3.10(a); § 2.1. Since the LPA explicitly gives Dugaboy the right to approve such compensation, and Dugaboy was not participating in the control of the business, Dugaboy does not owe a fiduciary duty to Plaintiff. Dugaboy cannot breach a fiduciary duty it does not owe. Further, Nancy Dondero as Trustee owes no fiduciary duty to Plaintiff independently from what Dugaboy owes, as Dugaboy is her principal. Like Dugaboy, Nancy Dondero cannot breach a fiduciary duty she does not owe. Under *Twombly*, Plaintiff's claim for breach of fiduciary duty against Dugaboy and Nancy Dondero should be dismissed pursuant to Rule 12(b)(6).

2. Nancy Dondero Owes No Fiduciary Duty to Debtor.

32. Under Delaware law, a trustee's fiduciary duties of care and loyalty flow to the trust and the beneficiar(ies) of the trust. *Tigani v. Tigani*, 2021 Del. Ch. LEXIS 60, *1, 2021 WL 1197576 (March 30, 2021). A trustee is prohibited from considering her own interests and "all consideration of the interests of third persons." *Id.* at * 38.

33. Plaintiff claims that if Dugaboy had the authority to enter into the Subsequent Agreement, then Ms. Dondero would then somehow owe a fiduciary duty directly to Plaintiff. The Amended Complaint does not allege any facts as to why or how such a fiduciary duty would appear, and there is no legal authority to support such a conclusion. As discussed above, not even Dugaboy owed a fiduciary duty to Plaintiff in determining compensation, as Dugaboy was expressly authorized to do under § 3.10(a) of the LPA. Nancy Dondero, individually, is even further removed from owing any duty to Plaintiff, much less a fiduciary duty. Plaintiff cannot create a legal duty simply by claiming one exists, and its breach of fiduciary duty claim against Nancy Dondero should be dismissed under *Twombly* and Rule 12(b)(6).

3. Debtor Lacks Standing to Assert a Claim for Breach of Fiduciary Duty Based Upon an Executory Contract It Rejected.

34. Plaintiff's Sixth Claim is also barred for the same reasons that discussed in Section A.2 *supra*, and similarly relies on the fact that this cause of action accrued after the LPA was breached on October 15, 2019. In this case, Plaintiff suffered no legal injury – and no cause of action accrued - until the notes were not paid on demand by December 11, 2020.

35. Generally, “a cause of action accrues...when facts come into existence that authorize a claimant to seek judicial remedy.” *Dunmore v. Chicago Title Ins. Co.*, 400 S.W.3d 635, 640 (Tex. App. – Dallas 2013, no pet.) (citing cases). “Breach of fiduciary duty claims generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act *and* resulting injury.” *Dunmore*, at 641 (emphasis added). Further, “[t]he general rule governing when a claim accrues...is the ‘legal injury rule,’ which provides that a claim accrues ‘when a wrongful act causes some legal injury, even if that fact of injury is not discovered until later, and even if all damages have not yet occurred.’” *Id.* (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)). “[A] legal injury [is] an injury giving cause of action by reason of its being an invasion of a Plaintiff's right...be the damage however slight.” *Murphy*, at 270. Although the discussion of when a claim accrues in Texas generally involves application of the discovery rule (which is not applicable to these facts), the concept of “legal injury” is still the cornerstone of an accrual analysis.

36. Here, Plaintiff alleges that Dugaboy and Nancy Dondero breached a fiduciary duty when it entered into the Subsequent Agreement.³⁷ The alleged wrongful act was the Subsequent Agreement itself which Plaintiff alleges breached a fiduciary duty. However, Plaintiff suffered no

³⁷ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

legal injury from the Subsequent Agreement until Defendant did not pay the Notes when demanded (if it even suffered one at all). The Subsequent Agreement simply made the Notes potentially forgivable upon conditions subsequent, which could not have impacted the alleged value of the Notes until the conditions occurred. As a result, the cause of action did not accrue until December 11, 2020, after the Petition Date. Debtor's rejection of the LPA, the alleged source of the fiduciary duties allegedly breached,³⁸ therefore bars pursuit of the Plaintiff's Sixth Claim for the same reasons set forth in Section A.2 *supra*.

C. Plaintiff's Seventh Claim of Aiding and Abetting Breach of Fiduciary Duty against Jim and Nancy Dondero Fails for Several Reasons.

1. Neither Jim nor Nancy Dondero could have Aided and Abetted a Breach of Fiduciary Duty because Dugaboy did Not Owe a Fiduciary Duty to Plaintiff.

37. Plaintiff claims that Jim and Nancy Dondero aided and abetted Dugaboy's alleged breach of fiduciary duty by entering into the Subsequent Agreement. However, aiding and abetting is a fundamentally dependent claim that can only succeed if there is a valid underlying breach of fiduciary duty claim. *In re Draw Another Circle*, 602 B.R. 878, 904 (Bankr. D. Del. 2019) (citing Restatement (Second) of Torts § 876 for the proposition "the derivative nature of an aiding and abetting claim will exist only with the success of the breach of fiduciary duty claim"); *West Fork Advisors LLC v. SunGard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App.-Dallas 2014) (citing Restatement (Second) of Torts § 876(b) (1979)). As previously discussed in Section B.1., Dugaboy did not owe any fiduciary duty to Plaintiff that could have been breached. Therefore, Plaintiff's derivative claim of aiding and abetting against both Jim and Nancy Dondero is legally impossible and should be dismissed under *Twombly* and Rule 12(b)(6).

³⁸ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2. Nancy Dondero Cannot Aid and Abet Herself as Dugaboy Trustee Because Aiding and Abetting Requires More Than One Actor.

38. Even if Dugaboy owed and breached a fiduciary duty to Plaintiff (which it did not), it is legally impossible for Nancy Dondero to have aided and abetted Dugaboy's alleged breach of fiduciary duty by authorizing the Subsequent Agreement as she was acting as Dugaboy in her trustee status. Because there are limited cases on point, an analysis under the Restatement (Second) of Torts § 876 (1979) is compelling because Delaware courts routinely look to the Restatement to fill lacunae in the law. *In re Rural Metro Corp.*, 88 A.3d 54, 98 (Del. Ch. 2014), decision clarified on denial of reargument sub nom. *In re Rural Metro Corp. Stocholders Litig.* (Del. Ch. 2014) (applying the Restatement to an aiding and abetting breach of fiduciary duty analysis). "The Delaware Supreme Court often relies on the Restatement (Second) of Torts." *Id.* at 98. Comparison to cases in other jurisdictions construing law similar to Delaware law is also instructive.

39. The Restatement (Second) § 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with *the other* or pursuant to a common design with him, or (b) knows that *the other's* conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to *the other* in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979), adopted in Delaware by *Patton v. Simone*, Civ. A. 90C-JA-29, 1992 WL 183064 (Del. Super. Ct. June 25, 1992) (emphasis added). Under the Restatement (Second), people act "in concert" with each other when they act "in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." Restatement (Second) of Torts § 876, comment A. Under the Restatement (Second), Nancy

Dondero could not have conceivably acted “in accordance with an agreement” with herself in her Trustee capacity, as she is a singular individual.

40. Delaware has not directly addressed the issue of whether one can aid and abet one's self, but it has applied the Restatement (Second) when analyzing aiding and abetting a breach of fiduciary duty claims, which requires a plaintiff to prove: (1) the existence of a fiduciary relationship, (2) breach of the fiduciary's duty, (3) defendant, who is not a fiduciary, knowingly participated in the breach, and (4) damages to the plaintiff as the result of the concerted action of the fiduciary and the non-fiduciary. *In re USDigital, Inc.*, 443 B.R. 22, 46 (Bankr. D. Del. 2011) (citing elements of aiding and abetting breach of fiduciary duty in Delaware and holding that a director defendant cannot have aided and abetted the same fiduciary duty he allegedly breached in a previous count); *In re Draw*, at 904 (applying Restatement (Second) to the knowing participation element); *Patton*, at *8 (applying Restatement (Second) to aiding and abetting analysis); *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) (applying the Restatement (Second) to knowing participation in aiding and abetting analysis and acknowledging that § 876 has been cited with approval in Delaware in). Again, because Plaintiff is alleging that Nancy Dondero aided and abetted Dugaboy (which was acting through Nancy Dondero), the requirement of a second actor is not met because Nancy Dondero cannot act in concert with herself.

41. Analogously, officers and agents cannot aid and abet their principal or each other in the commission of a tort. *Cornell Glasgow, LLC v La Grange Props., LLC*, 2012 WL 2106945, at *11 (Del. Super. Ct. June 6, 2012); *Amaysing Techs. Corp. v. Cyberair Communications, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts

of the corporation.”). Application of this law to the present circumstances further compels the conclusion that Nancy Dondero cannot aid and abet herself. Texas also has looked to the Restatement (Second) of Torts § 876 for guidance regarding its aiding and abetting doctrine, which states that “[i]t is settled as the law of [the State of Texas] that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with [that] fiduciary and is liable as such.” *In re TOCFHBI, Inc.*, 413 B.R. 523, 534 (Bankr. N.D. Tex. 2009) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 574, 160 S.W.2d (1942)) (emphasis added, citing elements); *W. Fork Advisors, LLC v. SunGuard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App. – Dallas 2014, pet. denied) (looking to Restatement (Second) regarding aiding and abetting analysis). Although also having sparse law regarding whether one can aid and abet one's own self, Texas law still requires a third party in order to prove aiding and abetting a breach of fiduciary duty. For the same reasons mentioned above, Nancy simply cannot aid and abet her own actions as Dugaboy Trustee.

42. Arizona courts have more directly held that under the Restatement (Second), “when [Plaintiffs] fail to allege [agent] took any actions in [their] individual capacity ‘in concert’ with the actions giving rise to the breach of fiduciary duty claim against [insurance company], [plaintiff’s] aiding and abetting claim against [agent] will be dismissed.” *Young v. Liberty Mut. Group, Inc.*, CV-12-2302-PHX-JAT, 2013 WL 840618, at *4 (D. Ariz. Mar. 6, 2013).³⁹ In *Young*, the Court reasoned that “...it does not follow that [agent] must have committed the separate tort of aiding and abetting merely because he was the agent through which [insurance company] breached its duty.” *Id.* at *4. The Court dismissed the claim on the agent’s 12(b)(6) motion.

³⁹ In *Young*, Plaintiff sued both Liberty Mutual for breach of fiduciary duty, and her personal insurance agent for aiding and abetting said breach. Because Plaintiff failed to allege [agent] took any actions in his individual capacity “in concert” with the actions giving rise to Plaintiff’s claim against Liberty Mutual, the aiding and abetting claim was dismissed upon 12(b)(6) motion.

Further, in *Jones v. Colorado Cas. Ins. Co.*, the same Court dismissed a similar claim upon another insurance agent's 12(b)(6) motion, agreeing with the agent's assertion that "one cannot aid and abet one's self." *Jones v. Colorado Cas. Ins. Co.*, CV 12-1968-PHX-JAT, 2013 WL 4759260, at *3 (D. Ariz. Sept. 4, 2013) (dismissing a claim against an insurance agent for aiding and abetting the insurance company's breach of fiduciary duty, determining that in order for there to be harm to a third person, there must be at least two tortfeasors). Just as the insurance agents could not aid and abet themselves as representatives for the insurance companies, Nancy Dondero could not have aided and abetted herself in her capacity as Dugaboy Trustee.

43. Connecticut takes a similar approach in holding that aiding and abetting means to help or compel *another* to act, and that an alleged tortfeasor cannot aid or abet himself, and doing so would yield "circular results." *Bolick v. Alea Group Holdings, Ltd.*, 278 F. Supp. 2d 278, 282 (D. Conn. 2003) (dismissing aiding and abetting claim).⁴⁰ Because Nancy Dondero was acting as Dugaboy in the conduct about which Debtoer complains, she is not a "third party" to an act. It is impossible for Nancy Dondero to aid and abet her own self - as most distinctly stated in *Cornell Glasgow, LLC* and *Bolick* - because aiding and abetting requires the concerted action and scienter of more than one person. Therefore, Plaintiff's Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

3. Plaintiff does Not Plead the Sufficient Scienter Requirement for Aiding and Abetting in its Amended Complaint for Either Jim or Nancy Dondero.

44. In addition to the above infirmities, Plaintiff fails to allege the necessary scienter required to show aiding and abetting for both Jim and Nancy Dondero. Delaware courts

⁴⁰ *Bolick* addressed an employment discrimination case where Plaintiff sued her supervisor for both harassment and aiding and abetting that same harassment. The Court held that to hold the supervisor liable for his wrongful behavior and also aiding and abetting that wrongful behavior is illogical and would yield circular results. Court used dictionary to reference "abettor" as someone who encourages an offender.

acknowledge that an aiding and abetting analysis largely comes down to what constitutes “knowing participation.” *In re Draw*, at 904. The aider and abettor must act “knowingly, intentionally, or with reckless indifference...that is, with an illicit state of mind.” *Id.* The Plaintiff must allege specific facts that show Defendants had “actual knowledge” that their conduct intentionally aided and abetted a breach, not simply that they “knew or should have known.” *Id.* (citing *Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass’n*, CIV. 10-520 JBS KMW, 2011 WL 864421, at *5 (D. Del. Mar. 9, 2011)).

45. In *In re Draw*, a Chapter 11 trustee filed an amended adversary complaint against several members of the company’s board of directors, asserting breach of fiduciary duties and aiding and abetting breaches of fiduciary duties. On the defendant’s 12(b)(6) motion, the court held that plaintiff’s amended complaint failed to allege specific facts showing actual knowledge that [Director] was liable for aiding and abetting, and that plaintiff simply alleged [Director] “knew or should have known” his conduct aided and abetted the breach. *Id.* at 904. The court subsequently dismissed plaintiff’s aiding and abetting claims against that particular director.

46. In *Capitaliza-T*, defendant moved to dismiss plaintiff’s amended complaint under Rule 12(b)(6), citing that it did not contain sufficient factual allegations regarding defendant’s knowledge of breach of fiduciary duty. The court applied the Delaware rule that “at a minimum, the complaint [must] alleged circumstantial facts suggesting that the defendant had knowledge of the specific principal violation.” *Id.* at *5 (citing *Brug v. Enstar Group, Inc.*, 755 F.Supp. 1247, 1256 (D. Del. 1991)). The court held that although plaintiff’s amended complaint contained circumstantial allegations against defendant for aiding and abetting, it was not enough to allege

that defendants “had knowledge of the underlying...breach of fiduciary duty” to survive a 12(b)(6) motion. *Capitaliza-T*, at *7.

47. In this case, Plaintiff simply alleges that “[the Donderos] were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and “[t]he Donderos aided and abetted Dugaboy’s breach of its fiduciary duties...by knowingly participating in the authorization of the...Alleged Agreement.”⁴¹ In its Amended Complaint, Plaintiff references only factors that could be circumstantial at best when describing its Third Claim for relief against Jim Dondero, but never clearly articulates the required specific facts that show “actual knowledge” that he was overtly acting to substantially assist Dugaboy in breaching a fiduciary duty as required by *In re Draw* and *Capitaliza-T*.⁴² Further, Plaintiff makes no specific factual allegations against Nancy Dondero, other than she “[was] aware” of Dugaboy’s fiduciary duties, and that she aided and abetted the breach. Neither claims against Jim nor Nancy Dondero rise to the standard of articulation discussed in *In re Draw* and *Capitaliza-T*. Therefore, Plaintiff’s Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

4. Neither Jim nor Nancy Dondero are Liable for Aiding and Abetting Because Aiding and Abetting Requires More Than One Single Act.

48. As discussed in Section C.3 *supra*, the test for stating an aiding and abetting claim is stringent and focuses of proof of scienter that a party knew it was aiding another party in committing tortious conduct. *In re Draw*, at 904. This would require Plaintiff to show (1) a primary act by Dugaboy (via Nancy) that breached a fiduciary duty (which it cannot), and (2) a

⁴¹Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

⁴² Am. Compl. ¶¶ 3,36,38,39,40,41, Adv. No. 21-03003 [Doc. 73-2]; Am. Compl. ¶¶ 3,50,51,52,53, Adv. No. 21-03007 [Doc. 55-2]; Am. Compl. ¶¶ 3,48,49,50,51, Adv. No. 21-03006 [Doc. 60-2]; Am. Compl. ¶¶ 3,35,36,37,38,39, Adv. No. 21-03005 [Doc. 55-2].

secondary act by each of Jim and Nancy Dondero that shows scienter and knowing participation in subverting a fiduciary duty.

49. Plaintiff cannot show concerted action here on behalf of Jim or Nancy Dondero, because the only singular act that occurred was Dugaboy approving the compensation under the LPA. Plaintiff alleges no other separate act by Nancy Dondero that would have been “in concert” with or “knowingly participating” in anything, as she was acting as the Dugaboy Trustee (discussed above in Section C.2.). Further, Plaintiff shows no other separate act or proof of scienter that Jim Dondero specifically set out to knowingly aid Dugaboy in tortious conduct under *In re Draw*, since Dugaboy engaged in no such conduct. Therefore, Plaintiff’s Seventh Claim fails *Twombly* and must be dismissed under Rule 12(b)(6).

5. Debtor Lacks Standing to Bring an Aiding and Abetting a Breach of Fiduciary Duty Claim Based on an Executory Contract It Rejected.

50. The analysis here is the same as in Argument III.A.2. and B.2, *supra*. Plaintiff argues that Jim and Nancy Dondero aided and abetted Dugaboy’s alleged breach of fiduciary duty by authorizing the Subsequent Agreement, which Plaintiff alleges may have violated the LPA.⁴³ A cause of action for a derivative claim such as aiding and abetting shares accrual and limitations periods with the underlying tort of breach of fiduciary duty. *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 144 (Tex. 2019), *reh’g denied*, (Sept. 6, 2019). “Because a civil conspiracy claim is derivative of an underlying tort, the claim accrues when the underlying tort accrues.” *Id.* at 145. Here, because Plaintiff’s aiding and abetting claims derive from the alleged breach of fiduciary duty claim, the claims share accrual dates.

⁴³ Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

51. Again, Plaintiff was not injured until Jim Dondero did not pay the Notes. This claim did not accrue until December 11, 2020, and is also predicated on allegations that the Subsequent Agreement violates fiduciary duties arising out of the rejected LPA. Once again, Plaintiff is attempting to bring a post-petition claim under the LPA it rejected. Therefore, Plaintiff's Seventh Claim must be dismissed under *Twombly* and Rule 12(b)(6).

IV. CONCLUSION

Dugaboy, Jim Dondero, and Nancy Dondero therefore respectfully request this Court dismiss Plaintiff's Fifth, Sixth, and Seventh Amended Claims in its Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

Dated: September 1, 2021

Respectfully submitted,

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez
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EXHIBIT 76

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

In re: § **Case No. 19-34054-SGJ-11**
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Chapter 11**
§
Debtor. §

HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. §
§
v. § **Adversary No.: 21-03007-sgj**
§
HCRE PARTNERS, LLC (n/k/a NEXPOINT §
REAL ESTATE PARTNERS, LLC), JAMES §
DONDERO, NANCY DONDERO, AND §
DUGABOY INVESTMENT TRUST §
Defendants. §

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MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James D. Dondero, Nancy Dondero, and The Dugaboy Investment Trust (“Dugaboy”) (the “Defendants”) move this Court for an order to stay this adversary proceeding and refer the parties to arbitration, and in further support state the following:

I. STATEMENT OF FACTS

1. On December 24, 2015, Mr. Dondero, on behalf of Strand Advisors, Inc., and Nancy Dondero, on behalf of Dugaboy, executed the Fourth Amended and Restated Agreement (the “LPA”) of Limited Partnership of Highland Capital Management, L.P. (“HCM”).¹ Section 6.14 of the LPA provides for Mandatory Arbitration in the event of a legal dispute between the parties arising from the agreement (“Arbitration Provision”). Section 6.14 specifically states:

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas.

The Arbitration Provision specifically governs the discovery process for arbitration, the authority of the arbitrators, and the costs of arbitration.²

¹ The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. Declaration of Michael P Aigen dated August 30, 2021 (“Aigen Dec.”) at Ex. 1. The signatories to it are: (1) General Partner, Strand Advisors, Inc., a Delaware corporation by James D. Dondero, President; (2) Limited Partner, The Dugaboy Investment Trust by Nancy M. Dondero, its Trustee; (3) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #1 by Lawrence Tonomura, its Trustee; (4) Limited Partner, The Mark and Pamela Okada Family Trust- Exempt #2 by Lawrence Tonomura, its Trustee; (5) Limited Partner, Mark K. Okada; and (6) Limited Partner, Hunter Mountain Investment Trust by John Honis, the President of Beacon Mountain 1 LC, Administrator.

² See LPA Section 6.14, which states:

2. From 2013 to 2017, HCRE executed a series of demand Notes in favor of the Debtor (the “Notes”). The authority to execute promissory note in favor of the Debtor arises from Article 4 of the LPA because a General Partner has full authority to conduct the business, which includes lending and borrowing money and executing promissory notes. Article 4 states:

In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation:

....

(ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations);

....

(vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.1;

....

(vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations.

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. . . . Each party shall bear its own attorney’s fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement.

3. In addition, the LPA provides authority for partners to lend money to their Affiliates.

Section 4(e) specifically provides:

The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine: provided, however, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

In addition, Section 3.9(f) of the LPA allows for the partnership to make tax loans to the Founding Partners:

The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

4. Debtor demanded payment on the Notes and subsequently filed an adversary proceedings seeking collection, described further below. One of the affirmative defenses asserted in the adversary proceedings is that Debtor is not entitled to demand payment because, prior to the demands for payment, HCM had agreed that it would not collect the Notes, and that they would be treated as compensation to the Debtor's founder and then-CEO Jim Dondero, if any of certain conditions subsequent were met.³ Debtor refers to the agreement as the "Alleged Agreement." The condition subsequent was the sale of any of HCM's interests in certain portfolio companies (Cornerstone, Trussway and/or MGM) for a greater amount than their cost.⁴

³ See *NexPoint Real Estate Partner, LLC f/k/a HCRE Partners, LLC's First Amended Answer to Plaintiff's Complaint* [Ad. No. 21-03007, Dkt. No. 34 at 8 ¶ 58].

⁴ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition of James Dondero Transcript at 212: 18-25; 213: 1-17.

5. Under Section 4.1(k) of the LPA, the “salaries or other compensation, if any, of the officers and agents of the Partnership [were to] be fixed from time to time by the General Partner.” Additionally, under the LPA, Dugaboy had explicit authorization to approve compensation for Jim Dondero and entities he was affiliated with, and thus bind the Partnership through, LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The General Partner and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.⁵

The Class A shareholders included Strand Advisors, The Dugaboy Investment Trust, Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark and Pamela Okada Family Trust – Exempt Trust #2.⁶ Dugaboy alone comprised 75% of the Class A shareholders,⁷

Nancy Dondero was the Family Trustee of the Dugaboy Trust,⁸ and had the power to act for Dugaboy in this regard.⁹

After the Notes were entered into, Mr. Dondero asked Dugaboy (via Ms. Dondero) to approve an agreement that the Notes would be forgiven as compensation to Mr. Dondero upon the favorable sale of any or all of the portfolio company interests by HCM, and she did.¹⁰

⁵ Aigen Dec. Ex. 1, LPA at Exhibit A thereof). Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests.

⁶ Aigen Dec. Ex. 1, LPA at Exhibit A thereof.

⁷ *See id.*

⁸ Aigen Dec. Ex. 3, *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

⁹ Aigen Dec. Ex. 4, *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

¹⁰ Aigen Dec Ex. 2, Remote Deposition of James Dondero Transcript at 176-178.

The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“‘*Affiliate*’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘*control*’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“‘*Person*’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Mr. Dondero was an Affiliate of Strand under the LPA’s definition. Thus, Mr. Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

6. On January 22, 2021, Highland Capital Management, L.P. (“Debtor” or “Plaintiff” when describing post-petition actions and HCM when describing pre-petition actions) commenced Adversary Proceeding No. 21-03007 against HCRE, asserting a state law, non-core breach of contract claim (“Count I”) and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the Notes (“Count II”).

7. HCRE answered the adversary complaint, asserting, inter alia, that Debtor’s claims should be barred, because prior to the demand for payment HCM agreed it would not collect on the Notes upon fulfillment of conditions subsequent,¹¹ based upon what the Debtor refers to as the “Alleged Agreement.”

¹¹ *NexPoint Real Estate Partner, LLC f/k/a HCRE Partners, LLC’s First Amended Answer to Plaintiff’s Complaint* [Ad. No. 21-03007, Dkt. No. 34 at 8 ¶ 58].

¹¹ Aigen Dec. Ex. 2, May 28, 2021 Remote Deposition

8. On August 23, 2021, the Court entered an order permitting Debtor to file its *Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* (“Amended Complaint”) asserting additional claims for relief including: Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550 against Mr. Dondero (“Count III”); Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1) against Mr. Dondero (“Count IV”); Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy (“Count V”); Breach of Fiduciary Duty against Dugaboy (“Count VI”); and Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero (“Count VII”). Debtor seeks avoidance of the Alleged Agreement, declaratory relief, and damages. The Parties agreed that the Defendants would answer or otherwise move against the Amended Complaints on or before September 1, 2021.¹² The new claims, under Counts V, VI, and VII are non-core contract claims that arise from the LPA, containing a broad arbitration provision. Further, the Defendants have critical affirmative defenses for the claims for declaratory relief, breach of fiduciary, and aiding and abetting breach of fiduciary duty, that are rooted in non-core state contract law that also arise from the LPA.

9. Although Debtor alleges that it “believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the notes,”¹³ there is no doubt that adjudication of the existence and enforceability of the Alleged Agreement affects all of Debtor’s claims under Counts V, VI, and VII for declaratory relief, breach of fiduciary duty and breach of fiduciary duty. These claims

¹² See *Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* attached as Exhibit C to *Debtor’s Unopposed Motion for Leave to Serve and File Amended Complaint* [Adv. No. 21-03007, Dkt. No. 55-2 at Exhibit C] stipulating to August 30, 2021 which has been extended to September 1, 2021 by the parties via email communication.

¹³ *Amended Complaint* [Adv. No. 21-03007, Dkt. No. 63 at ¶ 3].

pertain to loans made by the Debtor to its Affiliates and compensation for the Debtor's CEO, all of which are governed by the LPA.¹⁴

10. Defendants requests the Court order the parties to arbitration on Counts V, VI, and VII, as provided by the pre-petition LPA entered into by the parties, and stay the adversary proceeding pending arbitration.

II. STANDARD OF REVIEW

11. When deciding whether to grant a motion to compel arbitration, the Fifth Circuit has established a two-step analysis for determining whether parties must arbitrate a particular claim or set of claims under the FAA: (A) there must be an enforceable agreement to arbitrate; and (B) the claims must be arbitrable. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted) (stating "First we must ask if the party has agreed to arbitrate the dispute. . . If so, we then ask if any federal statute or policy renders the claims non-arbitrable."); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) ("A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement."). Once a party seeking to compel arbitration establishes the asserted claims fall within a valid arbitration agreement, the burden shifts, and the party seeking to avoid arbitration must prove an affirmative defense to the provision's enforcement, such as waiver. *Venture Cotton Coop.*, 435 S.W.3d at 227.

12. In applying the first portion of the two-step analysis, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *See, e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) ("This determination is generally made on the basis of 'ordinary state-law principles that govern the formation of contracts.'" (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). The second part of determining

¹⁴ *See generally* Aigen Dec. Ex. 1, LPA Article 4 and Section 3.10.

whether the parties have agreed to arbitrate—the question of whether the dispute comes within the scope of the agreement—is answered by applying the federal substantive law of arbitrability.” *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009) (citations omitted).

13. Under both Texas and Federal law, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983); *see also Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)). In addition, the Supreme Court has declared that the Federal Arbitration Act, “is a strong congressional declaration of a liberal policy favoring arbitration.” *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 849 (N.D. Tex. 2014) (collecting cases) (“if a valid agreement to arbitrate does exist, the court must observe the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration.”).

III. ARGUMENT

14. This Court should compel arbitration as to Counts V, VI, and VII of the Amended Adversary Complaint because: (1) The claims under Counts V, VI, and VII comprise disputes involving legal rights or remedies arising from the LPA and are governed by an enforceable, and broadly worded, arbitration provision; (2) Counts V, VI, and VII assert noncore claims, and in the Fifth Circuit courts do not have discretion to refuse to compel the arbitration of matters not involving “core” bankruptcy proceedings and should compel arbitration of even core claims if they are not integral to the bankruptcy; and (3) federal and state policy strongly favors arbitration.

15. The Federal Arbitration Act (“FAA”) requires district courts to direct parties to arbitrate issues covered by a valid arbitration agreement. 9 U.S.C. §§ 3, 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “Federal policy strongly favors enforcing

arbitration agreements.” *Dean Witter Reynolds*, 470 U.S. at 217; *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24. When a party moves to compel arbitration, the FAA requires district courts to order arbitration of arbitrable claims. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (In re Sedco, Inc.)*, 767 F.2d 1140, 1147 (5th Cir.1985). Because of the strong presumption in favor of arbitration, “a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.” *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 724–25 (S.D. Tex. 2013), *aff’d*, 559 F. App’x 417 (5th Cir. 2014) (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir.2004)); *see also Grant v. Houser*, 469 Fed. Appx. 310, 315 (5th Cir.2012) (noting the strong presumption in favor of arbitration).

16. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25; *see also Henry*, 551 S.W.3d at 115 (quoting *In re Serv. Corp. Intern.*, 85 S.W.3d at 174). The Fifth Circuit resolves doubts concerning the scope of matter covered by an arbitration provision in favor of referring arbitration. The court states:

We emphasize that our sole responsibility is to determine whether this dispute is governed by an arbitration clause, not to determine the merits of the dispute. *See Snap-On Tools Corp., v. Mason*, 18 F.3d 1261, 1267 (5th Cir.1994). “We resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration. . . . [A]rbitration should not be denied ‘unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’” *Neal*, 918 F.2d at 37 (internal citations omitted). *See also AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 643, 650 (1986).

Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

A. **This Dispute is Governed by An Enforceable Arbitration Provision Reaching All Legal Rights Arising From the LPA.**

17. Debtor’s claims asserted in Counts V, VI, and VII arise under the LPA, which contains an enforceable and broadly worded arbitration provision. The U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, has already interpreted arbitration provisions with identical scope language (and near-identical scope language) to the Arbitration Provision under the LPA, to be valid and binding. *See In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 549-50 (Bankr. N.D. Tex. 2019).¹⁵ Importantly, the court made clear that “it would seem to be beyond peradventure that [the arbitration clause] was, at one time, enforceable between the parties, *with regard to any disputes that arose regarding the agreements.*” *Id.* at 552 (emphasis added); *see also id.* at 557 (emphasis added) (“there were valid arbitration agreements *that applied to all disputes* arising out of the [agreements at issue].”). Accordingly, the court concluded that all claims at issue, including claims for declaratory judgment, fell within the scope of the relevant arbitration clauses. *See id.* at 558.

18. The Arbitration Provision here also covers any “unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from this Agreement.*” LPA, Section 6.14 (emphasis added). Such broad language is sufficient to reach collateral matters, including the oral agreement between the parties which involves legal rights arising from LPA.¹⁶ *Buell Door Co.*

¹⁵ The Court’s decision provides the relevant arbitration clause language. The arbitration clause at Section 16(f) of the Sub-Advisory Agreement states:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies *arising from* this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .

In re Acis Cap. Mgmt., L.P., 600 B.R. at 550 (emphasis added).

¹⁶ It is important to note that the particular language “arising from” is significant in determining that the Arbitration Provision here is broad. The Fifth Circuit and Texas District Courts have specifically determined

v. Architectural Sys., Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, at *6 (N.D. Tex. Aug. 20, 2002) (concluding that the phrase “arising out of” and similar language constitute “broad” arbitration clauses); *see also Elkjer*, 8 F. Supp. at 855 (concluding that the arbitration clause which uses the phrase “arising under or in connection with this [Partnership] Agreement,” is “broad [and] capable of expansive reach” to include statutory claims). “Broad arbitration clauses are not limited to claims which literally ‘arise under [a] contract,’ but rather embrace all disputes between the parties **having a significant relationship** to the contract regardless of their label.” *Id.* at *4 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir.1998) (emphasis added) (internal citations omitted).

19. In the Fifth Circuit, a “broadly construed arbitration provision may encompass claims arising under a separate agreement.” *See, e.g., Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 393–94 (5th Cir. 2002) (holding that an arbitration provision, which covered “any and all claims. . . arising out of or relating to” an agreement, applied to claims arising under a separate agreement); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 38 (5th Cir. 1990) (holding that an arbitration provision encompassing “any and all disputes between [the parties] . . . reach[ed] all aspects of the parties’ relationship,” including claims arising under a separate agreement); *see also I.D.E.A. Corp. v. WC & R Ints., Inc.*, 545 F. Supp. 2d 600, 606 (W.D. Tex. 2008) (noting a broad arbitration provision

that only the phrase “arising under” indicates a narrow arbitration clause, rather than broad. This Court has held:

upon reviewing the above referenced Fifth Circuit cases, the court concludes that the phrase “arising out of” and similar language constitute “broad” arbitration clauses. *Accord Morphis v. Federal Home Loan Mortgage Corp.*, No. 3:02-CV-0210-P, 2002 WL 1461930, *3–4 (N.D.Tex. July 3, 2002) (provision that “any and all disputes between [the parties],” with no limiting clause constituted a broad clause). On the other hand, the phrase “arising under” indicates a “narrow” arbitration clause. *See Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983) (the term “arising under” is relatively narrow) (citation omitted).

Buell Door Co., 2002 WL 1968223, at *6. Here, the “arising from” language of the Arbitration Provision is similar to “arising of out” and is therefore broad.

may encompass claims arising under a separate agreement). Accordingly, the Arbitration Provision covers all of the claims regardless if they arise under the LPA or the separate Notes because the authority to enter into the Notes arises from the LPA which reaches all aspects of the parties' relationship.

20. Here, the LPA choice of law provision, Section 6.1, provides the "Agreement shall be construed in accordance with and governed by the laws of the state of Delaware. . . ." As a result, Delaware state contract law determines whether the LPA includes a valid agreement to arbitrate. Delaware arbitration law mirrors federal law in that "public policy of Delaware favors arbitration." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (citations omitted). Even Debtor's rejection of the LPA does not absolve Debtor of its obligation to arbitrate. It is well established that the "rejection of a contract, or even breach of it, will not void an arbitration clause. . . . Any different conclusion would allow a party to avoid arbitration at will simply by breaching [or rejecting] the contract." *Madison Foods v. Fleming Cos., Inc. (In re Fleming Cos, Inc.)*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005) (citations omitted).

21. Moreover, any question about the scope of the arbitration agreement, including the arbitrability of any particular claim, is for the arbitrator. Under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . , so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). The Fifth Circuit provides an in-depth explanation of who decides what issues when a contract includes an arbitration provision. *See Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199 (5th Cir. 2016).

22. Incorporating rules from an arbitration service provider that themselves delegate the question of arbitrability to the arbitrator clearly and unmistakably expresses the parties' intent to leave the question of arbitrability to the arbitrator. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). Here, the Arbitration Provision provides that the "arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award." The rules of the American Arbitration Association provide that the arbitrator is to decide questions of arbitrability. AAA Commercial Arbitration Rule 7(a). Because the parties' arbitration delegates decision-making to the arbitrators, where the parties entered an agreement to arbitrate, questions of scope and arbitrability should be left to the arbitrator.

B. The Claims Asserted In Counts V, VI, and VII Are Arbitrable Because they Are Non-Core and Arise Under the LPA.

23. Under the LPA, the Court must compel arbitration on Counts V, VI, and VII of the Amended Complaint, because all of the claims are non-core claims arising from the rights and obligations under the LPA. Bankruptcy courts have no discretion to refuse to compel the arbitration of non-core matters. *See, e.g., Elite Precision Fabricators, Inc. v. Gen. Dynamics Land Sys., Inc.*, No. CV H-14-2086, 2015 WL 9302843, at *7 (S.D. Tex. Dec. 18, 2015) (citation omitted) (quoting "it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings"). More specifically, under Fifth Circuit precedent, a bankruptcy court only has discretion to refuse to compel arbitration of an arbitrable claim where: (1) "the proceeding derives exclusively from the provisions of the bankruptcy code;" and (2) "arbitration of the proceeding would conflict with the purposes of [the bankruptcy code]." *See Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Zimmerli v. Ocwen Loan Servicing, LLC*, 432 B.R. 238, 242 (Bankr. N.D. Tex. 2010). "Importantly, however, *'a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core'*

bankruptcy proceedings under 28 U.S.C. § 157(b).” *In re Cain*, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (emphasis added) (citation omitted) (stating “it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings.”); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. at 560 (in the *Acis* case—unlike here—the claims at issue were “an integral part of determining . . . proofs of claim,” resulting in the court denying the motion to compel arbitration).

24. For claims that are “derivative of the pre-petition legal or equitable rights possessed by a debtor” it is beyond dispute that “it is ‘universally accepted’ that such issues are arbitrable.” *In re Cain*, 585 B.R. at 137 (citing *Nat’l Gypsum Co.*, 118 F.3d at 1066, 1069). In other words, for non-core proceedings, a court “must give effect to the terms of any applicable arbitration clauses.” *In re Daisytek, Inc.*, 323 B.R. 180, 188 (N.D. Tex. 2005).

1. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count V Because Debtor’s Proposed Declaratory Relief Claim Is A Non-Core Claim Arising From The LPA.**

25. Debtor’s declaratory relief claim simply seeks declarations concerning the extent of limited partner (including Dugaboy’s) authority under the LPA, including authority to enter into the Alleged Agreement on behalf of the Partnership.¹⁷ This is a legal dispute arising from LPA, a pre-petition contract, thus coming within the Arbitration Provision and governed by state contract law. Courts generally agree that claims for declaratory judgment which could also exist outside of bankruptcy are non-core proceedings.¹⁸ *See, e.g., In re OCA, Inc.*, 410 B.R. 443, 450 (E.D. La.

¹⁷ *See Amended Complaint* [Adv. No. 21-03006, Dkt. No. 63 at ¶¶ 83-86].

¹⁸ *See also In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 222–23 (C.D. Cal. 2014)(“That court found a trustee’s claim for declaratory relief as to the ownership of similar tax refunds non-core because it was a “dispute between private parties” and arose out of a pre-bankruptcy tax sharing agreement governed by state contract law); *see also In re SFD @ Hollywood, LLC*, 414 B.R. 794, 797 (Bankr. S.D. Fla. 2009)(“This proceeding [for declaratory judgment] could also exist outside of bankruptcy. Accordingly, this is a non-core proceeding in which the Court cannot enter a final order, absent consent of the district court and the parties.”); *see also Sunterra Corp. v. Perini Bldg. Co.*, No. 204CV00784MCEEFB, 2008 WL 11512082, at *4 (E.D. Cal. June 12, 2008)(“The new causes of action--strict liability, negligence, breach of contract, professional

2007)(“That the doctors’ claims are for breach of contract, breach of fiduciary duty and declaratory relief, and are entirely based on state law, supports a finding that they are noncore claims.”)

26. Therefore, the Court lacks discretion to refuse to compel arbitration on Count V asserting Declaratory Relief pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001 against Dugaboy. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 260 (5th Cir. 1996) (district court did not abuse discretion in refusing to consider plaintiffs’ request for declaratory relief where order granting defendant’s motion to compel arbitration disposed of same issues raised in declaratory judgment action); *see also Austin Cap. Mgmt., Ltd. v. Bd. of Trustees of Texas Iron Workers’ Pension Fund*, No. A-09-CA-351 LY, 2009 WL 10699390, at *8 (W.D. Tex. July 30, 2009) (finding action seeking declaratory relief arbitrable); *see also Info. Sys. Audit & Control Ass’n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017) (stating that permitting a party to obtain declaratory relief from a court when there is a valid arbitration agreement is “essentially the same relief as that otherwise reserved for the arbitrator. It would make little sense to include such an expansive loophole in what is otherwise a sweeping arbitration provision.”).

2. **The Court Lacks Discretion To Refuse To Compel Arbitration On Count VI And VII Because Debtor’s Proposed Claims Asserting Breach Of Fiduciary Duty And Aiding And Abetting Breach Of Fiduciary Duty Are Non-Core Claims Arising From The LPA.**

27. Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero for entering into the Alleged Agreement, must be arbitrated because they are non-core claims that arise under the LPA. It is well established that state law claims, such as breach of fiduciary duty and aiding and abetting breach of fiduciary duty, are non-core claims. *See, e.g., In re Dune Energy, Inc.*, 575 B.R. 716, 729 (Bankr. W.D. Tex. 2017) (“Courts within the Fifth Circuit have consistently found that post-

negligence, and declaratory relief--would also exist independently of bankruptcy laws and are similarly “non-core” proceedings.”).

confirmation suits by plan trustees based on state law claims are only within the ‘related to’ (and not ‘core’) bankruptcy jurisdiction of a federal court.”); *see also Brickley for CryptoMetrics, Inc. Creditors’ Tr. v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 829–30 (W.D. Tex. 2017) (stating post-confirmation claims for breach of fiduciary duty and state law claims are “related to” claims); *see also Mirant Corp. v. The S. Co.*, 337 B.R. 107, 120 (N.D. Tex. 2006).

28. The breach of fiduciary duty claims under Count VI and aiding and abetting breach of fiduciary duty under Count VII are—and by their own terms—premised on Dugaboy’s authority to bind the Debtor under the LPA.¹⁹ The Debtor challenges whether the LPA affords the right to Dugaboy to approve such compensation, thus, any evaluation of the breach of fiduciary duty-related claims must first entail an analysis of the LPA, making construction of the LPA – the agreement containing the arbitration clause, a predicate to the analysis of the breach of fiduciary duty claims. Thus, Counts VI and VII involve unresolved legal disputes between the parties—including the Debtor and Mr. Dondero, Nancy Dondero, and Dugaboy, who are all parties and/or officers/directors/partners/employees/agents/affiliates/representatives of a General or Limited Partner—concerning legal duties to the Partnership that would not exist outside of the LPA.

29. The Fifth Circuit makes clear that where, as here, the breach of fiduciary duty (or aiding and abetting fiduciary duty) claim is interwoven with the partnership agreement containing an arbitration clause, the fiduciary claims will be subject to arbitration. *See Coffman v. Provost * Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 732 (E.D. Tex. 2001), *aff’d sub nom. Coffman v. Provost Umphrey LLP*, 33 Fed. Appx. 705 (5th Cir. 2002) (“Even if it is conceivable that Plaintiff

¹⁹ *See Amended Complaint* [Adv. No. 21-03007, Dkt. No. 63 at ¶ 89] (“If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.”); *id.* ¶¶ 92-94 (the Donderos “were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and the Donderos “aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.”)

could maintain a claim for breach of fiduciary duty without the Partnership Agreements, that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause . . . the Partnership Agreements will determine whether a fiduciary duty was breached—whether that duty arises from the common law or from the contract itself. . . . For these reasons, the court finds Plaintiff’s breach of fiduciary duty claim to be subject to arbitration.”); *see also Omni Pinnacle, LLC v. ECC Operating Services, Inc.*, 255 F. App’x 24, 25-26 (5th Cir. 2007) (internal quotation marks omitted) (“A dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”).

30. Because breach of fiduciary duty and aiding and abetting breach of fiduciary duty are non-core state-law claims that could exist outside of bankruptcy, the reviewing court lacks discretion to refuse enforcement of an otherwise-applicable arbitration agreement as to these claims. *See In re McCollum*, 621 B.R. 655, 659 (Bankr. N.D. Miss. 2020) (finding that breaching its fiduciary duty “is a state law contract claim which arose prepetition, could exist outside the bankruptcy case, and is tangential to the bankruptcy case. It does not invoke a substantive right created by bankruptcy law and is a non-core claim.”); *In re Gaughf*, 19-50947-KMS, 2020 WL 1271595, at *4 (Bankr. S.D. Miss. Mar. 12, 2020) (“Aiding and Abetting Count is non-core.”). Additionally, claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty do not reference the Bankruptcy Code or any right conferred by the Code. *See In re McCollum*, 621 B.R. at 659. Therefore, the Court lacks discretion to refuse to compel arbitration on Count VI asserting Breach of Fiduciary Duty against Dugaboy and Count VII Aiding and Abetting a Breach of Fiduciary Duty against Mr. Dondero and Nancy Dondero.

31. That Nancy Dondero is not personally a party to the LPA does not impair her right to enforce the arbitration agreement it contains. Debtor alleges misconduct by her and a signatory to the LPA relating to fiduciary duties Debtor alleges arise out of the LPA. There are two circumstances

under which a nonsignatory can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory; or (2) when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). Both circumstances are implicated by Debtor’s allegations against Nancy Dondero.

32. First, non-signatories are entitled to invoke an arbitration agreement when the claim against the non-signatory arises from the contract with an arbitration provision. *See, e.g., Bidas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)) (“[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a nonsignatory.”); *see also Amegy Bank Nat. Ass’n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 450–51 (S.D. Tex. 2012) (citing *Grigson*, 210 F.3d at 527). Because Debtor charges Nancy Dondero with breaching fiduciary duties (and aiding and abetting breaches of such duties) that arise out of the LPA, she falls precisely within the ambit of cases like *Bidas*, and *Grigson* and *Amegy*.

33. Second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract—here the allegations are made against Nancy Dondero (a non-signatory) and Dugaboy (a signatory) to the LPA—the non-signatory may compel arbitration on the claims. *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming that “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.”);

see also *Grigson*, 210 F.3d at 526 (“a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff”).

C. **The Court Should Stay All Claims Pending Arbitration.**

34. The claims that the Court refers to arbitration must be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. See *In re Gandy*, 299 F.3d 489, 494–95 (5th Cir. 2002) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (“A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement”). Further, bankruptcy courts generally do not have discretion to decline to stay, pending arbitration, proceedings involving non-core matters. *Id.* at 495. Accordingly, the Court should stay each of the Debtor’s claims against Defendants pending arbitration.

35. Should the Court not refer arbitration on every claim, in the alternative, the Court should stay the entire adversary proceeding pending arbitration. Permitting any claims to continue herein, while some or all claims are subject to arbitration would be unnecessarily expensive and duplicative. The Court has the inherent power to grant a discretionary stay of a proceeding pending arbitration when there are issues common to the arbitration and the court proceeding and those issues may be decided by the arbitrator. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (stating that the power to stay proceedings is incidental to power “inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); see also *In re Divine Ripe, L.L.C.*, 538 B.R. 300, 309 (Bankr. S.D. Tex. 2015) (same).

IV. **CONCLUSION**

WHEREFORE, for the reasons above, Defendants respectfully request that this Court compel arbitration on Counts V, VI, and VII, and order a stay of the proceedings pending arbitration.

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez _____

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03007-sgj
HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	



APPENDIX IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Defendants James Dondero, Nancy Dondero and The Dugaboy Investment Trust file this Appendix in Support of their Motion to Compel Arbitration and Stay Litigation and request the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Motion to Compel Arbitration and Stay Litigation, dated September 1, 2021	App. 1-3
1	Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.	App. 4-40
2	Excerpts from the Transcript of the Remote Deposition of James Dondero on May 28, 2021, Adversary Proceeding No. 21-3003	App. 41-54
3	Acceptance of Appointment of Family Trustee, executed by Nancy Marie Dondero on October 13, 2015	App. 55-60
4	Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees, The Dugaboy Investment, dated November 15, 2010	App. 61-97

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
TRUST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

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Exhibit A

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ATTORNEYS FOR DEFENDANTS JAMES DONDERO AND NANCY DONDERO

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03007-sgj
HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION**

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendants James Dondero and Nancy Dondero, and I submit this Declaration in support of the *Motion to Compel*

Arbitration and Stay Litigation being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of The Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts of the May 28, 2021 Remote Deposition of James Dondero Transcript at 176-178; 212:18-25; 213:1-17.

4. Attached as **Exhibit 3** is a true and correct copy of the *Acceptance of Appointment of Family Trustee*, executed by Nancy Marie Dondero on October 13, 2015.

5. Attached as **Exhibit 4** is a true and correct copy of *Trust Agreement Between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees The Dugaboy Investment*, entered November 15, 2010 at Article 5.2.

Dated: September 1, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“Class B Limited Partner” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“Class B Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“Class B NAV Ratio Trigger Period” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“Class C Limited Partner” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“Class C Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“Class C NAV Ratio Trigger Period” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“Code” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“Contribution Note” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“Default Loan” has the meaning set forth in Section 3.1(c)(i).

“Defaulting Partner” has the meaning set forth in Section 3.1(c).

“Delaware Act” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“Effective Date” means the date first recited above.

“Fiscal Year” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“*Record Date*” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“*Second Amended Buy-Sell and Redemption Agreement*” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“*Securities*” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“*Securities Act*” means the Securities Act of 1933, as amended, and any successor to such statute.

“*Substitute Limited Partner*” has the meaning set forth in Section 4.6(a).

“*Transfer*” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“*Treasury Regulations*” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "*Tax Distribution*"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; *provided, however*, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however, any* action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

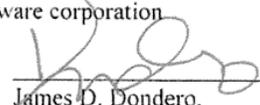
*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

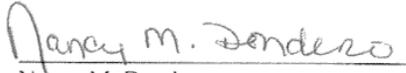
By: _____


James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____


Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: _____

Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

By: _____

Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA


Mark K. Okada

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #1**

By: 
Name: Lawrence Tonomura
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY
TRUST – EXEMPT TRUST #2**

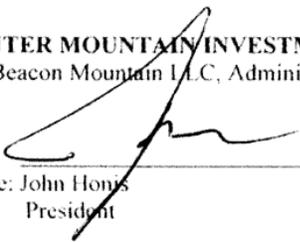
By: 
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST

By: Beacon Mountain L.L.C., Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>CLASS A PARTNERS</u>		
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___ % Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

[_____]

Exhibit 2

1 Dondero - 5-28-2021
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 In re:)
6)
6 HIGHLAND CAPITAL) Case No.
MANAGEMENT, LP,) 19-34054 L.P.
7) Chapter 11
Debtor,)
8 -----)
HIGHLAND CAPITAL MANAGEMENT,)
9 LP,)
10 Plaintiff,) Adversary No.
11 vs.) 21-03003-sgi
12 JAMES D. DONDERO,)
13 Defendant.)

14
15 REMOTE DEPOSITION OF
16 JAMES DONDERO
17
18 Pages 103 - 282
19 Dallas, Texas
20 Friday, 28th day of May, 2021

21
22
23 Job No. 194690
24 Reported by:
25 Daniel J. Skur, Notary Public and CSR

1 Dondero - 5-28-2021

2

3

4

5

6

7

8 28th day of May, 2021

9 9:33 a.m. - 1:59 p.m.

10

11

12 Remote Deposition of JAMES DONDERO,
13 located in Dallas, Texas, before Daniel J.
14 Skur, Notary Public and Certified Shorthand
15 Reporter in and for the State of Texas
16 located in Waxahachie, Texas.

17

18

19

20

21

22

23

24

25

1 Dondero - 5-28-2021

2 A P P E A R A N C E S:

3 Pachulski Stang Ziehl & Jones
4 Attorney(s) for Debtor
780 Third Avenue

5 New York, New York 10017

6 BY: John Morris, Esq.

7 Gregory Demo, Esq.

8
9 Stinson
Attorney(s) for The Witness
3102 Oak Lawn Avenue

10 Dallas, Texas 75219

11 BY: Deborah Deitsch-Perez

12 Michael Aigen, Esq.

13 Paul Lackey, Esq.

14
15 Sidley Austin
16 Attorney(s) for The Committee
2021 McKinney Avenue

17 Dallas, Texas 75201

18 BY: Paige Montgomery, Esq.

19

20

21 ALSO PRESENT:

22 Davor Rukavina, NexPoint

23 La Asia Canty

24

25

1 Dondero - 5-28-2021

2

3 IT IS HEREBY STIPULATED AND AGREED
4 by and between the attorneys for the respective
5 parties herein, that filing and sealing be and
6 the same are hereby waived.

7 IT IS FURTHER STIPULATED AND AGREED
8 that all objections, except as to the form of
9 the question, shall be reserved to the
10 time of the trial.

11 IT IS FURTHER STIPULATED AND AGREED
12 that the within deposition may be sworn to and
13 signed before any officer authorized to
14 administer an oath, with the same force and
15 effect as if signed and sworn to before the
16 Court.

17 - oOo -

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1 Dondero - 5-28-2021
2 P R O C E E D I N G S
3 R E M O T E O R A L D E P O S I T I O N O F
4 J A M E S D O N D E R O

5 (REPORTER NOTE: This deposition is
6 being conducted remotely in accordance with
7 the Current Emergency Order regarding the
8 COVID-19 State of Disaster.

9 Today's date is the 28th day of
10 May, 2021. The time is 9:33 a.m. Daylight
11 Savings Time. The witness is located in
12 Dallas, Texas.)

13 JAMES DONDERO,
14 having been duly cautioned and sworn to tell
15 the truth, the whole truth and nothing but the
16 truth, testified as follows:

17 (9:33 A.M.)

18 EXAMINATION

19 BY MR. MORRIS:

20 Q. Good morning, Mr. Dondero.

21 A. Morning.

22 Q. It's John Morris, again, from
23 Pachulski on behalf of the debtor. We're here
24 for your deposition today.

25 Do you understand that?

1 Dondero - 5-28-2021

2 BY MR. MORRIS:

3 Q. Mr. Dondero, can you describe for
4 me -- withdrawn.

5 Did you discuss with your sister
6 Nancy, the agreement that's referred to in
7 paragraph 40?

8 A. The agreement to subsequent
9 conditions, yes, absolutely. But this
10 agreement that's on the screen, I've never --
11 I've never -- I've never shown her this
12 document or talked to her about it.

13 Q. I'm not asking about the document.
14 I'm not asking about the document. I'm asking
15 about the agreement that's referred to in
16 paragraph 40.

17 Do you understand that?

18 A. Yes. And, yes, we had several
19 conversations about it.

20 Q. Okay. Can you describe for me
21 everything you remember about your discussions
22 with Nancy concerning the agreement that's
23 referred to in paragraph 40?

24 A. That the loans that were in place
25 would be forgiven upon a monetization -- the

1 Dondero - 5-28-2021
2 favorable monetization of certain large or
3 liquid assets on the Highland balance sheet;
4 and the three that were focused on was MGM,
5 Trussway, and Cornerstone.

6 Q. Did she say anything in response?

7 A. Just, "How much are we talking
8 about?" And I told her it was about 9 million
9 in aggregate, and -- and I told her that it
10 was -- that the forgiveness or the compensation
11 was compliant regarding any credit covenants or
12 Hunter Mountain covenants --

13 Q. Do you recall any --

14 A. -- that -- that if it were to be
15 forgiven, that additional compensation would be
16 compliant or permitted and really not material
17 relative to any outstanding credit agreements
18 that Highland had or agreements with Hunter
19 Mountain.

20 Q. Is this something that you discussed
21 with her, or is this just information that
22 you're giving me?

23 A. This is what I discussed -- that's
24 almost the entirety of the conversation. It
25 happened over a couple different conversations,

1 Dondero - 5-28-2021

2 but...

3 Q. Did anybody participate in any of
4 the conversations you're describing other than
5 you and your sister?

6 A. I don't believe it was necessary, it
7 didn't include anybody else.

8 Q. Okay. Again, I'm not here to
9 question. I'm just looking for facts,
10 Mr. Dondero.

11 So nobody participated in any of
12 these conversations that you can recall other
13 than you and Nancy; is that correct?

14 A. Correct, that I -- yes, there was
15 never a third party involved in our
16 conversations. I don't know -- I don't think
17 she discussed it with anybody else, but I don't
18 know.

19 Q. Did -- was the agreement subject to
20 any negotiation? Did she make any
21 counterproposal of any kind?

22 A. No. No, I -- again, I believe both
23 of our views at the time was that it was
24 immaterial to Highland overall or any other
25 agreements.

1 Dondero - 5-28-2021

2 three assets would trigger the conditions
3 subsequent?

4 A. Correct.

5 Q. Okay. And who decided whether the
6 asset was sold on a favorable basis?

7 Who made that decision, under your
8 agreement with Nancy?

9 A. It was just defined relative to
10 cost, so it was just -- it was just a
11 factual -- there's nothing to decide. It would
12 just be a factual answer.

13 Q. So, I just want to make sure I
14 understand.

15 Your agreement with Nancy was that
16 --

17 A. Yes.

18 Q. -- that -- all right. Withdrawn.

19 Your agreement with Nancy in January
20 or February 2019, was that if any of MGM,
21 Cornerstone, or Trussway was sold at cost, the
22 debtor would forgive your obligations under the
23 three notes.

24 Do I have that right?

25 MS. DEITSCH-PEREZ: Object to the

1 Dondero - 5-28-2021

2 form.

3 A. If any of them were sold above cost,
4 it would -- monetization would trigger the --
5 the three notes -- forgiveness of the three
6 notes, yes.

7 BY MR. MORRIS:

8 Q. Okay. And I just want to see if I
9 can understand: Did you and Nancy discuss in
10 January or February 2019 how much above cost
11 the sale would have to be in order for the
12 debtor to forgive your obligations under the
13 three notes?

14 MS. DEITSCH-PEREZ: Object to the
15 form.

16 A. No. It just had to be above cost,
17 not a amount above cost.

18 BY MR. MORRIS:

19 Q. Okay.

20 A. Because just monetizing it -- just
21 monetizing it and getting liquidity for an
22 illiquid investment, even if it was at cost, is
23 good. So something above cost is great. And
24 those are all big assets, and the notes were
25 small.

1 Dondero - 5-28-2021

2 C E R T I F I C A T E

3 STATE OF TEXAS)

4)

5 COUNTY OF ELLIS)

6 I, Daniel J. Skur, a Notary Public
7 within and for the State of Texas, do
8 hereby certify:

9 That JAMES DONDERO, the witness whose
10 deposition is hereinbefore set forth, was
11 duly sworn by me and that such deposition
12 is a true record of the testimony given by
13 such witness.

14 That pursuant to Rule 30 of the Federal
15 Rules of Civil Procedure, signature of the
16 witness was not reserved by the witness or
17 other party before the conclusion of the
18 deposition;

19 I further certify that I am not
20 related to any of the parties to this
21 action by blood or marriage; and that I am
22 in no way interested in the outcome of this
23 matter.

24 IN WITNESS WHEREOF, I have hereunto
25 set my hand this 28th day of May, 2021.



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Daniel J. Skur
Notary Public, State of Texas.
My Commission Expires 7/7/2022
TSG Reporting, Inc.
228 East 45th Street, Suite 810
New York, New York
(877) 702-9580

Dondero - 5-28-2021

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name:

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

In re:)	
HIGHLAND CAPITAL	)	Case No.
MANAGEMENT, LP,	)	19-34054 L.P.
Debtor,	)	Chapter 11
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, LP,)	
Plaintiff,	)	Adversary No.
vs.	)	21-03003-sgi
JAMES D. DONDERO,)	
Defendant.)	
Dep. Date: 05/28/2021		
Deponent: JAMES DONDERO		

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

CORRECTIONS:

Pg.	LN.	Now Reads	Should Read	Reason
140	4	THE WITNESS	MR. MORRIS	3
140	6	THE WITNESS	MR. MORRIS	3
140	8	THE WITNESS	MR. MORRIS	3
140	11	THE WITNESS	MR. MORRIS	3
140	13	THE WITNESS	MR. MORRIS	3
140	14	MR. MORRIS	THE WITNESS	3
140	15	THE WITNESS	MR. MORRIS	3
177	3	liquid	illiquid	3

181	25		Add to end (after yes): as long as the conditions subsequent could still be met.	1
182	13	focused	focus	3
188	11		Add to end (after monetized); or were monetized for less than cost.	1



JAMES DONDERO

SUBSCRIBED AND SWORN BEFORE ME

THIS 29th DAY OF June, 2021.

Linda Lauchner 6/19/25
 (Notary Public) MY COMMISSION EXPIRES:

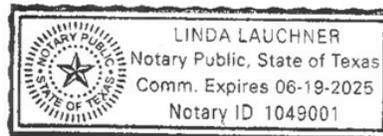


Exhibit 3

THE DUGABOY INVESTMENT TRUST
James D. Dondero, Primary Beneficiary

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

Re: The Dugaboy Investment Trust

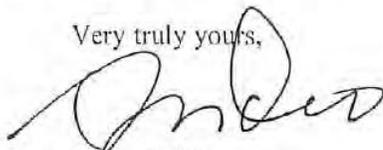
Dear Ms. Breault,

I, James D. Dondero, am writing to inform you that on October 12, 2015, I received notice from Grant James Scott that he will cease to serve as Family Trustee of The Dugaboy Investment Trust (the "**Trust**") and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust.

Pursuant to the attached Resignation of Family Trustee from Grant James Scott, I appoint Nancy Marie Dondero as the successor Family Trustee of the Trust.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.2 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with notice of my appointment of a successor Family Trustee.

Very truly yours,



James D. Dondero

THE DUGABOY INVESTMENT TRUST
Grant James Scott, Family Trustee

October 12, 2015

Dana Scott Breault
5207 Scarborough Lane
Dallas, Texas 75287

Cynthia D. M. Brown, President
Commonwealth Trust Company
29 Bancroft Mills Road #2
Wilmington, Delaware 19806

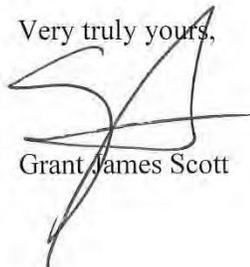
Re: The Dugaboy Investment Trust

Dear Ms. Breault,

I, Grant James Scott, am writing to inform you that as of October 12, 2015, I will cease to serve as Family Trustee of The Dugaboy Investment Trust (the “**Trust**”) and shall stop performing all duties and responsibilities undertaken as Family Trustee of the Trust pursuant to the attached Resignation of Family Trustee.

This letter and the attached Resignation of Family Trustee shall satisfy my obligations under Section 5.1 of that Trust Agreement entered into on November 15, 2010 to provide you, Settlor, with written notice of my resignation.

Very truly yours,

A handwritten signature in black ink, appearing to be 'G. Scott', written over the typed name 'Grant James Scott'.

Grant James Scott

RESIGNATION OF FAMILY TRUSTEE

I, **GRANT JAMES SCOTT**, do hereby acknowledge that I voluntarily tender my resignation as Family Trustee of The Dugaboy Investment Trust pursuant to that Trust Agreement, dated November 15, 2010 by, between and among Dana Scott Breault, as Settlor, and Common Wealth Trust Company, as Administrative Trustee.

This resignation shall take effect immediately upon the execution hereof and delivery of a written acknowledged instrument wherein NANCY MARIE DONDERO accepts the trust and the position of Family Trustee.

IN WITNESS WHEREOF, I hereby sign my Resignation as Family Trustee of the above trust.

Signed, sealed and delivered in the presence of:



Family Trustee

10/12/2015
Date

STATE OF TEXAS §

COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **GRANT JAMES SCOTT** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]



Notary Public's Signature

Expiration: January 15, 2019

ACCEPTANCE OF APPOINTMENT OF FAMILY TRUSTEE

I, **NANCY MARIE DONDERO**, appointed as Family Trustee under Article V, Section 5.2(a)(i) of The Dugaboy Investment Trust, dated November 15, 2010 (the "Trust"), hereby acknowledge and accept the position of Family Trustee of the Trust and hereby agree to faithfully perform all the duties and adopt all of the obligations imposed.

Signed this 13th day of October, 2015.

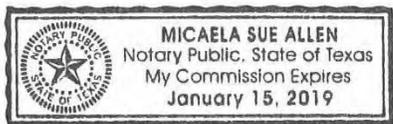
Nancy Marie Dondero

NANCY MARIE DONDERO
Family Trustee

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, a notary public, on this day personally appeared **NANCY MARIE DONDERO** known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, 2015.



[SEAL]

Micaela Sue Allen

Notary Public's Signature

Expiration: January 15, 2019

ACKNOWLEDGEMENT OF DELIVERY

I, JAMES D. DONDERO, acknowledge that this Acceptance of Appointment of Family Trustee by NANCY MARIE DONDERO was delivered to and received by me on October __, 2015.

A handwritten signature in black ink, appearing to read 'James D. Dondero', written over a horizontal line.

James D. Dondero

Exhibit 4

TRUST AGREEMENT

Between

DANA SCOTT BREault,
Settlor

and

JAMES D. DONDERO and
COMMONWEALTH TRUST COMPANY,
Trustees

THE DUGABOY INVESTMENT TRUST

WINSTEAD PC
DALLAS, TEXAS

THE DUGABOY INVESTMENT TRUST

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THE DUGABOY INVESTMENT TRUST

AGREEMENT OF TRUST made and entered into at Dallas, Texas, this ____ day of October, 2010, by and between DANA SCOTT BREault, as Settlor, and JAMES D. DONDERO, and COMMONWEALTH TRUST COMPANY, as Trustees.

ARTICLE I

DEFINITIONS

The following terms, as used in this Trust Agreement, have the meanings set forth below, unless another meaning is clearly indicated by context or circumstances:

1.1 Settlor. "Settlor" means DANA SCOTT BREault.

1.2 Jim. "Jim" means JAMES D. DONDERO.

1.3 Trustees. The initial Trustee of each trust created hereunder is JAMES D. DONDERO. "Trustee" means any person or entity serving as Trustee, whether original or successor and whether one or more in number. "Administrative Trustee" means COMMONWEALTH TRUST COMPANY in its capacity as Administrative Trustee, and any successor Administrative Trustee appointed in accordance with Section 5.2(c). "Independent Trustee" means GRANT JAMES SCOTT, III, (upon his acceptance as set forth in Section 5.2(b)) in his capacity as Trustee, and any successor Independent Trustee appointed in accordance with Section 5.2(b). "Family Trustee" means JAMES D. DONDERO in his capacity as Trustee, and any successor Family Trustee appointed in accordance with Section 5.2(a). The rights, powers, duties, and obligations, of the Family Trustee, Independent Trustee and Administrative Trustee are to be exercised and allocated pursuant to Section 6.2 of this Trust Agreement.

1.4 Children. "Children" means REESE AVRY DONDERO, JAMESON DRUE DONDERO, and any other child born to or adopted by Jim after the date of this Trust Agreement. "Child" means one of the Children.

1.5 Descendants. "Descendants" means the legitimate children of the person designated and the legitimate lineal descendants of such children, and includes any person adopted before attaining age fifteen (15) and the adopted person's legitimate lineal descendants. A posthumous child shall be considered as living at the death of his parent.

1.6 Code. "Code" means the Internal Revenue Code of 1986, as amended, and corresponding provisions of future federal tax law.

1.7 Per Stirpes. "Per Stirpes," when used with respect to a distribution of property among a class of beneficiaries, shall mean by representation; that is, the Descendants of a deceased ancestor take the share such ancestor would have received had he or she been living, and the issue of a living ascendant would not take in competition with such ascendant. The per

stirpital allocation shall commence with the most senior generation that has a living representative.

ARTICLE II

FUNDING

Settlor has transferred to the Trustee, without consideration, One Thousand and No/100 Dollars (\$1,000.00) which shall be administered and distributed in accordance with the terms of this Trust Agreement. Settlor and others may transfer to the Trustee properties acceptable to them, to be added to the trust estate. The Trustee shall administer the initial trust estate pursuant to the terms of Section 3.1.

ARTICLE III

DISTRIBUTION OF PRINCIPAL AND INCOME

3.1 Trust for Jim. The trust for the benefit of Jim shall be administered and distributed upon the following terms:

(a) Distributions to Jim. The Family Trustee may distribute to Jim so much of the net income and principal of the trust as the Family Trustee deems necessary to provide for Jim's maintenance, support and health. Undistributed income shall be accumulated and added to principal. In exercising its discretion, the Family Trustee shall take into account the following factors:

- (i) Jim is the primary beneficiary of the trust.
- (ii) The Family Trustee shall take into consideration in determining Jim's needs any other income or resources known upon reasonable inquiry by the Family Trustee to be available to Jim for these purposes.
- (iii) Settlor's intention to assist or enable Jim to obtain and furnish a home commensurate with his standard of living.
- (iv) Settlor's intention to assist or enable Jim to obtain capital to enter a business or profession.
- (v) Any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust

(b) Distributions by Independent Trustee. The Independent Trustee may, in its sole and absolute discretion, distribute to Jim so much of the income and principal of the trust as the Independent Trustee shall deem appropriate or advisable. It is Settlor's intention to give the Independent Trustee the broadest discretion possible in determining the amount and timing of distributions of income and principal hereunder and Settlor recognizes that the Independent Trustee may, in the exercise of its discretion, determine

to distribute the entire trust estate to Jim or to make no distributions to Jim during Jim's disability or for so long as Jim shall have a judgment outstanding, or for so long as any distribution might be lost to Jim's creditors. It is also Settlor's intention and desire for the Independent Trustee to consider any federal, state or local income taxes imposed on Jim as a result of the income and/or gains from the trust in determining the amount of distributions to be made to Jim under this subsection (b).

(c) Inter Vivos Special Power of Appointment. During Jim's lifetime, he shall have a special power to appoint any part or all of the trust estate to any individual or entity, except that no appointment shall be made to Jim, his creditors, his estate, or the creditors of his estate. Valid appointments may be in such amounts and proportions and upon such terms and conditions as Jim shall determine and evidence by written instrument delivered to the Trustee which specifically refers to this power of appointment and expresses the intention to exercise it; provided that such power of appointment shall not extend to any life insurance policies insuring Jim's life that constitute a part of the trust estate; and provided further that Jim shall not have a power to appoint by deed to or for the benefit of Jim or any individual or entity if such appointment has the effect of satisfying Jim's contractual or legal obligations. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.1(c).

(d) Independent Trustee's Power to Grant Testamentary General Power of Appointment. Except as otherwise provided herein, the Independent Trustee, by signed acknowledged instrument delivered to Jim, may grant Jim a testamentary general power of appointment (as defined in Sections 2041 of the Code) over part or all of the trust estate, provided, however, that such power of appointment shall only be effective in an amount up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless Jim's will provides otherwise by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of the trust estate over which the power is exercisable. As used in this section, the term "Net Death Taxes" shall mean the aggregate death taxes (including, without limitation, Federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to Jim's estate.

(i) If Jim has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (d) above, the amount that Jim may appoint under subsection (d) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of Jim's death, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers

together shall be no greater than the amount otherwise appointable under subsection (d) above.

(ii) The scope and terms of the power shall be defined in the instrument. Before such a power is exercised by Jim and the exercise becomes effective, the Independent Trustee may, in a similar manner, revoke or alter the power which was granted. This power shall not apply if the trust has an inclusion ratio of zero for generation-skipping transfer tax purposes. Jim shall not have a general power of appointment over any part of the trust estate unless such power is specifically granted to Jim by the Independent Trustee pursuant to this subsection.

(e) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon Jim's death. Upon termination of the trust, the Trustee shall distribute the balance of the trust estate as follows:

(i) Pursuant to General Testamentary Power of Appointment. This paragraph (i) shall apply if, but only if, the Independent Trustee grants Jim a general testamentary power of appointment pursuant to subsection (d) above and the Independent Trustee has not revoked the grant of that general power prior to the date of Jim's death. In that event, if Jim validly exercises such general testamentary power of appointment, the Trustee shall distribute so much of the trust estate then remaining as is validly appointed by Jim pursuant to such power in accordance with the terms of such appointment.

(ii) Special Testamentary Power of Appointment. This paragraph (ii) shall apply to so much of the trust estate then remaining as is not distributed pursuant to paragraph (i) above. The Trustee shall distribute the trust estate to such one or more individuals and entities, in such amounts and proportions and upon such terms and conditions, as Jim appoints by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, Jim may not appoint to Jim, Jim's estate, Jim's creditors, or creditors of Jim's estate.

(iii) Alternative Disposition. The remaining and unappointed trust estate shall be held in trust or distributed as follows:

(1) If one or more of Jim's Descendants are then living, the Trustee shall divide the trust estate into separate equal shares, one for each then living Child and one for the then living Descendants, collectively, of each deceased Child with one or more Descendants then living. The Trustee shall administer a share for each Child in a separate trust for the primary benefit of the Child and for the Child's Descendants pursuant to Section 3.2 hereof. The Trustee shall administer a share for the Descendants of each deceased Child pursuant to Section 3.3 hereof.

(2) If none of Jim's Descendants is then living, the trust estate shall be administered or distributed in accordance with Section 3.4 hereof.

3.2 Trust for Child. All property directed to be administered in a separate trust for a Child under this Section 3.2 shall be administered and distributed for the Child's benefit upon the following terms:

(a) Distributions to Child. The Trustee may distribute to the Child so much of the net income and principal of the trust as the Trustee deems necessary to provide for the Child's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Child's standard of living at the creation of the trust.

(ii) The Child is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Child's needs, any other income or resources known upon reasonable inquiry by it to be available to the Child for these purposes.

(iv) Settlor's intention to enable or assist each Child to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Child's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Child's motivation to provide for her own needs in life.

(b) Distributions to Child's Descendants. The Trustee may distribute to the Child's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Child, acting in the Child's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of the Descendants of the Children, in such amounts and proportions and upon such terms and conditions, as the Child shall direct; provided that the Child shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Child. This power of appointment may be exercised subject to such terms and conditions as the Child shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.2(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate upon the death of the Child. Upon termination, the Trustee shall distribute the trust estate then remaining, or any part thereof, to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Child shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Child may not appoint to the Child, the Child's creditors, estate, or creditors of the Child's estate. The trust property not appointed by the Child in accordance with this special power of appointment shall be administered by the Trustees for the Child's then living Descendants pursuant to Section 3.3 hereof. If there are no Descendants of the Child then living, the Trustee shall distribute the remaining trust estate to Jim's then living Descendants, Per Stirpes. If any property is distributable to a person for whose benefit a trust which was established under this Trust Agreement is then being administered, the property shall be added to that trust and administered according to its terms. If no Descendant of Jim is then living, the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.3 Trusts for Descendants. The Trustee shall divide property which is to be administered under this Section 3.3 for the Descendants of a deceased Child, among such

Descendants, Per Stirpes. The Trustee shall administer each share created for a Descendant of a deceased Child (the "Beneficiary") in a separate trust for the Beneficiary's benefit upon the following terms:

(a) Distributions. The Trustee shall distribute to the Beneficiary so much of the net income and principal of the trust as the Trustee deems necessary for the Beneficiary's reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The Beneficiary's standard of living at the creation of the trust.

(ii) The Beneficiary is the primary beneficiary of the trust.

(iii) The Trustee shall take into consideration, in determining the Beneficiary's needs, any other income or resources known upon reasonable inquiry by it to be available to the Beneficiary for these purposes.

(iv) Settlor's intention to enable or assist each Beneficiary to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Beneficiary's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to the Beneficiary's motivation to provide for his or her own needs in life.

(b) Distributions to Beneficiary's Descendants. The Trustee may distribute to the Beneficiary's Descendants so much of the net income and principal of the trust as the Trustee, in its discretion, deems necessary to provide for their reasonable maintenance, support, health and education. In exercising its discretion, the Trustee shall take into account the following factors:

(i) The primary purpose of the trust.

(ii) The respective needs of each Descendant.

(iii) The Trustee shall take into consideration, in determining a Descendant's needs, any other income or resources known upon reasonable inquiry by it to be available to the Descendant for these purposes.

(iv) Settlor's intention to enable or assist each Descendant to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's judgment it is pursued to the Descendant's advantage and to receive an excellent earlier education.

(v) Settlor's intention that the trust distributions not serve as a disincentive to a Descendant's motivation to provide for his or her own needs in

life, and Settlor's instruction to the Trustee to terminate or lessen distributions to a Descendant if that objective, in the judgment of the Trustee, would thereby be served.

Distributions hereunder need not be equal among the Descendants, and the Trustee may make distributions to one or more Descendants to the exclusion of others. Distributions shall be charged against the trust estate as a whole, and not against the distributive share of any Descendant upon termination of the trust.

(c) Inter Vivos Special Power of Appointment. The Beneficiary, acting in the Beneficiary's individual capacity, shall have a special power to appoint the income and principal of the trust to or for the benefit of one or more members of the limited class consisting of Jim's Descendants in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall direct; provided that the Beneficiary shall not have a power to appoint by deed to or for the benefit of any individual if such appointment has the effect of satisfying a contractual obligation or legal support obligation of the Beneficiary. Furthermore, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. This power of appointment may be exercised subject to such terms and conditions as the Beneficiary shall direct, including an appointment in further trust, but no trust created by the exercise of such power may extend beyond the maximum term allowable with respect to any trust created under this Trust Agreement. Any exercise of this power of appointment must be made in an executed and acknowledged written instrument delivered to the Trustee which to be effective must refer specifically to the power granted under this Section 3.3(c).

(d) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate at the death of the Beneficiary. Upon termination, and except as otherwise provided pursuant to Section 3.5 hereof, the Trustee shall distribute the trust estate then remaining, or any part thereof to such one or more members of the limited class consisting of Jim's Descendants, in such amounts and proportions and upon such terms and conditions, as the Beneficiary shall appoint by will or codicil which specifically refers to this power of appointment and expresses the intention to exercise it. However, the Beneficiary may not appoint to the Beneficiary, the Beneficiary's creditors, estate or creditors of the Beneficiary's estate. The trust property not effectively appointed by the Beneficiary in accordance with this special power of appointment or pursuant to Section 3.5 hereof shall be distributed, Per Stirpes, to: the Beneficiary's Descendants living at the termination of the trust; or if there are no such Descendants then living, to the then living Descendants of the Child who was the parent of the Beneficiary; or if there are no such Descendants then living, to Jim's then living Descendants. If any property is distributable under this subsection to a Child, such property shall be added to the Child's Trust and administered pursuant to the terms of Section 3.2. If any property is distributable under this subsection to a Descendant of Jim (other than a Child), such property shall be administered in trust for such Descendant's benefit pursuant to the terms of this Section 3.3. If no Descendant of Jim is then living,

the Trustee shall administer or distribute the remaining trust estate pursuant to Section 3.4 hereof.

3.4 Contingent Distribution. If Jim and Jim's Descendants are all are deceased and no other disposition of the trust estate is called for in this Trust Agreement, the trust estate then remaining shall be distributed to those persons other than creditors and Settlor who, under the laws of Texas in force at that time, would have taken the personal property of Jim had he died intestate, a single person without Descendants, domiciled in the State of Texas, the moment after the event causing the distribution hereunder, the shares and proportions of taking to be determined by Texas laws.

3.5 General Power of Appointment for Certain Beneficiaries.

(a) Except as provided in subsection (c) below, any provision of this Trust Agreement to the contrary notwithstanding, at the death of any individual ("such beneficiary") at whose death the generation-skipping transfer tax would, but for the provisions of this section, be applicable with respect to any trust created under this Trust Agreement, the Trustees shall pay out of the principal of such trust such amount as such beneficiary, by express provision referring to this Trust Agreement and this power of appointment in his or her will, appoints, to or among such beneficiary's creditors, up to but not in excess of the amount, if any, above which any further addition to the amount subject to the power of appointment would increase the Net Death Taxes (as hereinafter defined) by an amount equal to or greater than the decrease in the generation-skipping transfer tax that would result from such further addition. Unless such beneficiary's will otherwise provides by express reference to this Trust Agreement and the above power of appointment, the increase in the Net Death Taxes resulting from such power shall be paid from that amount of the principal of such trust over which such power is exercisable. The foregoing provisions of this section shall be effective only if the Trustees make a determination that the generation-skipping transfer tax would not be applicable with respect to the amount of such trust over which such power is exercisable. As used in this section, the term "Net Death Taxes" shall mean "the aggregate death taxes (including, without limitation, federal, state, local and other estate taxes and inheritance taxes but exclusive of interest and penalties), after taking into account all applicable credits, payable with respect to the estate of such beneficiary."

(b) If under the will of any individual or individuals and/or any other trust instrument or instruments, such beneficiary has one or more other general powers of appointment exercisable and measured substantially as provided in subsection (a) above, the amount such beneficiary may appoint under subsection (a) shall be reduced proportionally, based on the net fair market values of the principal of the trusts with respect to which such powers are exercisable as of the date of death of such beneficiary, so that the aggregate of the amount so appointable under this Trust Agreement and the amount or amounts so appointable pursuant to such other power or powers together shall be no greater than the amount otherwise appointable under subsection (a) above.

(c) The provisions of this section shall not apply to the trust administered for Jim under Section 3.1.

3.6 Postponement of Distribution. Upon termination of any trust established hereunder, if any property is distributable to a beneficiary who is then under age twenty-five (25), or who, because of age, physical or mental weakness, or for any other reason is, in the sole discretion of the Trustee, unable to manage the property, the Trustee shall retain such property in a separate trust for the benefit of that beneficiary, until he or she attains age twenty-five (25) and in the sole discretion of the Trustee becomes able to manage the property. At that time, the remaining trust property shall be distributed to the beneficiary and the separate trust shall terminate. During the term of the trust, the Trustee shall distribute to the beneficiary so much of the net income and principal as the Trustee deems necessary to provide for the beneficiary's health, support, maintenance and education. If the beneficiary dies before the termination of the trust, the then remaining trust estate shall be distributed to the beneficiary's estate.

ARTICLE IV

PROVISIONS AFFECTING DISTRIBUTION

4.1 Withdrawal Right. Jim shall have the right, following a contribution to Jim's trust, to make a withdrawal in accordance with the provisions of this section unless the transferor indicates otherwise when making the transfer. A separate withdrawal right shall attach to each separate contribution of properties to Jim's trust. If a transferor is married at the time of contribution to the Trustee, then solely for purposes of the withdrawal rights granted in this Section 4.1, unless the transferor notifies the Trustee in writing to the contrary, such contribution shall be treated as two separate contributions having been made one-half (1/2) by the transferor and one-half (1/2) by the transferor's spouse, regardless of whether the property contributed is community property and regardless of whether they elect to treat such contribution as having been made one-half by each of them for Federal gift tax purposes. Any person making a contribution to Jim's trust may give the Trustee written instructions that no withdrawal right is to be granted, or that alternative withdrawal rights are to be granted with respect to the contribution being made.

(a) Amount That May Be Withdrawn. When a contribution is made, Jim may withdraw the lesser of the following amounts:

(i) the maximum present interest exclusion amount permitted, under Section 2503(b) of the Code, or any similar succeeding statute (such amount being \$12,000 at the date of execution of this Trust Agreement), less the cumulative value of all previous known gifts to or for the benefit of Jim by the same transferor during the same calendar year which would qualify for the present interest exclusion; or

(ii) the remainder determined by subtracting Jim's cumulative rights of withdrawal with respect to any other gifts from any transferor that are either

currently outstanding or that have previously lapsed (but not including the present right of withdrawal) during the same calendar year from the greater of (1) Five Thousand Dollars (\$5,000), or (2) Five Percent (5%) of the total value of Jim's trust determined as of the date the current withdrawal power is to lapse (such value may be estimated by the Trustee), or (3) any greater withdrawal power, the lapse of which would not constitute a release of such power under Sections 2041(b)(2) and 2514(e) of the Code or any similar subsequent statute; or

(iii) the value of the contribution that is subject to the withdrawal right.

(b) Withdrawal Period and Notice. Unless directed to the contrary by the transferor, the Trustee shall promptly provide Jim with written notice of the date of the contribution, the name of the transferor, the value of the properties contributed, and the value of Jim's withdrawal right. Withdrawals may be made at any time for a period of thirty (30) days following Jim's receipt of the notice of the existence of the withdrawal right. During any period that Jim lacks legal capacity, Jim's guardian or other legal representative, other than Settlor, may exercise Jim's withdrawal right on Jim's behalf. If Jim does not exercise the withdrawal right before the expiration of that period, the unexercised right shall lapse. For purposes of this section, the term "contribution" means any cash or other property which is transferred to the Trustee as part of the trust estate. The value of any contribution to the trust estate shall be its value for federal gift tax purposes.

(c) Payment of Withdrawal Amount. If Jim exercises his withdrawal right, payment of the amount due shall be made in cash immediately upon receipt by the Trustee of a demand in writing from Jim or his guardian or other legal representative, other than Settlor. Upon the exercise of a withdrawal right, payment shall be made, first, from any gifts made to Jim's trust prior to the exercise of such withdrawal right, but during the same calendar year in which the withdrawal right is exercised, and shall be charged against the trust. Should such gift or gifts not consist of sufficient cash to satisfy the exercised withdrawal right, the Trustee shall use other liquid assets of Jim's trust for such purpose. Should Jim's trust not contain sufficient liquid assets to satisfy an exercised withdrawal right when made, the Trustee shall borrow funds in order to satisfy the demand and shall, if necessary, pledge trust property to secure the loan.

(d) Distributions During Withdrawal Period. If any contribution is made subject to a withdrawal right, the Trustee shall not make any distributions under any other provision of the Trust Agreement which would prevent the Trustee from being able to satisfy fully any unexpired right of withdrawal.

(e) Lapse of Withdrawal Right. In the event Jim allows a withdrawal right granted under this Section 4.1 to lapse with respect to a contribution, or any portion thereof, the Trustee is authorized to characterize such lapse as a "release" for purposes of Section 678(a) of the Code.

4.2 Restriction Upon Alienation. No beneficiary may anticipate, by assignment or otherwise, his beneficial interest in the principal or income of the trust estate; nor may any beneficiary sell, transfer, encumber, or in any way charge his interest in trust income or principal prior to actually receiving it. Neither the income nor the principal of any trust established hereunder shall be subject to any execution, garnishment, attachment, bankruptcy, claims for alimony or support, other legal proceeding of any character, legal sequestration, levy or sale, or in any other event or manner be applicable or subject, voluntarily or involuntarily, to the payment of a beneficiary's debts. The Trustee shall make distributions to or for each beneficiary according to the terms hereof, notwithstanding any purported sale, assignment, hypothecation, transfer, attachment, or judicial process. The provisions of this section shall not limit or detract from any power of appointment or withdrawal right granted to any beneficiary herein.

4.3 Distributions Constitute Separate Property. Settlor intends to make a gift to each beneficiary hereunder of only that portion of the income and principal of each trust that is in fact distributed to such beneficiary. Inasmuch as the amounts actually distributed to a beneficiary hereunder constitute the gift Settlor contemplated making, such distributions, whether they be income or principal, shall constitute the separate property of such beneficiary and not the community property of such beneficiary. Furthermore, it is Settlor's intention that no beneficiary shall have any interest in any undistributed income or principal until the distribution of such income or principal and, accordingly, such undistributed income and principal shall not be deemed the community property of any such beneficiary and that beneficiary's spouse.

4.4 Method of Payment. The Trustee, in its discretion, may make distributions to any beneficiary, including a beneficiary who is under a physical, mental, or legal disability (minority or other), in any one or more of the following ways: directly to the beneficiary without the intervention of any legal guardian or other legal representative; as expenditures in the beneficiary's behalf; to the guardian, committee, conservator, or other similar official acting for the beneficiary; to a custodian for the beneficiary under a Uniform Transfers to Minors Act or Uniform Gifts to Minors Act; to a relative of the beneficiary or to any suitable person with whom the beneficiary resides or who has care or custody of the beneficiary; and in all ways provided by law for gifts or other transfers to or for minors or other persons under disability. In each case, receipt by the beneficiary or other person to whom payment is made or a distribution entrusted shall be a complete discharge of the Trustee with respect thereto. The Trustee may act upon such evidence as it deems appropriate and reliable in determining a beneficiary's ability to manage property and identifying a proper recipient of trust funds hereunder.

4.5 Evidence of Need. In exercising its discretion under this Trust Agreement, the Trustee shall be entitled to rely upon the written certification of a beneficiary or of another as to the nature and extent of a beneficiary's needs, and the adequacy of the beneficiary's resources apart from the trust to meet those needs. The Trustee may, but shall not be required to, make inquiry into the accuracy of the information it receives

4.6 Termination of Small Trust. Notwithstanding any provision of this Trust Agreement to the contrary, the Trustee may at any time terminate any trust when in its judgment the trust is so small that it would be inadvisable or uneconomical to continue the trust administration. In the event of termination, the Trustee shall distribute the trust to the income

beneficiaries of the trust determined at the time of distribution in the proportions to which they are entitled to receive income. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes. Distribution of trust funds in the manner herein provided shall relieve the Trustee of any further responsibility with respect to such funds. This section shall not apply to a Trustee with respect to any trust of which such Trustee is a beneficiary, or if Trustee has duty to support the beneficiary or to any Trustee who may be removed and replaced by a beneficiary of the trust unless the successor trustee must be a corporate fiduciary or someone who is not related or subordinate to the beneficiary within the meaning of Section 672(c) of the Code. The provisions of this section shall not limit or detract from any withdrawal right granted to any beneficiary herein.

4.7 Generation-Skipping Transfer Taxes and Payment. It is Settlor's intent that the trusts created hereunder be exempt from Generation-Skipping Transfer Taxes. If, however, the Trustee considers any distribution or termination of an interest or power in a trust to be a taxable distribution (a "Distribution") or a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination or Direct Skip. In the case of a Distribution, the Trustee may increase the amount to be distributed by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part by reason of property held in trust under a Settlor's will or codicil, and in part by reason of other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the Distribution, Termination, or Direct Skip hereunder, taking into consideration deductions, exemptions, credits and other factors which the Trustee deems appropriate. The Trustee may, but need not make any equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions or Terminations or Direct Skips.

ARTICLE V

THE TRUSTEE

5.1 Resignation of Trustee. The Trustee may resign as to any one or more of the trusts created hereunder by giving written notice to Settlor, if living; otherwise to the current income beneficiary of the trust.

5.2 Appointment and Succession of Trustees.

(a) Generally.

(i) Family Trustee. Jim is the initial Family Trustee of all trusts created hereunder. If Jim ceases to act as Family Trustee, or if any successor Family Trustee fails or ceases to act, Jim may appoint a successor Family Trustee within thirty (30) days of a vacancy arising. If Jim is deceased or if Jim otherwise fails to appoint a successor, GRANT JAMES SCOTT, III is appointed as successor Family Trustee. If GRANT JAMES SCOTT, III fails or ceases to act as Family Trustee, or if any other Family Trustee fails or ceases to act, and a successor is not appointed by Jim as provided above, JOHN WILLIAM HONIS is appointed as successor Family Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Family Trustee, and a successor is not appointed by Jim as provided above, the Family Trustee last serving shall appoint a successor Family Trustee. If a successor Family Trustee is not appointed within sixty (60) days of a vacancy arising, the successor Family Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(ii) Independent Trustee. GRANT JAMES SCOTT, III is appointed as the initial Independent Trustee and shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee wherein GRANT JAMES SCOTT, III accepts the trust and the position of Independent Trustee. If GRANT JAMES SCOTT, III, fails or ceases to act, or if any other Independent Trustee fails or ceases to act, Jim may appoint a successor within thirty days (30) of the vacancy arising; provided that Jim shall not serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of Section 672(c) of the Code. If a successor is not so appointed, JOHN WILLIAM HONIS is appointed Independent Trustee. If JOHN WILLIAM HONIS fails or ceases to act as Independent Trustee, and a successor is not appointed by Jim as provided above, the Independent Trustee last serving may appoint the successor Independent Trustee. If a successor Independent Trustee is not so appointed within sixty (60) days of a vacancy arising, a successor Independent Trustee shall be appointed pursuant to the provisions of subsection (b) hereof.

(iii) Administrative Trustee. COMMONWEALTH TRUST COMPANY is the initial Administrative Trustee. If COMMONWEALTH TRUST COMPANY fails or ceases to serve, Jim may appoint a successor Administrative Trustee within thirty days (30) of the vacancy arising. If a successor is not so appointed, the Family Trustee may appoint a successor Administrative Trustee within sixty (60) days of the vacancy arising. If a successor is not so appointed, a successor shall be appointed in the same manner as provided for the Family Trustee under subsection (a) above. The selection of the Administrative Trustee can have a substantial impact on the situs of the trust, which should be considered in appointing a successor Administrative Trustee.

Notwithstanding any other provision in the Trust Agreement to the contrary, no Administrative Trustee may be appointed under this paragraph if the appointment of such Administrative Trustee would change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust

The Administrative Trustee shall act in a fiduciary capacity but shall not be a Trustee or co-Trustee except to the extent and for the limited purposes described in Section 6.2. Accordingly, no reference in this Trust Agreement to the "Trustee" or "co-Trustee" shall include, or be deemed to refer to, the Administrative Trustee. Notwithstanding the foregoing, the same individual or bank or trust company may serve simultaneously as both a Trustee or co-Trustee and as Administrative Trustee for any trust created hereunder. The initial Administrative Trustee and each successor may resign at any time and may be removed at any time by the Family Trustee.

For services rendered as Administrative Trustee under this Agreement, any Administrative Trustee shall be entitled to reasonable compensation for his, her or its services, as well as be entitled to reimbursement for all expenses reasonably incurred in performing his, her or its duties hereunder. Any Administrative Trustee may receive (or retain) payment in accordance with its schedule or rates as published from time to time and as in effect at the time such compensation becomes payable, unless otherwise agreed in writing with the Family Trustee.

No termination fee shall be charged upon removal or resignation of an Administrative Trustee. However, such Administrative Trustee shall be entitled to reasonable compensation for time and materials for additional services over and above Administrative Trustee's normal duties in transferring trust assets and administration of the trust to the new Administrative Trustee.

(b) Successor Trustee. If a named or appointed successor Trustee fails or ceases to serve and no other successor is named or appointed pursuant to subsection (a) hereof, a majority in number of the beneficiaries to whom the Trustee is to or may distribute income at that time may appoint the successor Trustee, and each shall have a reasonable time in which to act. If a successor Trustee is not so appointed, any beneficiary of a trust may secure the appointment of a successor Trustee by a court of competent jurisdiction at the expense of the trust estate.

(c) Manner of Appointment; Permissible Trustees. Appointment, other than by a court, shall be by a signed, acknowledged instrument delivered to the appointed Trustee. An appointment may be made before a vacancy arises, to become effective in the event of the vacancy with the last such instrument to control. The successor Trustee appointed by Jim or a Trustee may be one or more persons and/or entities; provided that neither Settlor nor Jim shall serve as Independent Trustee and a successor Independent Trustee appointed by Jim may not be related or subordinate to Jim within the meaning of

Section 672(c) of the Code. Any other successor Trustee shall be a trust company or a bank in the United States having trust powers with not less than Fifty Million Dollars unimpaired capital and surplus. A successor Trustee shall have a reasonable time after a vacancy occurs in which to accept the office by signed, acknowledged instrument delivered to those making the appointment, if living, or to the then current beneficiaries to whom the Trustees are to or may make distributions.

5.3 Removal of Trustee. Jim shall have the power to remove the Trustee of any trust created hereunder, without cause. If Jim is deceased or if Jim is incapacitated within the meaning of Section 5.11 hereof, the primary beneficiary (or, if more than one, a majority of the primary beneficiaries) of a trust may remove any Trustee without cause. Removal shall be effected by delivering to the Trustee a signed acknowledged instrument which is effective thirty (30) days from its receipt (unless a shorter period is agreed to by the Trustee).

5.4 Succession of Corporate Trustee. If any corporate Trustee before or after qualification changes its name, becomes consolidated or merged with another corporation, or otherwise reorganizes, any resulting corporation which succeeds to the fiduciary business of such corporate Trustee shall become a Trustee hereunder in lieu of such corporate Trustee.

5.5 Trustee's Fees. Jim and Jim's Descendants shall not receive a fee for serving as Trustee. Any other Trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities, taking into account the value and nature of the trust estate and the time and work involved. The Trustee shall be reimbursed for reasonable costs and expenses incurred in connection with its fiduciary duties hereunder.

5.6 Bond. The Trustee shall not be required to furnish bond or other security.

5.7 Liability of Trustee.

(a) Generally. A Trustee other than a corporate trustee shall only be liable for willful misconduct or gross negligence, and shall not be liable for breach of fiduciary duty by virtue of mistake or error in judgment.

(b) Administrative Trustee. Every act done, power exercised or obligation assumed by the Administrative Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Administrative Trustee acting in a fiduciary capacity and not otherwise, and every person, firm, corporation or other entity contracting or otherwise dealing with the Administrative Trustee shall look only to the funds and property of the trust fund for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Administrative Trustee shall not be individually liable therefor even though the Administrative Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of the trust fund.

The decision of the Administrative Trustee hereunder with respect to the exercise or nonexercise by such Administrative Trustee of any power hereunder, or the time or

manner of the exercise thereof, made in good faith, shall fully protect such Administrative Trustee and shall be final, conclusive and binding upon all persons interested in the Trust or the income therefrom. To the extent permitted under applicable law, the Administrative Trustee acting hereunder shall not be responsible for any error of judgment or mistake of fact or law, absent bad faith or willful misconduct.

The Administrative Trustee shall be liable hereunder only for the Administrative Trustee's bad faith or willful misconduct proved by clear and convincing evidence in the court then having primary jurisdiction over the trust. The Administrative Trustee shall not be personally liable for making any delegation that is authorized under this Agreement, nor for any action taken without the Administrative Trustee's express agreement, nor for any failure to act absent willful misconduct. The Administrative Trustee shall not be liable for relying absolutely on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Administrative Trustee by any entity in which the trust fund holds an ownership interest; and (ii) the opinions of counsel or any accountant to any trust.

Prior to the death of Settlor, the Administrative Trustee shall be under no duty to inform any person having a beneficial interest in any trust created hereunder of the existence of any such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust. Following the death of Settlor, the Administrative Trustee shall be under no duty to inform any person, other than the primary beneficiary of each trust hereunder, having a beneficial interest in any trust created hereunder of the existence of such trust or the nature and extent of that person's beneficial interest in, or rights with respect to, any such trust.

While not required, the same procedure used to settle the Administrative Trustee's accounts may also be employed to obtain the conclusive consent by the beneficiaries to the Administrative Trustee's specific conduct of any other particular matter. The Administrative Trustee and each former Administrative Trustee shall be indemnified and held harmless by each trust created hereunder against any threatened, pending or completed action, claim, demand, suit or proceeding, whether civil, criminal, administrative or investigative, falling within the exculpatory provisions of this Section or to which the Administrative Trustee is made a party, or threatened to be made a party, by reason of serving as Administrative Trustee if the Administrative Trustee acted in good faith, subject to the limitations set forth above. Such indemnification shall include expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually incurred by the Administrative Trustee in connection with such action, claim, demand, suit or proceeding. The cost of indemnification shall be apportioned against the various trusts created hereunder as the Administrative Trustee reasonably considers appropriate, taking into account the nature of the claims involved.

The Administrative Trustee shall not have any fiduciary responsibility to observe, monitor or evaluate the actions of any Trustee or other fiduciary and shall not be liable to any party for the failure to seek to attempt to prevent a breach of trust, or failure to remedy a breach of trust, or in a recurring situation to request instructions from a court

having jurisdiction over the trust. In no event shall any Administrative Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

Any Successor Administrative Trustee shall be deemed vested with all the duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Administrative Trustee. No Successor Administrative Trustee shall be personally liable for any act or failure to act of any predecessor Administrative Trustee or any other Trustee. The Successor Administrative Trustee may accept the account rendered and the property delivered by the predecessor Administrative Trustee as a full and complete discharge to the predecessor Administrative Trustee, without incurring any liability for so doing.

5.8 Predecessor Fiduciary. No successor Trustee shall be obligated or required to inquire into the acts, omissions, or accounts of any prior trustee or to bring any action against any prior trustee to compel redress of any breach of trust or for any other reason. In no event shall a successor Trustee be liable for any act or omission of any prior Trustee. A successor Trustee may accept the account rendered and the property received from a prior Trustee as a full and complete discharge to the prior Trustee without incurring any liability for doing so. A successor Trustee shall have all of the powers and discretions conferred in the governing instrument upon the original trustee.

5.9 Periodic Accounting. The Trustee may from time to time render an informal account, statement or report of its administration of each separate trust hereunder to each beneficiary who during the period covered by the account was entitled absolutely to a current payment of income or principal from the trust, or, if there is no such beneficiary, to such beneficiaries who are entitled absolutely or in the discretion of the Trustee to a payment of income or principal from the trust. If any beneficiary or legal representative or parent of a beneficiary who is not of full age or legal capacity to whom any such account is rendered shall not, within ninety (90) days after the mailing of such statement, have notified the Trustee in writing of its disapproval of the same, such statement shall be deemed to be approved

No Administrative Trustee shall be required to file or render periodic accounts in or to any court other than for good cause shown. No Administrative Trustee shall be required to give any bond.

Within 90 days following the close of each calendar year, if information is available, and if not within 30 days after it is delivered to the Administrative Trustee, and within 90 days after the removal or resignation of the Administrative Trustee, the Administrative Trustee may deliver an accounting to each primary beneficiary. The accounting shall be a written accounting of the trusts hereunder during such year or during the period from the close of the last preceding year to the date of such removal or resignation and shall set forth all investments, receipts, distributions, expenses and other transactions of each such trust and show all cash, securities, and other property held as a part of each such trust at the end of such year or as of the date of such removal or resignation, as the case may be. The accountings referred to in this Section shall be deemed to be an account stated, accepted and approved by all of the beneficiaries of each trust for which an

accounting is rendered, and the Administrative Trustee shall be relieved and discharged, as if such accounting had been settled and allowed by a final judgment or decree of a court of competent jurisdiction, unless protested by written notice to the Administrative Trustee, within 60 days of mailing thereof, by the person designated to receive such accounting. The Administrative Trustee shall have the right, at the expense of the trust, to apply at any time to a court of competent jurisdiction for judicial settlement of any account of the Administrative Trustee whether or not previously settled as herein provided or for the determination of any question of construction or for instructions. In any such action or proceeding it shall be necessary to join as parties solely the Administrative Trustee and the Settlor (although the Administrative Trustee may also join such other parties as it may deem appropriate), and any judgment or decree entered therein shall be conclusive and binding on all persons at any time interested in the trust.

5.10 Beneficiary under Disability. A parent, custodian, or guardian of any beneficiary who is under the disability of minority or, in the Trustee's opinion, any other legal, physical, or mental disability, may, in carrying out the provisions of this Trust Agreement, act and receive notice in the beneficiary's stead, and sign any instrument for the beneficiary.

5.11 Incapacity of Individual Trustee. In the event a Trustee other than a corporate Trustee becomes unable to discharge his duties as Trustee hereunder by reason of accident, physical or mental illness or deterioration, or other cause, and does not resign, then upon certification by two medical doctors affirming that each has examined the Trustee and that each has concluded, based on such examination, that he is unable to discharge his duties hereunder, the Trustee shall cease to serve, as if he had resigned, effective the date of the certification.

ARTICLE VI

TRUST ADMINISTRATION

6.1 General Powers. Subject to any limitation stated elsewhere in this Trust Agreement, and the division of powers contained in Section 6.2, the Trustee shall have, in addition to all powers granted to trustees by the common law and by Delaware statutes, as amended from time to time, the following powers with respect to each trust established hereunder:

(a) Retain Property. To retain any property received from any source, including any corporate Trustee's securities, regardless of lack of diversification, risk, or nonproductivity.

(b) Invest. To invest the trust estate in any kind of property, including common trust funds administered by a corporate Trustee or by others, without being limited by any statute or any rule of law dealing with the character, risk, productivity, diversification of, or otherwise concerning, investments by trustees.

(c) Sell. By public offering or private negotiation, to sell, exchange, assign, transfer, or otherwise dispose of all or any real or personal trust property and give options

for these purposes, for such price and on such terms, with such covenants of warranty and such security for deferred payment as the Trustee deems proper. To partition between the trust and any other owner, as the Trustee deems proper, any property in which the trust owns an undivided interest.

(d) Lease. To lease trust property for terms within or extending beyond the term of the trust, for any purpose.

(e) Real Estate. To operate, maintain, repair, rehabilitate, alter, erect, improve, or remove any improvements on real estate; to subdivide real estate; to grant easements, give consents, and enter into contracts relating to real estate or its use; and to release or dedicate any interest in real estate.

(f) Borrow. To borrow money for any purpose either from the banking department of any corporate Trustee or from others; to encumber or hypothecate trust property by mortgage, deed of trust, or otherwise; and to maintain, renew, or extend any indebtedness upon such terms as the Trustee deems appropriate.

(g) Loans. To lend money to any person or entity, including, but not limited to, a beneficiary hereunder, but not including a Settlor or a Trustee (other than a beneficiary serving as Trustee) hereunder, or a spouse of theirs, upon such terms and with such security as the Trustee deems advisable.

(h) Conserve Estate. To take any action to conserve the trust estate.

(i) Litigation. To commence or defend at the expense of the trust such litigation with respect to the trust estate as the Trustee deems advisable.

(j) Claims. To collect, pay, contest, compromise, settle, renew, or abandon any claims or demands of or against the trust estate without court authority on whatever terms the Trustee deems advisable.

(k) Abandon Property. To abandon any property or interest in property belonging to the trust when, in the Trustee's discretion, such abandonment is in the best interest of the trust and its beneficiaries.

(l) Documents. To execute contracts, notes, conveyances, and other instruments containing covenants, representations, or warranties binding upon and creating a charge against the trust estate or containing provisions excluding personal liability, or any other written instrument of any character appropriate to any of the powers or duties conferred upon the Trustee.

(m) Agents. To employ attorneys, auditors, investment advisors, depositaries, and agents with or without discretionary powers, to employ a bank with trust powers as agent for the purpose of performing any ministerial duties incident to the administration, and to pay all expenses and fees so incurred.

(n) Securities. To engage in all actions necessary to the effective administration of securities including, but not limited to, the authority to: vote securities in person or by proxy; engage in a voting trust or voting agreement; and consent to or participate in mergers, consolidations, sales of assets, recapitalizations, reorganizations, dissolutions, or other alterations of corporate structure affecting securities held in the trust.

(o) Nominee. To hold securities and other property in bearer form or in the name of a trustee or nominee with or without disclosure of any fiduciary relationship.

(p) Additional Property. To receive additional property from any source and add it to the trust estate.

(q) Insurance. To carry insurance of such kinds and in such amounts as the Trustee deems advisable, except for insurance on the life of a Settlor, the Trustee, or a spouse of theirs. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of Settlor, the Trustee, or a spouse of theirs.

(r) Business Powers.

(i) In General. To engage in any lawful business including, but not limited to, the power to continue at the risk of the trust estate the operation of any business which may become a part of the trust estate, and to sell, liquidate, or otherwise terminate any business interest, including, but not limited to, the fulfillment of any agreement for the disposition of any such business interest.

(ii) Closely Held Businesses. This trust may be funded with, or subsequently purchase or otherwise acquire, securities or other financial interests in one or more closely held businesses (each of which is hereinafter referred to as the "business").

(1) Exoneration from Liability. It is realized that the business may not be the type of investment in which fiduciaries would normally invest estate or trust funds. Nonetheless, the Trustees shall incur no liability for any loss which may be sustained by reason of the retention, operation or sale of the business or the exercise of any power conferred upon the Trustees with respect to the business.

(2) Management Powers. The Family Trustee shall have the exclusive duty to deal with and manage the business. In addition to any power granted by law or elsewhere in this document, the Family Trustee shall have the following powers:

(A) To retain and continue the business or any interest therein for such time as the Family Trustee considers advisable;

(B) To operate or participate in the operation of the business in the form of a corporation, limited liability company, partnership or proprietorship;

(C) To direct, control, supervise, manage, operate or participate in the operation of the business; to serve as an officer and director of the business; and to receive from the business compensation for his services in addition to his compensation as a Family Trustee;

(D) To delegate all or any part of his power to supervise, manage or operate the business to such persons as he may select, including any director, officer or employee of the business;

(E) To engage, compensate and discharge such managers, employees, agents, attorneys, accountants, consultants or other representatives as he considers advisable, including anyone who may be a beneficiary or fiduciary of this Trust;

(F) To invest or employ in the business, or to use as collateral for loans to the business, such other estate or trust funds as he considers advisable;

(G) To sell, liquidate or otherwise dispose of all or any part of the business at such time or times, for such prices and upon such terms and conditions as he considers advisable, and to sell the business to anyone who is a beneficiary or a fiduciary of this Trust; and

(3) Exclusion from Powers. Neither Commonwealth Trust Company nor any successor Administrative Trustee shall have any power, duty and/or responsibility in connection with the operation, control, supervision, management and participation of the business.

(s) Income and Principal. To determine, in accordance with the provisions of Delaware law, what constitutes income and principal of the trust estate, the manner in which expenses and other charges shall be allocated between these accounts, and whether or not to establish reserves for depreciation or depletion, and to add undistributed income to principal.

(t) Tax Elections. To exercise any tax option or election permitted by law as the Trustee determines, in its sole discretion, even though the effect is to treat beneficiaries hereunder differently, or to favor some at the expense of others. The Trustee may, but need not, make such compensating adjustments among beneficiaries with respect thereof as it deems appropriate considering the nature of the tax election and the amounts involved.

(u) Reliance. To rely upon any notice, certificate, affidavit, or other document or evidence believed by the Trustee to be genuine and accurate, in making any payment or distribution. The Trustee shall incur no liability for a disbursement or distribution made in good faith and without actual notice or knowledge of a changed condition or status affecting any person's interest in the trust or any other matter.

(v) Commingling. To commingle and invest as one fund, or make joint investments with, the principal of two or more separate trusts established hereunder, with each trust having an undivided interest therein.

(w) Division and Distribution. To make all allocations, distributions, or divisions contemplated by this Trust Agreement; to allocate, distribute and divide different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or trusts, in cash or in kind, or both, without regard to the income tax basis of specific property allocated to any beneficiary or trust, even though shares may as a result be composed differently, and to determine the value of any property so allocated, divided or distributed.

(x) Withholding of Distribution. To withhold from distribution all or any part of the trust property as long as the Trustee, in its discretion, determines that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the trust.

(y) Mineral Powers. To retain or acquire interests in oil, gas, or other mineral resources; to execute as to those interests any agreements, assignments, contracts, deeds, grants or leases for any term (even though the term may extend beyond the termination of the trust); to manage, control, operate, explore, mine, develop, or take any action for the production, recovery, sale, treatment, storage, or transportation of any such interest; to drill, rework, or recompleat wells of any type; to conduct or participate in secondary recovery operations; to enter into agreements for pooling or unitization; and to install, operate, or participate in the operation of any plant, mine, or other facility.

(z) Environmental Hazards. To use and expend the trust income and principal to (i) take all appropriate action to prevent, identify, or respond to actual or threatened violations of any environmental law or regulation for which the Trustee may have responsibility, including the authority to conduct environmental assessments, audits, and site monitoring to determine compliance with any environmental law or regulation; (ii) take all appropriate remedial action to contain, cleanup, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; and (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards.

(aa) Miscellaneous Powers. Generally to do and perform any and all acts, things, or deeds which, in the discretion of the Trustee, may be necessary or proper for the protection, preservation, and promotion of the trust properties and estate.

6.2 Division of Powers. The powers and duties granted under this Trust Agreement shall be divided among the Trustees as follows:

(a) Administrative Trustee. The Administrative Trustee shall have the following exclusive duties, which shall all be carried out in the State of Delaware or such other jurisdiction as the Trustee shall, from time to time, select as the situs of the trust:

(i) To maintain bank accounts, brokerage accounts and other custody accounts which receive trust income and contributions and from which trust expenditures and distributions are disbursed.

(ii) To maintain storage of tangible personalty and evidence of intangible trust property.

(iii) To maintain trust records.

(iv) To maintain an office for Trustee meetings and other trust business.

(v) To originate, facilitate and review trust accountings, reports and other communications with the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vi) To respond to inquiries concerning the trust from the Settlor, any co-Trustees, beneficiaries and unrelated third parties.

(vii) To execute documents with respect to trust account transactions.

(viii) To retain accountants, attorneys, investment counsel, agents and other advisers in connection with the performance of its duties under this Section 6.2.

(b) Independent Trustee. The Independent Trustee shall have all of the powers and duties specifically assigned to the Independent Trustee under this Trust Agreement. These powers may only be exercised by the Independent Trustee.

(c) Family Trustee. The Family Trustee shall possess and exercise all of the powers and duties of the Trustee not specifically granted to the Administrative Trustee or the Independent Trustee under this Trust Agreement, including those specifically assigned to the Family Trustee. Without limiting the generality of the foregoing, the Family Trustee shall exercise all Trustee authority and have all Trustee responsibility with respect to the investment of the trust estate. If there is no Family Trustee serving,

however, all of the powers and duties of the Trustee, including those assigned to the Family Trustee, shall be exercised and discharged by the Independent Trustee.

6.3 Merger of Trusts. If at any time a Trustee of any trust created pursuant to this Trust Agreement shall also be acting as Trustee of any other trust created by trust instrument or by will for the benefit of the same beneficiary or beneficiaries and upon substantially the same terms and conditions, the Trustee is authorized and empowered, if in the Trustee's discretion such action is in the best interest of the beneficiary or beneficiaries of the trust created hereunder, to transfer and merge all of the assets then held under such trust created pursuant to this Trust Agreement to and with such other trust and thereupon and thereby to terminate the trust created pursuant to this Trust Agreement. The Trustee is further authorized to accept the assets of the other trust which may be transferred to the Trustee of the trust created hereunder and to administer and distribute such assets and properties so transferred in accordance with the provisions of this Trust Agreement. If the component trusts differ as to contingent beneficiaries and the contingency occurs, the funds may be distributed in such shares as the Trustee, in the Trustee's sole discretion, shall deem necessary to create a fair ratio between the various sets of remaindermen. If any trust created in this Trust Agreement is merged with any trust created under any other instrument, such merged trust shall not continue beyond the date on which the earliest maximum term of the trusts so merged would, without regard to such merger, have been required to expire. Settlor further directs that, as to any property at any time a part of any trust estate (including a merged trust) as to which under the laws of any state applicable to said property that trust is required to be terminated at any time prior to its normal termination date, the trust as to that particular property shall terminate at the time required by the laws of said state.

6.4 Certain Powers and Rights Limited. Settlor intends that the trust created under Section 3.1 hereof shall not be included in Jim's gross estate for estate tax purposes unless the Independent Trustee grants Jim a general power of appointment pursuant to paragraph 3.1(d). All issues applicable to the trust shall be resolved accordingly.

6.5 GST Inclusion Ratio. If property not having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio equal to zero. If property having an inclusion ratio for purposes of the generation-skipping transfer tax equal to zero is directed to be added to a trust which has an inclusion ratio not equal to zero, the Trustee may decline to make the addition and may, instead, administer the property as a separate trust with provisions identical to the trust having an inclusion ratio not equal to zero.

6.6 Out-of-State Properties. If any trust property is situated in a jurisdiction in which the Trustee is unable or unwilling to act, the Trustee may appoint an ancillary trustee for such jurisdiction and may confer upon the ancillary trustee such powers and discretions, exercisable without court order, to act with respect to such property as the Trustee deems proper. The ancillary trustee shall be responsible to the Trustee for all property it administers. The Trustee

may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.7 Management of Real Property. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof), acting alone, shall make any and all decisions regarding: (i) the acquisition, retention and disposal of real estate; (ii) the operation, maintenance, repair, rehabilitation, alteration, construction, erection, improvement, or removal of any improvements on real estate; (iii) the subdivision of real estate; (iv) the granting of easements, giving of consents, and entering into contracts relating to real estate or its use; (v) the release or dedication of any interest in real estate; and (vi) the payment of taxes, utilities, and maintenance expenses attributable to real estate owned by any trust created hereunder. The Family Trustee (or the Independent Trustee pursuant to Section 6.2(c) hereof) may, in its discretion, either exercise such powers or appoint an ancillary trustee to exercise such powers. The Trustee may pay the ancillary trustee reasonable compensation for its services and may absolve it from any requirement to furnish bond or other security.

6.8 No Court Supervision. The Trustee shall not be required to qualify before or be appointed by any court; nor shall the Trustee be required to obtain the order or approval of any court in the exercise of any power or discretion.

6.9 Division of Trusts. The Trustee may divide any trust established by this Trust Agreement into two or more separate trusts as provided in this section. Settlor exonerates the Trustee from any liability arising from the exercise or failure to exercise any powers granted herein, provided the Trustee acts in good faith.

(a) Division and Funding of Separate Trusts. The Trustee may divide any trust established by this Trust Agreement, at any time, into two or more separate trusts so that the generation-skipping transfer tax inclusion ratio as defined in Section 2642(a) of the Code for each trust shall be either zero or one. Any such division shall be accomplished in accordance with applicable regulations under Chapter 13 of the Code.

(b) Administration of Separate Trusts. Such separate trusts shall have the identical provisions as the original trust. However, with respect to each separate trust, the Trustee may: (1) make different tax elections, (2) expend principal and exercise any other discretionary powers with respect to such separate trusts differently, (3) invest such separate trusts differently, and (4) take all other actions consistent with such trusts being separate trusts.

(c) Powers of Appointment. The donee of any power of appointment with respect to a trust so divided may exercise such power of appointment differently with respect to the separate trusts created by the division.

6.10 Limitation of Powers. The following limitations, affecting the administration of the trusts created hereunder, apply notwithstanding any other provision of this Trust Agreement. For purposes of this Section 6.10, the term "Settlor" shall include any individual who contributes property to the Trustee to be added to the trust estate.

(a) Support Duty. Distributions from the trust estate shall not be made which discharge, in whole or in part, the personal legal obligations of a Settlor or a Trustee from time to time existing, to support or educate any of the trust beneficiaries. When determining these legal obligations, the existence of this trust and funds made available by it shall not be taken into consideration.

(b) Adequacy of Consideration. No party may, through purchase, exchange, or otherwise, deal with or dispose of the corpus or the income of the trust estate for less than adequate consideration in money or money's worth.

(c) Insurance. The Trustee shall not apply trust property to the payment of premiums on an insurance policy on the life of a Settlor, the Trustee or a spouse of either of them.

(d) Borrow. The Trustee shall not allow a Settlor to borrow trust principal or income, directly or indirectly, without adequate interest or security.

(e) Substitute Property. The Trustee shall not allow a Settlor to reacquire or exchange any property of the trust estate by substituting other property with an equivalent value.

(f) Vote. A Settlor, acting as a Trustee, shall not be entitled to vote, directly or indirectly, shares of stock of a controlled corporation, as defined under Section 2036 of the Code, which is held as part of the trust estate.

6.11 Dealing with Fiduciaries. The Trustee may enter into any transaction with the Trustee or beneficiaries of the trusts created hereunder, acting in their individual or in another fiduciary capacity, or with any person or entity related to the Trustee or a beneficiary in any manner, if such transaction is otherwise authorized under this Trust Agreement. Without limiting the generality of the foregoing authorization, the Trustee may enter into any transaction otherwise authorized hereunder on behalf of any trust created hereunder even though the other party to the transaction is: a trust of which a beneficiary or Trustee under this Trust Agreement is a beneficiary or trustee, including, but not limited to, any trust established by this Trust Agreement; an estate of which a beneficiary or Trustee under this Trust Agreement is a representative or beneficiary; or a business or charitable corporation of which a beneficiary or Trustee under this Trust Agreement is a director, officer, employee, or owner.

ARTICLE VII

IRREVOCABILITY

This Trust Agreement and each of its provisions may not be revoked, amended, or modified.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

8.1 Applicable Law. The trust created under this Trust Agreement shall be deemed a Delaware trust and all matters pertaining to the validity, construction, and application of this Trust Agreement or to the administration of the trust created hereunder shall, in all respects, be governed by the laws of the State of Delaware. However, if the Trustee, in its sole discretion, determines that a change of situs would be beneficial to the purposes of the trust established by this Trust Agreement, the Trustee shall have the discretion and authority to change the situs of any such trust to another state. No change of situs shall be authorized herein, however, which would result in a termination of the trust for federal tax purposes. Furthermore, the Trustee shall not be entitled to change the situs of the trust to a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust. Any proceeding involving the Trust must be brought in the State of Delaware for so long as the situs of the Trust shall be the State of Delaware.

8.2 Perpetuities Provision. The trust created hereunder shall be perpetual to the fullest extent permitted by Delaware law. If the trust created hereunder is deemed to be subject to the law of a jurisdiction that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust shall terminate in all events upon the expiration of the longest period the property may be held in trust under this Agreement under the law of such jurisdiction (including any application periods in gross, such as 110 years, 360 years, or 1,000 years); provided, however, that if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this Section shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust is determined with reference to the death of the last survivor of a group of individuals in being upon the date of this Trust Agreement, those individuals shall consist of Jim and Jim's Descendants who are in being on the date of this Trust Agreement. Upon termination of a trust pursuant to the provisions of this Section 8.2, the Trustee shall distribute such trust to its income beneficiaries determined at the time of distribution. If at that time rights to income are not fixed by the terms of the trust, distribution shall be made to the persons to whom the Trustee may then distribute income, in proportions determined in the Trustee's discretion, exercised consistently with the trust's purposes.

In the event any trust created hereunder owns real property, and if such real property is subject to a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then the Trustee shall take such action as is necessary to avoid termination of the trust with respect to that real property interest including, without limitation, selling the real property or contributing the real property to a business entity in exchange for ownership interests in such entity to be owned by the trust.

8.3 Gestation. A child in gestation who is born alive shall be considered a child in being throughout the period of gestation.

8.4 Survivorship. Any person must survive by thirty (30) days for a gift made in this Trust Agreement which directly or indirectly requires such person's survival of another to be effective.

8.5 Release of Powers and Interests. Any person, including a beneficiary and a Trustee, shall have the power to disclaim, release, or restrict, irrevocably, in whole or in part, any interest, right, power, or discretion granted to such person with respect to any trust by signed instrument delivered to the Trustee, or in any other manner permitted by law. Any person designated or appointed as a Trustee may, prior to accepting the trust, by written instrument decline to accept any right, power, or discretion with respect to the trust and may accept the trust without such right, power, or discretion.

8.6 Powers of Appointment.

(a) Capacity in Which Exercisable. Every power of appointment granted to a beneficiary under this Trust Agreement is exercisable by that beneficiary in the beneficiary's individual capacity, notwithstanding the fact that the beneficiary may also be serving as a Trustee of the trust.

(b) Manner of Appointment. Every power of appointment granted herein: (i) shall be personal to the donee of such power and may not be exercised on behalf of the donee by any other person, including an attorney-in-fact, a guardian, or any other court appointed representative, and (ii) may be exercised in whole or in part and in favor of one or more potential beneficiaries to the exclusion of others. Appointment may be outright or in further trust, with all provisions determined by the donee of the power, and may confer a power of appointment upon the beneficiary or others, if within the constraints imposed by any applicable rule against perpetuities and any other law which is applicable to the appointment.

(c) Exercise of Inter Vivos Power. An inter vivos power of appointment granted in this Trust Agreement may be exercised only by a written instrument, executed and acknowledged by the donee and delivered to the Trustee during the donee's lifetime, which specifically refers to the power of appointment and expresses the intention to exercise it. If no such instrument is delivered to the Trustee during the donee's lifetime, upon the donee's death the Trustee may distribute the property subject to the power in the manner provided in this Trust Agreement for distribution in default of exercise.

(d) Determination of the Exercise of a Testamentary Power. The Trustee may rely upon any instrument admitted to probate as a will or codicil in determining whether a testamentary power of appointment granted herein has been exercised. If no will or codicil is brought to the Trustee's attention within ninety (90) days of a death to indicate the exercise of a testamentary power, the Trustee may distribute the property subject to the power according to the terms herein provided for distribution in default of exercise. The Trustee will be protected from liability for its actions as authorized in this subsection (d), but this subsection does not affect a beneficiary's rights in the property subject to the power of appointment.

(e) Tax Consequences. The exercise of a power of appointment may have important tax consequences. The donee of any power of appointment should consult with counsel before exercising such power of appointment.

8.7 Liability of Third Party. No person paying money or delivering property to the Trustee need see to the application of such money or property. No person dealing with the Trustee need inquire into the propriety of any transaction or the Trustee's authority to enter into and consummate the same.

8.8 Use of Words. As used in this Trust Agreement, the masculine, feminine, and neuter gender, and the singular or plural of any word each includes the others unless the context indicates otherwise.

8.9 Unenforceable Provision. If any provision of this Trust Agreement is unenforceable, the remaining provisions shall be given effect, unless to do so would produce an unreasonable result.

8.10 Titles, Headings, and Captions. All titles, headings, and captions used in this Trust Agreement have been included for administrative convenience only and should not be construed in interpreting this Trust Agreement.

8.11 Counterpart Signatures. This document may be executed in counterparts, and all counterparts so executed shall constitute a single document, notwithstanding that the interested parties are not or may not be signatories to the original or to the same counterpart.

8.12 Trust Name. The trusts established under Article II of this Trust Agreement, collectively, shall be known as the "The Dugaboy Investment Trust".

IN WITNESS WHEREOF, the Settlor, the Family Trustee and the Administrative Trustee have hereunto set their hands on the day and year first above written in multiple originals. The Trustees agree to administer the trust estate in accordance with the terms of this Trust Agreement. The Independent Trustee shall begin serving as such upon delivery of a written acknowledged instrument to the Family Trustee in accordance with Section 5.2 hereof.

Dana Scott Breault 23 Oct 10
DANA SCOTT BREAULT, Settlor

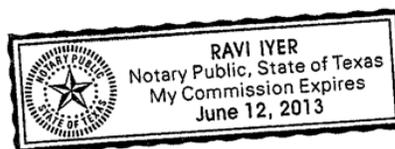
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared DANA SCOTT BREAULT, as Settlor, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 23rd day of October, 2010.

Ravi Iyer

Notary Public



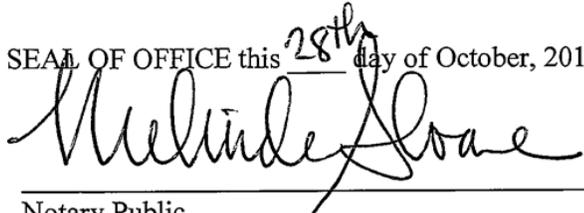


JAMES D. DONDERO, Family Trustee

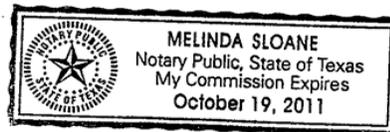
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JAMES D. DONDERO, as Family Trustee, known to me to be the person whose name is subscribed to the foregoing Trust Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ^{28th} day of October, 2010.



Notary Public



COMMONWEALTH TRUST COMPANY,
Administrative Trustee

By: Cynthia D M Brown
Name: Cynthia D. M. Brown
Title: President

STATE OF DELAWARE §
 §
COUNTY OF NEW CASTLE §

BEFORE ME, the undersigned authority on this day personally appeared Cynthia D. M. Brown, President, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed as the act of COMMONWEALTH TRUST COMPANY and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 15th day of ~~October~~ November, 2010.

Laura M Owens
Notary Public



5480300v.6 47609/1

EXHIBIT 78

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03007-sgj
HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND DUGABOY INVESTMENT TRUST	§	
	§	
Defendants.	§	

**DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S
FIFTH, SIXTH, AND SEVENTH CLAIMS FOR RELIEF¹**

¹ This Motion to Dismiss is being concurrently filed in Adv. Nos. 21-03003, 21-03007, 21-03006, and 21-03005, Case No. 19-34054-sgj11, as Plaintiff's assertions and Amended Complaints against all Defendants are identical in material respects.

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In the alternative to and contingent upon a denial by the Court of Defendants' Motion to Compel Arbitration (which the Court should not deny), Defendants move to dismiss the Fifth, Sixth, and Seventh Claims for Relief in Plaintiff's Amended Complaint for failure to state claims on which this Court could grant relief under Federal Rule of Civil Procedure 12(b)(6), as incorporated into this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure. In filing this Motion to Dismiss, Defendants do not waive any rights to compel arbitration, as set forth in Defendants' Motion to Compel Arbitration.² Defendants show in support as follows:

I. BACKGROUND

A. The Bankruptcy and Rejection of Executory Contracts

1 Highland Capital Management, L.P. ("Plaintiff") filed a voluntary Chapter 11 bankruptcy petition ("Bankruptcy Petition") on October 16, 2019 ("Petition Date") in the United States Bankruptcy Court for the District of Delaware, and venue was subsequently transferred to this Court on December 4, 2019.³ On November 24, 2020, Plaintiff filed its Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") along with its Disclosure Statement, which the Court approved on November 24, 2020.⁴

2. On January 11, 2021, Plaintiff filed its Second Notice of Executory Contracts and Unexpired Leases to be Assumed by the Plaintiff [then, Debtor] Pursuant to the Plan (the

² *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (Defendant did not substantially invoke the judicial process and waive its right to arbitration despite removal of action to federal court, filing motion to dismiss, filing motion to stay proceedings, answering plaintiff's complaint, asserting counterclaim, and exchanging discovery); *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891 (5th Cir. 2005) (Arbitration not waived when defendant filed a 100-plus page motion for summary judgment and a concurrent motion to arbitrate); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (no waiver of arbitration right when the party seeking arbitration did no more than defend itself against the claims made against it).

³ Order Transferring Venue, Case 19-12239-Css [Doc. 184].

⁴ Case No. 19-34054-sgj11 [Doc. 1476]

“Assumption Notice”).⁵ The Assumption Notice itemized seventy-one (71) executory contracts to be assumed by the Plaintiff, notably including the Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P. (the “LPA”). However, on January 21, 2021, the Debtor entered a Withdrawal Notice, rejecting the LPA along with several other executory contracts,⁶ and confirmed on February 1, 2021, that it had withdrawn the LPA from its list of assumed executory contracts.⁷ On February 22, 2021 (the “Rejection Date”), the Court confirmed the Plan, causing the rejection of the LPA.⁸

B. The Limited Partnership Agreement

3. James Dondero (“Jim Dondero”) is the co-founder of Highland Capital (Plaintiff in this Adversary Proceeding), and served as its President and CEO until January 9, 2020.⁹ The Dugaboy Family Trust (“Dugaboy”) is one of Debtor’s Class A limited partners and holds the majority of the Debtor’s Class A limited partnership interests. LPA, Exhibit A. Jim Dondero’s sister Nancy Dondero serves as the Dugaboy Family Trustee.¹⁰ Jim Dondero is a lifetime beneficiary of Dugaboy.¹¹

4. Dugaboy’s explicit authorization to approve compensation for Jim Dondero - and thus bind the Partnership - comes specifically from the LPA in § 3.10(a), which provides in pertinent part:

(a) Compensation. The *General Partner* and any *Affiliate* of the General Partner shall receive no compensation from the Partnership for services rendered

⁵ Case 19-34054-sgj11 [Doc. 1719].

⁶ Case 19-34054-sgj11 [Doc. 1791, Schedule A].

⁷ Case 19-34054-sgj11 [Doc. 1871].

⁸ Case 19-34054-sgj11 [Doc. 1943].

⁹ Am. Compl. ¶ 11, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 12, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 12, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 12, Adv. No. 21-03005 [Doc. 63].

¹⁰ Am. Compl. ¶ 13, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 14, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 14, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 14, Adv. No. 21-03005 [Doc. 63].

¹¹ Am. Compl. ¶ 12, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 13, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 13, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 13, Adv. No. 21-03005 [Doc. 63].

pursuant to this Agreement or any other agreements *unless approved by a Majority Interest*; LPA § 3.10(a) (emphasis added).

The LPA defines relevant actors in the Compensation provision as follows:

“**Majority Interest**’ means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.” LPA § 2.1, p.4.

“**Class A Limited Partners**’ means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.” LPA § 2.1, p.2.

Exhibit A reflects “The Dugaboy Investment Trust” as a Class A Limited Partner owning 74.4426% of the Class A Limited Partnership Interests. LPA, Exhibit A, line 5.¹²

Based on the Compensation provision and definitions, Dugaboy clearly had the right to approve compensation for the General Partner and its Affiliates. The General Partner entitled to compensation here is Strand Advisors, Inc. The LPA Preamble states in pertinent part:

“This [LPA] is entered...by and among Strand Advisors, Inc., a Delaware Corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner. LPA Preamble, p.1.

The LPA goes on to articulate Affiliates (of Strand):

“**Affiliate**’ means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term ‘**control**’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.” LPA § 2.1, p.2.

“**Person**’ means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.” LPA § 2.1, p.5.

It is undisputed that Jim Dondero was an Affiliate of Strand under the LPA’s definition. It is also undisputed that he controlled Highland Capital Real Estate Partners (“HCRE”), Nexpoint Advisors, L.P. (“Nexpoint”), and Highland Capital Management Services, Inc. (“HCMS”).¹³

Thus, Jim Dondero was entitled to compensation approved by Dugaboy pursuant to the LPA.

¹² See attached, LPA Exhibit A.

¹³ Am. Compl. ¶ 2, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 2, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 2, Adv. No. 21-03005 [Doc. 63].

C. The Promissory Notes

5. Over the last several years, multiple promissory notes were executed in favor of the Plaintiff to different entities and individuals, which obligations became subject to potential forgiveness as compensation for Jim Dondero that, under the LPA, Dugaboy was charged with approving:

Notes to Jim Dondero (the “Dondero Notes”):

1. A note for \$3,825,000, executed on February 2, 2018, payable on demand.
2. A note for \$2,500,000, executed on August 1, 2018, payable on demand.
3. A note for \$2,500,000, executed on August 13, 2018, payable on demand.¹⁴

Notes to HCRE (the “HCRE Notes”):

1. A note for \$100,000, executed on November 27, 2013, payable on demand.
2. A note for \$2,500,000, executed on October 12, 2017, payable on demand.
3. A note for \$750,000, executed on October 15, 2018, payable on demand.
4. A note for \$900,000, executed on September 25, 2019, payable on demand.
5. A term note for \$6,059,831, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁵

Notes to HCMS (the “HCMS Notes”):

1. A note for \$150,000, executed on March 28, 2018, payable on demand.
2. A note for \$200,000, executed on June 25, 2018, payable on demand.
3. A note for \$400,000, executed on May 29, 2019, payable on demand.
4. A note for \$150,000, executed on June 26, 2019, payable on demand.¹⁶

Note to Nexpoint (the “Nexpoint Note”):

1. A term note for \$30,746,812.33, executed on May 31, 2017, payable in thirty (30) equal annual installment payments, each due on the 31st day of December each calendar year.¹⁷

¹⁴ Am. Compl. ¶¶ 20-22, Adv. No. 21-03003, Case No. 19-34054-sgj11 [Doc. 79].

¹⁵ Am. Compl. ¶¶ 21-24, Adv. No. 21-03007, Case No. 19-34054-sgj11 [Doc. 63]; According to its Amended Complaint, Plaintiff alleges in ¶ 63 that it has suffered damages under the note “in the amount of at least \$5,012,260.96, as of December 11, 2020,” but in ¶ 64 that it has suffered damages “in the amount of at least \$6,145,466.84 as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date...”

¹⁶ Am. Compl. ¶¶ 21-24, Adv. No. 21-03006, Case No. 19-34054-sgj11 [Doc. 68].

¹⁷ Am. Compl. ¶ 21, Adv. No. 21-03005, Case No. 19-34054-sgj11 [Doc. 63]; Plaintiff alleges in ¶ 31 that “as of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03,” and claims the same amount as damages in ¶ 48.

6. Jim Dondero entered into agreement (the “Subsequent Agreements,” or as Plaintiff refers to them, the “Alleged Agreements”) with Nancy Dondero (acting for Dugaboy as its Trustee) that Plaintiff would not demand collection of the Notes unless events had occurred that made fulfillment of conditions subsequent impossible.¹⁸ However, annual term loan payments and annual interest payments on the demand notes were to be (and were) made.¹⁹

7. On December 3, 2020, after the bankruptcy Petition Date, Plaintiff demanded payment from Jim Dondero, HCRE, and HCMS on their respective demand notes due by December 11, 2020.²⁰ On January 7, 2021, Plaintiff made a demand on the Nexpoint term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98,” and a demand on the HCRE term note, claiming that “[t]he amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84.”²¹ Plaintiff has refused to recognize the Subsequent Agreement, calling it a “fiction.”²² Other than annual term and interest payments and some voluntary prepayments on the term notes, Defendants have not paid the Notes.²³

¹⁸ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

¹⁹ *E.g.*, Am. Compl. ¶ 21,27, Adv. No. 21-03005 [Doc. 63], showing the original principal of the note being \$30,746,812.33, but Plaintiff only demanding \$24,471,804.98 in its demand letter; *E.g.*, Am. Compl. ¶ 37,63,64, Adv. No. 21-03007 [Doc. 63], showing the original principal of the note being \$6,059,831, but Plaintiff alleging it was damaged in the amount of at least \$5,012,260.96 as of December 11, 2020, but also in the next paragraph inconsistently alleging it was damaged in the amount of at least \$6,145,466.84.

²⁰ Am. Compl. ¶ 26, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 28, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 28, Adv. No. 21-03006 [Doc. 68].

²¹ Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63]; Am. Compl. ¶43, Adv. No. 21-03007 [Doc. 63].

²² Am. Compl. ¶ 3, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 3, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 3, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 3, Adv. No. 21-03005 [Doc. 63].

²³ With respect to the Nexpoint term loans, due to a mistake, the 2020 end-of-year payment was late and the notes should be deemed current, Am. Ans. ¶ 40,41, Adv. Pro. 21-03005 [Doc. 50]; Am. Compl. ¶ 28, Adv. No. 21-03005 [Doc. 55-2], acknowledging payment of \$1,406,111.92.

D. The Adversary Proceedings

8. On January 22, 2021, Plaintiff initiated Adversary Proceedings against Jim Dondero, HCRE, HCMS, and Nexpoint for breach of contract and turnover of property.²⁴ On August 17, 2021, Plaintiff filed Amended Complaints against each Defendant alleging additional claims against Jim Dondero and new claims against Dugaboy and Nancy Dondero. Defendants each filed Amended Answers asserting several affirmative defenses, including that the Subsequent Agreements preclude the respective claims.²⁵

9. In the Fifth Claim of each Amended Complaint,²⁶ Plaintiff asks the Court to declare (a) that limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the LPA, (b) that neither Dugaboy nor Nancy Dondero was authorized under the LPA to enter into the Subsequent Agreement on behalf of the Partnership, (c) that neither Dugaboy nor Nancy Dondero otherwise had the right or authority to enter into the Subsequent Agreement on behalf of the Partnership, and (d) the Subsequent Agreement is null and void.²⁷

10. In the Sixth Claim of each Amended Complaint,²⁸ Plaintiff alleges that if Dugaboy, as a limited partner under the LPA, or Nancy Dondero, as the representative of Dugaboy, had the

²⁴ Am. Compl. ¶ 33, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 47, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 45, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 33, Adv. No. 21-03005 [Doc. 63].

²⁵ Am. Answer ¶ 40, Adv. No. 21-03003 [Doc. 16]; Am. Answer ¶ 58, Adv. No. 21-03007 [Doc. 34]; Am. Answer ¶ 56, Adv. No. 21-03006 [Doc. 34]; Am. Answer ¶ 42, Adv. No. 21-03005 [Doc. 50].

²⁶ Nancy Dondero is a Defendant on Counts V, VI, and VII in Adv. No. 21-03005, Adv. No. 21-3006, and Adv. No. 21-3007. Nancy Dondero is a Defendant only on Count VII in Adv. No. 21-03003.

²⁷ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63], Plaintiff alleges against Dugaboy and Nancy Dondero; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

²⁸ See note 26, *supra*.

authority to enter into the Subsequent Agreement on behalf of [Plaintiff], then Dugaboy incurred a fiduciary duty of care, and breached said duty by entering into the Subsequent Agreement.²⁹

11. In the Seventh Claim of each Amended Complaint, Plaintiff alleges that Jim and Nancy Dondero were aware that Dugaboy would have fiduciary duties owed to the Plaintiff if acting to bind the Plaintiff per the authorization in the LPA, and aided and abetted Dugaboy's breach of its fiduciary duties by knowingly participating in the authorization of the Subsequent Agreement.³⁰

II. STANDARD OF REVIEW

12. An asserted cause of action must be dismissed when the complaint fails to state a claim. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must meet two criteria: (1) it must assert a plausible claim, and (2) it must set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at 1949-50 (citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)). Thus, either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" requires dismissal. *Id.* The plaintiff must allege specific facts and not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). A court may not strain to find inferences favorable to the plaintiff or accept conclusory allegations, unwarranted deduction, or legal conclusion. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

13. To satisfy *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, *Twombly*, at 570. A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court

²⁹ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

³⁰ Am. Compl. ¶ 79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 77, Adv. No. 21-03005 [Doc. 63].

to draw the reasonable inference that the defendant is liable under the alleged claim. *Id.* at 556. Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also “plausibly suggest an entitlement to relief.” *Id.*, *Iqbal*, at 1951.

III. ARGUMENTS AND AUTHORITIES

A. **Plaintiff’s Fifth Claim for Declaratory Relief Under the LPA Should Be Dismissed for Two Reasons.**

1. **Plaintiff’s Fifth Claim Fails Because the Terms of the LPA are so Clear on their Face That There is No Actual Controversy between Parties.**

14. Plaintiff’s claim presents no “actual controversy” because the provisions of the LPA clearly allow Dugaboy to bind the Partnership by approving compensation and there is no controversy that could require a declaration by this Court.

15. Plaintiff argues that Dugaboy was not authorized to enter into the Subsequent Agreement regarding Jim Dondero’s compensation, nor was it authorized to bind the Partnership.³¹ Plaintiff further attached the LPA as “Exhibit 5” to its Amended Complaints and referenced this Court to § 4.2, which states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership *other than as specifically set forth in this Agreement*.³² (emphasis added).

16. Contrary to Plaintiff’s argument, the LPA explicitly authorizes Dugaboy as the Majority Interest to approve compensation for Jim Dondero as previously articulated in this Motion. Approving compensation inherently binds the Partnership in that it exchanges money on behalf of the Partnership for services rendered. Because it is so expressly provided for in the LPA,

³¹ *Id.*

³² Am. Compl. ¶ 43, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 55, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 53, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 27, Adv. No. 21-03005 [Doc. 63].

Plaintiff's contention that Dugaboy could not act to bind the Partnership through compensation agreements amounts to Plaintiff's misinterpretation of the LPA as opposed to an "actual controversy" in need of declaratory relief. This claim is nothing more than Plaintiff's attempt at an end-around to avoid proving the merits of its breach of fiduciary duty claims and essentially asks this Court for an advisory opinion to help Plaintiff do so. Under *Twombly*, Plaintiff's claim for declaratory relief should be dismissed pursuant to Rule 12(b)(6).

2. Debtor Lacks Standing to Assert a Claim for Declaratory Relief Based Upon an Executory Contract It Rejected.

17. There is no authority for "allowing a debtor's estate or a successor-in-interest such as the [creditor's committee or litigation trustee] to pursue claims for post-petition breaches of a rejected contract. Because rejection is an affirmative declaration by the debtor that the estate will not take on the obligations of a prepetition contract made by the debtor, [Plaintiff-Debtor's] rejection of the [LPA] not only relieved the estate of its post-petition performance obligations, but also relieved the estate of its ability to assert claims for post-petition breaches thereof." *Lauter v. Citgo Petroleum Corp.*, CV H-17-2028, 2018 WL 801601, at *15 (S.D. Tex. Feb. 8, 2018). As explained below, as a result, not only does this preclude Debtor's claims for breach of fiduciary duty (see sections B.2., C.5. *infra*), it also precludes Debtor's attempt to obtain declaratory relief.

18. Plaintiff seeks declaratory relief against Dugaboy and Nancy Dondero to determine if either of them were authorized to enter into the Subsequent Agreement under the LPA.³³ Although most causes of action accrue when an injury results from a wrongful act, a cause of action for declaratory relief differs in that it does not accrue until there is an actual controversy between the parties. *In re Estate of Denman*, 362 S.W.3d 134, 144 (Tex. App. -- San Antonio

³³ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2011, no pet.); *Murphey v. Honeycutt*, 199 S.W.2d 298, 299 (holding that declaratory judgment action accrued in a will construction case at the time when an heir committed an act indicating she was operating against the will, not when the will was executed years prior to the heir's act); *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 278 (Tex. App. – El Paso 2021, pet. filed) (holding that in a lease dispute, the actual controversy did not arise-- and the claim did not accrue- when the lease was entered into by the parties, but rather when plaintiff challenged the lease terms at a later date).

19. Here, Plaintiff's declaratory relief claim accrued (if at all) when Jim Dondero asserted the Subsequent Agreement as an affirmative defense. Plaintiff alleges that the actual controversy here is whether or not Dugaboy or Nancy Dondero had authority to enter into the Subsequent Agreement under the rejected LPA. Plaintiff specifically pleads that "[a] bona fide, actual, present dispute exists between the [Plaintiff] and Dugaboy concerning whether Dugaboy was authorized to enter into the Alleged Agreement on the [Plaintiff]'s behalf...[and a] judgment declaring the parties' respective rights and obligations will resolve their dispute."³⁴ Plaintiff did not allege anywhere in its Original Complaint that a dispute regarding Dugaboy's authority to enter the Subsequent Agreement required declaratory relief. Only after Defendants filed their Amended Answers did Plaintiff seek such relief in its Amended Complaint.³⁵ Therefore, this cause of action for declaratory relief accrued when Plaintiff received Defendant's Amended Answers after the bankruptcy began, as that is when facts came into existence that created an actual controversy under the LPA.

20. Section 365 of Title 11 of the United States Code (the "Bankruptcy Code") governs the inclusion and exclusion of executory contracts in bankruptcy. Section 365 vests the power to

³⁴ *Id.*

³⁵ *Id.*

reject or assume any of the Debtor's executory contracts in the trustee, subject to the court's approval. 11 U.S.C. § 365(a). A debtor's rejection of an executory contract constitutes a breach of such contract immediately before the date of the filing of the [bankruptcy] petition. 11 U.S.C. § 365(g)(1). In this case, Plaintiff's act of rejection resulted in a material breach of the LPA that relates back to October 15, 2019 (the "Breach Date") pursuant to the Bankruptcy Code. *See* 11 U.S.C. § 365(g)(1).

21. "Rejection is an affirmative declaration that the estate will not take on the obligations of a pre-petition contract made by the debtor" and "places the obligation to perform outside of the bankruptcy administration." *Lauter*, at *13, citing *Matter of Austin Dev. Co.*, 19 F.3d 1077, 1082-83 (5th Cir. 1994); *In re Continental Airlines*, 981 F.2d 1450, 1459 (5th Cir. 1993). "[R]ejection does not change the substantive rights of the parties to the contract, but merely means the bankruptcy estate itself will not become a party to it." *In re Alongi*, 272 B.R. 148, 153 (Bankr. D. Md. 2001) (citing M. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U.Colo.L.Rev. 845 (1988)). As noted above, rejection not only relieves the estate of post-[bankruptcy]petition performance obligations, but also of its ability to assert claims for post-petition breaches thereof. *Lauter*, at *15.

22. The court in *Lauter* looked to the reasoning of Fifth Circuit opinions examining the effects of plaintiffs rejecting executory contracts under § 365. In *In re Continental*, the court reasoned in part that, under § 365, "An agreement cannot 'exist' for one purpose yet take on a 'nonexistent' quality which works for the advantage of one party or the other" when a debtor-plaintiff sought to avoid paying airline pilots under an executory contract it rejected, attempting to treat the contract as terminated. *Id.* at 1460. Likewise, the court in *Matter of Austin* reasoned that a rejection of a lease under § 365 did not terminate the lease, but moved the rights of the parties

affected “outside of the bankruptcy court’s realm because after rejection, the debtor’s estate is no longer involved in the leasehold transaction.” *Id.* at 1083.

23. Following the Fifth Circuit’s application of § 365 in cases such as *In re Continental* and *Matter of Austin*, the court in *Lauter* addressed the impact of a debtor-plaintiff’s attempt to pursue post-petition claims against a defendant whose executory contract had been rejected. The court held that just as in any other contract dispute, a prior material breach by a counterparty relieved the aggrieved party of the duty to perform and deprived the breaching party of the ability to make claims for breach after its own breach. *Id.* at *12-13, 15. After a thorough discussion of § 365, the court ultimately found that the plaintiff lacked standing to pursue claims resulting from a post-petition breach of an executory contract, holding that “the court has not found any authority allowing a debtor’s estate . . . to pursue claims for post-petition breaches of a rejected contract.” *Id.* at *15.

24. Here, Plaintiff asks this Court to interpret and, in effect, determine a breach of the same LPA it rejected and breached prior to the bankruptcy petition date. The LPA was rejected on February 22, 2021 and thus deemed materially breached on October 15, 2019 under § 365(g)(1). Because this cause of action accrued after both rejection and the relation-back breach provision of § 365, Plaintiff’s Fifth Claim for declaratory relief amounts to a post-petition claim arising from a rejected executory contract, which the court in *Lauter* held a Debtor lacks standing to assert in a bankruptcy proceeding. Therefore, this claim should be dismissed pursuant to *Twombly* and Rule 12(b)(6).

B. Plaintiff’s Sixth Claim of Breach of Fiduciary Duty Against Dugaboy and Nancy Dondero Fails for Two Reasons.

1. Dugaboy Owes No Fiduciary Duty to Plaintiff as a Consequence of Exercising Its Right to Approve Compensation.

25. Plaintiff alleges that “if Dugaboy, as a limited partner, had the authority to enter into the Alleged Agreement...then Dugaboy would owe the [Plaintiff] a fiduciary duty.”³⁶ The LPA in this case is governed by the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”) except as specifically provided for in the LPA. LPA §§ 1.1,1.2; *see also* Del. Code Ann. Tit. 6, § 17-1102. The DRULPA allows partnership agreements to expand, restrict, or eliminate fiduciary and other legal or equitable duties, provided it may not eliminate the implied contractual duty of good faith and fair dealing. Del. Code Ann. Tit. 6, § 17-1101(d). The DRULPA also specifically permits a partnership agreement to provide the rules for how partners may transact with the partnership. Del. Code Ann. Tit. 6, § 17-107.

26. In Delaware, a limited partner does not owe a fiduciary duty as a consequence of exercising a right of the limited partner under the partnership agreement. *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 864 (Del. Ch. 1999); *In re Est. of Conaway*, 2012 WL 524190, at *3 (Del. Ch. Feb. 15, 2012), *aff’d sub nom. Russell-Conaway v. Frederick-Conaway*, 2012 WL 4478655, 54 A.3d 257 (Del. 2012) (unpublished).

27. In *Bond Purchase*, a limited partner exercised its right under the limited partnership agreement to obtain records of the owners of the partnership for the purpose of making a tender offer for additional interests in the partnership. Although the other partners claimed this request for records was a breach of a fiduciary duty, the court held that “in the absence of any provision in the partnership agreement engrafting duties onto [the limited partner],” “[the limited partner]

³⁶ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

owes no fiduciary duties,” and allowed the limited partner access to the records it sought under the partnership agreement. *Id.* at 864.

28. In *In re Est. of Conaway*, a limited partner withheld consent to transfer another partner’s interest as he was allowed to under the limited partnership agreement. The receiving party alleged a breach of the non-consenting limited partner’s fiduciary duty. The court held that where the limited partner “merely exercised his contracted-for rights under the terms of the [limited partnership agreement],” the limited partner breached no fiduciary duty, assuming there even was one. *Id.* at *3.

29. Just as the limited partners in *Bond Purchase* and *In re Est. of Conaway*, Dugaboy was merely exercising its right to approve compensation pursuant to the LPA when it entered into the Subsequent Agreement. LPA § 3.10(a); § 2.1. Therefore, Dugaboy owes no fiduciary duty to the Plaintiff as a consequence of simply exercising its right under the LPA. While a limited partner who takes on an active role in the management of the entity may thereby assume fiduciary duties, *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (citing cases); *Bond Purchase* at 863-64, merely engaging in actions delegated to the limited partner in the partnership agreement does not constitute participating in the control of a business so as to trigger the assumption of fiduciary duties. Del. Code Ann. Tit. 6, § 17-303(b)(8)(o).

30. Texas has similarly held that “a limited partner does not participate in the control of the business” by taking certain actions listed in the statutes, and such “actions complained of by the plaintiff did not amount to the types of control that could give rise to a duty to the other limited partners.” *Strebel v. Wimberly*, 371 S.W.3d 267, 280 (Tex. App. 2012) (summarizing holding of *AON Properties, Inc. v. Riveraine Corp.*, 1999 WL 12739, at *23 (Tex. App. Jan. 14, 1999)).

31. Here, Dugaboy did not participate in the control of the business because it was taking actions explicitly extended to it in the LPA by approving compensation under § 3.10(a). LPA § 3.10(a); § 2.1. Since the LPA explicitly gives Dugaboy the right to approve such compensation, and Dugaboy was not participating in the control of the business, Dugaboy does not owe a fiduciary duty to Plaintiff. Dugaboy cannot breach a fiduciary duty it does not owe. Further, Nancy Dondero as Trustee owes no fiduciary duty to Plaintiff independently from what Dugaboy owes, as Dugaboy is her principal. Like Dugaboy, Nancy Dondero cannot breach a fiduciary duty she does not owe. Under *Twombly*, Plaintiff's claim for breach of fiduciary duty against Dugaboy and Nancy Dondero should be dismissed pursuant to Rule 12(b)(6).

2. Nancy Dondero Owes No Fiduciary Duty to Debtor.

32. Under Delaware law, a trustee's fiduciary duties of care and loyalty flow to the trust and the beneficiar(ies) of the trust. *Tigani v. Tigani*, 2021 Del. Ch. LEXIS 60, *1, 2021 WL 1197576 (March 30, 2021). A trustee is prohibited from considering her own interests and "all consideration of the interests of third persons." *Id.* at * 38.

33. Plaintiff claims that if Dugaboy had the authority to enter into the Subsequent Agreement, then Ms. Dondero would then somehow owe a fiduciary duty directly to Plaintiff. The Amended Complaint does not allege any facts as to why or how such a fiduciary duty would appear, and there is no legal authority to support such a conclusion. As discussed above, not even Dugaboy owed a fiduciary duty to Plaintiff in determining compensation, as Dugaboy was expressly authorized to do under § 3.10(a) of the LPA. Nancy Dondero, individually, is even further removed from owing any duty to Plaintiff, much less a fiduciary duty. Plaintiff cannot create a legal duty simply by claiming one exists, and its breach of fiduciary duty claim against Nancy Dondero should be dismissed under *Twombly* and Rule 12(b)(6).

3. Debtor Lacks Standing to Assert a Claim for Breach of Fiduciary Duty Based Upon an Executory Contract It Rejected.

34. Plaintiff's Sixth Claim is also barred for the same reasons that discussed in Section A.2 *supra*, and similarly relies on the fact that this cause of action accrued after the LPA was breached on October 15, 2019. In this case, Plaintiff suffered no legal injury – and no cause of action accrued - until the notes were not paid on demand by December 11, 2020.

35. Generally, “a cause of action accrues...when facts come into existence that authorize a claimant to seek judicial remedy.” *Dunmore v. Chicago Title Ins. Co.*, 400 S.W.3d 635, 640 (Tex. App. – Dallas 2013, no pet.) (citing cases). “Breach of fiduciary duty claims generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act *and* resulting injury.” *Dunmore*, at 641 (emphasis added). Further, “[t]he general rule governing when a claim accrues...is the ‘legal injury rule,’ which provides that a claim accrues ‘when a wrongful act causes some legal injury, even if that fact of injury is not discovered until later, and even if all damages have not yet occurred.’” *Id.* (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)). “[A] legal injury [is] an injury giving cause of action by reason of its being an invasion of a Plaintiff's right...be the damage however slight.” *Murphy*, at 270. Although the discussion of when a claim accrues in Texas generally involves application of the discovery rule (which is not applicable to these facts), the concept of “legal injury” is still the cornerstone of an accrual analysis.

36. Here, Plaintiff alleges that Dugaboy and Nancy Dondero breached a fiduciary duty when it entered into the Subsequent Agreement.³⁷ The alleged wrongful act was the Subsequent Agreement itself which Plaintiff alleges breached a fiduciary duty. However, Plaintiff suffered no

³⁷ Am. Compl. ¶ 75, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 89, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 87, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 73, Adv. No. 21-03005 [Doc. 63].

legal injury from the Subsequent Agreement until Defendant did not pay the Notes when demanded (if it even suffered one at all). The Subsequent Agreement simply made the Notes potentially forgivable upon conditions subsequent, which could not have impacted the alleged value of the Notes until the conditions occurred. As a result, the cause of action did not accrue until December 11, 2020, after the Petition Date. Debtor's rejection of the LPA, the alleged source of the fiduciary duties allegedly breached,³⁸ therefore bars pursuit of the Plaintiff's Sixth Claim for the same reasons set forth in Section A.2 *supra*.

C. Plaintiff's Seventh Claim of Aiding and Abetting Breach of Fiduciary Duty against Jim and Nancy Dondero Fails for Several Reasons.

1. Neither Jim nor Nancy Dondero could have Aided and Abetted a Breach of Fiduciary Duty because Dugaboy did Not Owe a Fiduciary Duty to Plaintiff.

37. Plaintiff claims that Jim and Nancy Dondero aided and abetted Dugaboy's alleged breach of fiduciary duty by entering into the Subsequent Agreement. However, aiding and abetting is a fundamentally dependent claim that can only succeed if there is a valid underlying breach of fiduciary duty claim. *In re Draw Another Circle*, 602 B.R. 878, 904 (Bankr. D. Del. 2019) (citing Restatement (Second) of Torts § 876 for the proposition "the derivative nature of an aiding and abetting claim will exist only with the success of the breach of fiduciary duty claim"); *West Fork Advisors LLC v. SunGard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App.-Dallas 2014) (citing Restatement (Second) of Torts § 876(b) (1979)). As previously discussed in Section B.1., Dugaboy did not owe any fiduciary duty to Plaintiff that could have been breached. Therefore, Plaintiff's derivative claim of aiding and abetting against both Jim and Nancy Dondero is legally impossible and should be dismissed under *Twombly* and Rule 12(b)(6).

³⁸ Am. Compl. ¶ 72(a-d), Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶ 86(a-d), Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶ 84(a-d), Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶ 70(a-d), Adv. No. 21-03005 [Doc. 63].

2. Nancy Dondero Cannot Aid and Abet Herself as Dugaboy Trustee Because Aiding and Abetting Requires More Than One Actor.

38. Even if Dugaboy owed and breached a fiduciary duty to Plaintiff (which it did not), it is legally impossible for Nancy Dondero to have aided and abetted Dugaboy's alleged breach of fiduciary duty by authorizing the Subsequent Agreement as she was acting as Dugaboy in her trustee status. Because there are limited cases on point, an analysis under the Restatement (Second) of Torts § 876 (1979) is compelling because Delaware courts routinely look to the Restatement to fill lacunae in the law. *In re Rural Metro Corp.*, 88 A.3d 54, 98 (Del. Ch. 2014), decision clarified on denial of reargument sub nom. *In re Rural Metro Corp. Stocholders Litig.* (Del. Ch. 2014) (applying the Restatement to an aiding and abetting breach of fiduciary duty analysis). "The Delaware Supreme Court often relies on the Restatement (Second) of Torts." *Id.* at 98. Comparison to cases in other jurisdictions construing law similar to Delaware law is also instructive.

39. The Restatement (Second) § 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with *the other* or pursuant to a common design with him, or (b) knows that *the other's* conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to *the other* in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979), adopted in Delaware by *Patton v. Simone*, Civ. A. 90C-JA-29, 1992 WL 183064 (Del. Super. Ct. June 25, 1992) (emphasis added). Under the Restatement (Second), people act "in concert" with each other when they act "in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." Restatement (Second) of Torts § 876, comment A. Under the Restatement (Second), Nancy

Dondero could not have conceivably acted “in accordance with an agreement” with herself in her Trustee capacity, as she is a singular individual.

40. Delaware has not directly addressed the issue of whether one can aid and abet one's self, but it has applied the Restatement (Second) when analyzing aiding and abetting a breach of fiduciary duty claims, which requires a plaintiff to prove: (1) the existence of a fiduciary relationship, (2) breach of the fiduciary's duty, (3) defendant, who is not a fiduciary, knowingly participated in the breach, and (4) damages to the plaintiff as the result of the concerted action of the fiduciary and the non-fiduciary. *In re USDigital, Inc.*, 443 B.R. 22, 46 (Bankr. D. Del. 2011) (citing elements of aiding and abetting breach of fiduciary duty in Delaware and holding that a director defendant cannot have aided and abetted the same fiduciary duty he allegedly breached in a previous count); *In re Draw*, at 904 (applying Restatement (Second) to the knowing participation element); *Patton*, at *8 (applying Restatement (Second) to aiding and abetting analysis); *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) (applying the Restatement (Second) to knowing participation in aiding and abetting analysis and acknowledging that § 876 has been cited with approval in Delaware in). Again, because Plaintiff is alleging that Nancy Dondero aided and abetted Dugaboy (which was acting through Nancy Dondero), the requirement of a second actor is not met because Nancy Dondero cannot act in concert with herself.

41. Analogously, officers and agents cannot aid and abet their principal or each other in the commission of a tort. *Cornell Glasgow, LLC v La Grange Props., LLC*, 2012 WL 2106945, at *11 (Del. Super. Ct. June 6, 2012); *Amaysing Techs. Corp. v. Cyberair Communications, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts

of the corporation.”). Application of this law to the present circumstances further compels the conclusion that Nancy Dondero cannot aid and abet herself. Texas also has looked to the Restatement (Second) of Torts § 876 for guidance regarding its aiding and abetting doctrine, which states that “[i]t is settled as the law of [the State of Texas] that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with [that] fiduciary and is liable as such.” *In re TOCFHBI, Inc.*, 413 B.R. 523, 534 (Bankr. N.D. Tex. 2009) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 574, 160 S.W.2d (1942)) (emphasis added, citing elements); *W. Fork Advisors, LLC v. SunGuard Consulting Services, LLC*, 437 S.W.3d 917, 921 (Tex. App. – Dallas 2014, pet. denied) (looking to Restatement (Second) regarding aiding and abetting analysis). Although also having sparse law regarding whether one can aid and abet one's own self, Texas law still requires a third party in order to prove aiding and abetting a breach of fiduciary duty. For the same reasons mentioned above, Nancy simply cannot aid and abet her own actions as Dugaboy Trustee.

42. Arizona courts have more directly held that under the Restatement (Second), “when [Plaintiffs] fail to allege [agent] took any actions in [their] individual capacity ‘in concert’ with the actions giving rise to the breach of fiduciary duty claim against [insurance company], [plaintiff’s] aiding and abetting claim against [agent] will be dismissed.” *Young v. Liberty Mut. Group, Inc.*, CV-12-2302-PHX-JAT, 2013 WL 840618, at *4 (D. Ariz. Mar. 6, 2013).³⁹ In *Young*, the Court reasoned that “...it does not follow that [agent] must have committed the separate tort of aiding and abetting merely because he was the agent through which [insurance company] breached its duty.” *Id.* at *4. The Court dismissed the claim on the agent’s 12(b)(6) motion.

³⁹ In *Young*, Plaintiff sued both Liberty Mutual for breach of fiduciary duty, and her personal insurance agent for aiding and abetting said breach. Because Plaintiff failed to allege [agent] took any actions in his individual capacity “in concert” with the actions giving rise to Plaintiff’s claim against Liberty Mutual, the aiding and abetting claim was dismissed upon 12(b)(6) motion.

Further, in *Jones v. Colorado Cas. Ins. Co.*, the same Court dismissed a similar claim upon another insurance agent's 12(b)(6) motion, agreeing with the agent's assertion that "one cannot aid and abet one's self." *Jones v. Colorado Cas. Ins. Co.*, CV 12-1968-PHX-JAT, 2013 WL 4759260, at *3 (D. Ariz. Sept. 4, 2013) (dismissing a claim against an insurance agent for aiding and abetting the insurance company's breach of fiduciary duty, determining that in order for there to be harm to a third person, there must be at least two tortfeasors). Just as the insurance agents could not aid and abet themselves as representatives for the insurance companies, Nancy Dondero could not have aided and abetted herself in her capacity as Dugaboy Trustee.

43. Connecticut takes a similar approach in holding that aiding and abetting means to help or compel *another* to act, and that an alleged tortfeasor cannot aid or abet himself, and doing so would yield "circular results." *Bolick v. Alea Group Holdings, Ltd.*, 278 F. Supp. 2d 278, 282 (D. Conn. 2003) (dismissing aiding and abetting claim).⁴⁰ Because Nancy Dondero was acting as Dugaboy in the conduct about which Debtor complains, she is not a "third party" to an act. It is impossible for Nancy Dondero to aid and abet her own self - as most distinctly stated in *Cornell Glasgow, LLC* and *Bolick* - because aiding and abetting requires the concerted action and scienter of more than one person. Therefore, Plaintiff's Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

3. Plaintiff does Not Plead the Sufficient Scienter Requirement for Aiding and Abetting in its Amended Complaint for Either Jim or Nancy Dondero.

44. In addition to the above infirmities, Plaintiff fails to allege the necessary scienter required to show aiding and abetting for both Jim and Nancy Dondero. Delaware courts

⁴⁰ *Bolick* addressed an employment discrimination case where Plaintiff sued her supervisor for both harassment and aiding and abetting that same harassment. The Court held that to hold the supervisor liable for his wrongful behavior and also aiding and abetting that wrongful behavior is illogical and would yield circular results. Court used dictionary to reference "abettor" as someone who encourages an offender.

acknowledge that an aiding and abetting analysis largely comes down to what constitutes “knowing participation.” *In re Draw*, at 904. The aider and abettor must act “knowingly, intentionally, or with reckless indifference...that is, with an illicit state of mind.” *Id.* The Plaintiff must allege specific facts that show Defendants had “actual knowledge” that their conduct intentionally aided and abetted a breach, not simply that they “knew or should have known.” *Id.* (citing *Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass’n*, CIV. 10-520 JBS KMW, 2011 WL 864421, at *5 (D. Del. Mar. 9, 2011)).

45. In *In re Draw*, a Chapter 11 trustee filed an amended adversary complaint against several members of the company’s board of directors, asserting breach of fiduciary duties and aiding and abetting breaches of fiduciary duties. On the defendant’s 12(b)(6) motion, the court held that plaintiff’s amended complaint failed to allege specific facts showing actual knowledge that [Director] was liable for aiding and abetting, and that plaintiff simply alleged [Director] “knew or should have known” his conduct aided and abetted the breach. *Id.* at 904. The court subsequently dismissed plaintiff’s aiding and abetting claims against that particular director.

46. In *Capitaliza-T*, defendant moved to dismiss plaintiff’s amended complaint under Rule 12(b)(6), citing that it did not contain sufficient factual allegations regarding defendant’s knowledge of breach of fiduciary duty. The court applied the Delaware rule that “at a minimum, the complaint [must] alleged circumstantial facts suggesting that the defendant had knowledge of the specific principal violation.” *Id.* at *5 (citing *Brug v. Enstar Group, Inc.*, 755 F.Supp. 1247, 1256 (D. Del. 1991)). The court held that although plaintiff’s amended complaint contained circumstantial allegations against defendant for aiding and abetting, it was not enough to allege

that defendants “had knowledge of the underlying...breach of fiduciary duty” to survive a 12(b)(6) motion. *Capitaliza-T*, at *7.

47. In this case, Plaintiff simply alleges that “[the Donderos] were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor,” and “[t]he Donderos aided and abetted Dugaboy’s breach of its fiduciary duties...by knowingly participating in the authorization of the...Alleged Agreement.”⁴¹ In its Amended Complaint, Plaintiff references only factors that could be circumstantial at best when describing its Third Claim for relief against Jim Dondero, but never clearly articulates the required specific facts that show “actual knowledge” that he was overtly acting to substantially assist Dugaboy in breaching a fiduciary duty as required by *In re Draw* and *Capitaliza-T*.⁴² Further, Plaintiff makes no specific factual allegations against Nancy Dondero, other than she “[was] aware” of Dugaboy’s fiduciary duties, and that she aided and abetted the breach. Neither claims against Jim nor Nancy Dondero rise to the standard of articulation discussed in *In re Draw* and *Capitaliza-T*. Therefore, Plaintiff’s Seventh Claim should be dismissed under *Twombly* and Rule 12(b)(6).

4. Neither Jim nor Nancy Dondero are Liable for Aiding and Abetting Because Aiding and Abetting Requires More Than One Single Act.

48. As discussed in Section C.3 *supra*, the test for stating an aiding and abetting claim is stringent and focuses of proof of scienter that a party knew it was aiding another party in committing tortious conduct. *In re Draw*, at 904. This would require Plaintiff to show (1) a primary act by Dugaboy (via Nancy) that breached a fiduciary duty (which it cannot), and (2) a

⁴¹Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

⁴² Am. Compl. ¶¶ 3,36,38,39,40,41, Adv. No. 21-03003 [Doc. 73-2]; Am. Compl. ¶¶ 3,50,51,52,53, Adv. No. 21-03007 [Doc. 55-2]; Am. Compl. ¶¶ 3,48,49,50,51, Adv. No. 21-03006 [Doc. 60-2]; Am. Compl. ¶¶ 3,35,36,37,38,39, Adv. No. 21-03005 [Doc. 55-2].

secondary act by each of Jim and Nancy Dondero that shows scienter and knowing participation in subverting a fiduciary duty.

49. Plaintiff cannot show concerted action here on behalf of Jim or Nancy Dondero, because the only singular act that occurred was Dugaboy approving the compensation under the LPA. Plaintiff alleges no other separate act by Nancy Dondero that would have been “in concert” with or “knowingly participating” in anything, as she was acting as the Dugaboy Trustee (discussed above in Section C.2.). Further, Plaintiff shows no other separate act or proof of scienter that Jim Dondero specifically set out to knowingly aid Dugaboy in tortious conduct under *In re Draw*, since Dugaboy engaged in no such conduct. Therefore, Plaintiff’s Seventh Claim fails *Twombly* and must be dismissed under Rule 12(b)(6).

5. Debtor Lacks Standing to Bring an Aiding and Abetting a Breach of Fiduciary Duty Claim Based on an Executory Contract It Rejected.

50. The analysis here is the same as in Argument III.A.2. and B.2, *supra*. Plaintiff argues that Jim and Nancy Dondero aided and abetted Dugaboy’s alleged breach of fiduciary duty by authorizing the Subsequent Agreement, which Plaintiff alleges may have violated the LPA.⁴³ A cause of action for a derivative claim such as aiding and abetting shares accrual and limitations periods with the underlying tort of breach of fiduciary duty. *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 144 (Tex. 2019), *reh’g denied*, (Sept. 6, 2019). “Because a civil conspiracy claim is derivative of an underlying tort, the claim accrues when the underlying tort accrues.” *Id.* at 145. Here, because Plaintiff’s aiding and abetting claims derive from the alleged breach of fiduciary duty claim, the claims share accrual dates.

⁴³ Am. Compl. ¶¶ 78,79, Adv. No. 21-03003 [Doc. 79]; Am. Compl. ¶¶ 92,93, Adv. No. 21-03007 [Doc. 63]; Am. Compl. ¶¶ 90,91, Adv. No. 21-03006 [Doc. 68]; Am. Compl. ¶¶ 71,72, Adv. No. 21-03005 [Doc. 63].

51. Again, Plaintiff was not injured until Jim Dondero did not pay the Notes. This claim did not accrue until December 11, 2020, and is also predicated on allegations that the Subsequent Agreement violates fiduciary duties arising out of the rejected LPA. Once again, Plaintiff is attempting to bring a post-petition claim under the LPA it rejected. Therefore, Plaintiff's Seventh Claim must be dismissed under *Twombly* and Rule 12(b)(6).

IV. CONCLUSION

Dugaboy, Jim Dondero, and Nancy Dondero therefore respectfully request this Court dismiss Plaintiff's Fifth, Sixth, and Seventh Amended Claims in its Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

Dated: September 1, 2021

Respectfully submitted,

/s/Deborah Deitsch-Perez

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**ATTORNEYS FOR THE DUGABOY INVESTMENT
TRUST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/Deborah Deitsch-Perez _____
Deborah Deitsch-Perez

EXHIBIT 79

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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

<hr/>	
In re:	§
	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
	§ Case No. 19-34054-sgj11
Debtor.	§
<hr/>	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
	§
Plaintiff,	§ Adversary Proceeding No.
	§
vs.	§ 21-03005-sgj
	§
NEXPOINT ADVISORS, L.P., JAMES	§
DONDERO, NANCY DONDERO, AND THE	§
DUGABOY INVESTMENT TRUST,	§
	§
Defendants.	§
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**MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND
EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”), respectfully stating as follows:

I. RELIEF REQUESTED

1. By this Motion, NexPoint requests that the Court extend the deadline, in its *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [docket no. 70] (the “Scheduling Order”), for the designation of experts and service of expert reports, through December 13, 2021, with a corresponding extension of expert discovery. Specifically, NexPoint finds it appropriate and advisable to designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement (defined below) with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment. This request is necessitated by recent deposition testimony of key individuals on October 19 and 21, 2021, prior to which NexPoint did not know or reasonably believe that expert testimony on the duties of care would be advisable.

II. PROCEDURAL BACKGROUND

2. The Debtor initiated this Adversary Proceeding with the filing of its original complaint against NexPoint on January 22, 2021.

3. By this Adversary Proceeding, the Debtor seeks to collect on a promissory note issued by NexPoint to the Debtor on May 31, 2017 in the original principal amount of \$30,746,812.33 (the “Note”). The Note is a 30-year note and provides for an annual payment of principal and interest. After prior payments, the Debtor asserts that \$23,071,195.03 remains due and owing on the Note.

4. NexPoint has asserted various defenses and affirmative defenses to the Debtor’s allegations and causes of action. This Motion concerns one such affirmative defense only, to the effect that the Debtor, through its employees, caused the alleged underlying default.

5. On July 28, 2021, the District Court entered an order adopting this Court's report and recommendation and ordering that the reference for this Adversary Proceeding will be withdrawn once this Court certifies this Adversary Proceeding as being trial ready. As part of the same, the District Court necessarily agreed and ordered that NexPoint has a right to a trial by jury of this Adversary Proceeding.

III. FACTS

6. This Motion is supported by the Declaration of Davor Rukavina, attached hereto as incorporated herein (the "Declaration").

7. The Debtor alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated, and the Debtor demanded full and immediate payment.

8. One of NexPoint's affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the "Shared Services Agreement") between the Debtor and NexPoint dated January 1, 2018. The Agreement was in place as of December 31, 2020, although the Debtor terminated it later, in 2021. Under the Agreement, the Debtor provided various services to NexPoint, including so-called "back office" services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Shared Services Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint's funds. Indeed, Waterhouse (defined below) testified that it was "reasonable for NexPoint to rely on the debtors' employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note." *See Declaration at Exhibit C, 337:22-338:8.*

9. NexPoint asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor's negligence, the Note would remain in place. NexPoint has always asserted this as an affirmative defense. *See* Docket No. 6. NexPoint's defense, however, was based on its belief that the Debtor and its employees, including Waterhouse, did nothing to facilitate or ensure the payment, as opposed to a conscious decision not to make the payment.

10. On October 19, 2021, the Debtor deposed Frank Waterhouse ("Waterhouse"), as did NexPoint, in connection with this Adversary Proceeding. Waterhouse was the Debtor's chief financial officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020. To be clear, Waterhouse was the Debtor's employee, although he provided services to NexPoint as well pursuant to the Shared Services Agreement. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note.

11. This changed the potential facts as NexPoint understood them to be from ones where the Debtor simply failed utterly to facilitate the payment, as it has always done, to one where the Debtor intentionally, allegedly upon the instructions of Dondero, decided not to facilitate the payment. Assuming the Dondero instruction to be true, this raises the question of whether the Debtor thereafter had any affirmative duty with respect to the alleged instruction.

12. NexPoint did not know that Waterhouse would provide this testimony. NexPoint understood that Dondero instructed Waterhouse to make no further payments on the Shared Services Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars

on the Shared Services Agreement. But NexPoint did not understand that Waterhouse would testify that Dondero instructed him also not to pay the Note.

13. If Dondero told Waterhouse in early December, 2020 not to pay on the Note, then the question becomes whether Waterhouse or the Debtor thereafter “put their heads in the sand” in violation of any affirmative duty or obligation they may have had regarding the matter, such as: to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint and the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision. After all, the Debtor was responsible to facilitate the payment, the Debtor had various duties under the Shared Services Agreement, and it was in the Debtor’s interest that NexPoint would default, thus creating a conflict of interest.

14. Accordingly, on October 19, 2021, when NexPoint deposed James Seery, NexPoint asked Mr. Seery about section 6.01 of the Shared Services Agreement, labeled “standard of care,” which provides that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims.” Mr. Seery testified that he did not believe that this provision of the Shared Services Agreement obligated the Debtor or Waterhouse to do anything further after Dondero allegedly instructed Waterhouse not to pay on the Note.

15. At that time, NexPoint determined that it was appropriate, and would assist the finder of fact, to retain an expert on the “standard of care” provided for in the Shared Services Agreement. This is especially important because this will be a jury trial in the District Court. NexPoint did not believe that it would need to retain such an expert, and it had no reasonable grounds to suspect that it would need such an expert, prior to these depositions.

16. NexPoint moved as promptly as it could thereafter. NexPoint decided to retain an expert on October 22, 2021 and began searching for one on that day. NexPoint located a potential expert, Steven J. Pully, on October 26, 2021, and after conflicts were cleared and terms agreed to, Mr. Pully agreed to serve as NexPoint's expert on October 28, 2021. NexPoint files this motion just one day later, and less than two weeks after Waterhouse's deposition triggered the issue.

17. It goes without saying that neither Pully nor any reasonable expert can possibly review the issues, formulate an opinion, and prepare a report one day after they are retained. Among other things, Pully needs to review all underlying documents and deposition transcripts, some of which have yet to be returned by the court reporters. Accordingly, NexPoint believes that approximately six (6) weeks will be sufficient for Pully to prepare a report. NexPoint submits that the Debtor should have a period of time to then designate a potential rebuttal expert, and a period of time for expert discovery. Such a procedure would be fair for all involved and would constitute a minimal delay to what has already been a rapidly advanced case.

IV. ARGUMENT AND AUTHORITIES

18. It is appropriate for an expert to consider the issue of Waterhouse's and the Debtor's duties under the Shared Services Agreement—*i.e.*, “duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims,”—as issues such as “prudent person” and “like capacity and familiar with like aims” are appropriate for expert analysis and will assist the finder of fact, especially a jury.

19. Rule 16(b) provides that a deadline in a scheduling order may be modified “for good cause,” although there is some uncertainty as to whether this standard applies only after a deadline has passed (which is not the case here). *See* Fed. R. Civ. P. 16(b)(4); *Marathon Fin. Ins.*

Inc. RRG v. Ford Motor Co., 591 F.3d 458, 470 (5th Cir. 2009) (“Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order's deadline to amend has expired”).

20. When the issue concerns an “untimely submission of expert reports,” the Fifth Circuit has specified the following for factors as guiding the decision: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). Again, this test applies to a deadline which has already expired. Logically, therefore, a lesser standard should apply when a party seeks relief prior to the expiration of a deadline, as NexPoint does here.

21. Applying these or any factors:

- (i) this Adversary Proceeding is only some nine (9) months old and the parties have moved very quickly, with all discovery almost over;
- (ii) if this Motion is granted, all discovery in this Adversary Proceeding will have been completed by the end of 2021, still less than one (1) year after filing;
- (iii) the reason for the need to extend the deadline is the most logical reason that most frequently appears—that discovery has necessitated some previously unexpected action—which is one of the purposes of discovery;
- (iv) NexPoint’s failure to previously designate an expert was due solely to not having the benefit of Waterhouse’s and Seery’s recent deposition testimony, and is not the result of any delay or lack of diligence, as evidenced by the fact that NexPoint did already and timely designate two other experts on other issues (*i.e.* NexPoint did not sit on its responsibility to consider retaining experts);
- (v) the matter is important because the duties of care as specified in the Shared Services Agreement are terms of art necessitating an expert analysis, especially before a jury, and the matter goes to the heart of NexPoint’s affirmative defense, and is necessitated by Waterhouse’s testimony and not any prior action or inaction of NexPoint;
- (vi) there is no prejudice to the Debtor, which will have sufficient time to retain a rebuttal expert and take expert discovery (*i.e.* no witnesses or documents have been lost); and

- (vii) a continuance is easily available to avoid any prejudice to the Debtor—indeed, there is no need for a continuance even as the Adversary Proceeding has yet to be certified as trial ready and it is likely that the District Court will not schedule the Adversary Proceeding for trial for some time.

22. NexPoint submits that this Motion cannot come as a surprise to the Debtor. NexPoint has asserted its affirmative defense since the beginning. The only difference now is that, instead of a wholesale disregard of any duty to facilitate the Note payment, the issue has evolved to whether the Debtor or Waterhouse had any affirmative duty to act after the alleged instruction from Dondero. As it can be presumed that Waterhouse previously informed the Debtor or its counsel of this alleged instruction (as he apparently informed other employees at the Debtor), the Debtor likely knew what Waterhouse’s testimony would be well before NexPoint learned of that testimony. It is reasonable to conclude that the Debtor knew or should have known that the “standard of care” under the Shared Services Agreement would then become a material issue.

23. Accordingly, “good cause” to amend the Scheduling Order exists, if that higher standard even applies, and approving such amendment will not prejudice the Debtor and will instead serve the interests of justice.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, NexPoint respectfully requests that the Court enter an order: (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting NexPoint such other and further relief as may be proper.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on October 28, 2021, he conferred with counsel for the Debtor, John Morris, and the Debtor opposes the relief requested herein.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served on the following recipients via the Court's CM/ECF system:

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/s/ Davor Rukavina

Davor Rukavina

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

DECLARATION OF DAVOR RUKAVINA

STATE OF TEXAS

COUNTY OF DALLAS

I, Davor Rukavina, hereby state and testify to the following as being true and correct and under penalty of perjury pursuant to the laws of the United States of America:

1. My name is Davor Rukavina. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to execute this Declaration.

2. I am an attorney duly licensed to practice law in the State of Texas. I am a shareholder at Munsch Hardt Kopf & Harr, P.C. I am the lead attorney for NexPoint Advisors, L.P. ("NexPoint"), one of the defendants in this Adversary Proceeding.

3. At issue in this Adversary Proceeding is a 30-year promissory note executed by NexPoint in the original principal amount of \$30,746,812.33 (the "Note"), although the Note had been paid down significantly by the time of the filing of this Adversary Proceeding.

4. Highland Capital Management, L.P. (the “Debtor”) alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated and the Debtor demanded full and immediate payment.

5. The parties agreed by written stipulation that they would disclose experts and produce expert reports on or before October 29, 2021, and the Court’s scheduling order so requires. NexPoint requests an extension of this deadline. The following is the reason why.

6. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Agreement”) between the Debtor and NexPoint dated January 1, 2018, a copy of which is attached hereto as Exhibit “A.” The Agreement was in place as of December 31, 2020, although the Debtor terminated it later in 2021. NexPoint alleges that, under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. NexPoint therefore asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor’s negligence, the Note would remain in place.

7. The foregoing has always been an affirmative defense of NexPoint in this Adversary Proceeding, including in its amended answer filed on September 1, 2021, a copy of which is attached hereto as Exhibit “B.”

8. On October 19, 2021, the Debtor deposed Frank Waterhouse (“Waterhouse”), as did I, in connection with this Adversary Proceeding. Waterhouse was the Debtor’s chief financial

officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020.

9. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero (“Dondero”), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note. A copy of this deposition transcript is attached as Exhibit “C.”

10. This testimony was not expected by me or by NexPoint. I had understood that Dondero instructed Waterhouse to make no further payments on the Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars on the Agreement and because that was what Dondero and Waterhouse had been discussing. I had not understood that Waterhouse would testify that Dondero instructed him to also not pay the Note specifically.

11. Prior to that deposition, I had never spoken to Waterhouse. Waterhouse presently serves as an officer of NexPoint; however, and unlike every other case I have been involved with, I have not been permitted to discuss with Waterhouse litigation matters. This is because Waterhouse is in litigation with the Debtor on other matters and has separate and independent counsel, Debra Dandeneau and Frances Smith, who would not permit me to speak directly to Waterhouse, which I understood to be a logical and appropriate instruction to protect their client. I did discuss with Ms. Dandeneau what Waterhouse may know about the litigation between the Debtor and my clients, but that primarily focused on defenses that another client of mine, Highland Capital Management Fund Advisors, L.P., has. And I did discuss with Ms. Dandeneau that Dondero told Waterhouse to not make payments, but I understood that to be limited to the Agreement and to not include the Note, since the topic under discussion (as it was told to me)

between Dondero and Waterhouse was the Agreement and overpayments on the Agreement, and not the Note.

12. In sum, prior to October 19, 2021, I did not know that Waterhouse would testify that Dondero told him to not pay on the Note, and I had no reasonable reason to suspect the same. My surprise is evident from the transcript of that deposition, where I asked Waterhouse multiple times whether he was sure that Dondero told him this—so much so that opposing counsel objected multiple times as “asked and answered,” and even objected as having been asked and answered “four time.” Exhibit “C” at 390-392.

13. Assuming that Waterhouse’s testimony on this issue will be accepted by a trier of fact, the question is whether, from NexPoint’s perspective, Waterhouse had no further duties to review, confirm, investigate, or to discuss the issue with Dondero. In that respect, section 6.01 of the Agreement, labeled “standard of care,” states that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

14. I deposed Jim Seery on October 21, 2021, and asked him various questions about this provision of the Agreement. Mr. Seery testified to the effect that he did not believe that the Agreement obligated the Debtor or Waterhouse to do anything further after Dondero told Waterhouse to not pay the Note (again, assuming that this was true). I do not have a copy of Mr. Seer’s deposition yet.

15. With Mr. Seery testifying that he did not believe that the Agreement required the Debtor or Waterhouse to do anything further if Dondero in fact gave the instruction Waterhouse testified that he did, NexPoint concluded that it needed to retain an expert to review whether the “standard of care” specified in the Agreement compelled the Debtor or Waterhouse to do anything

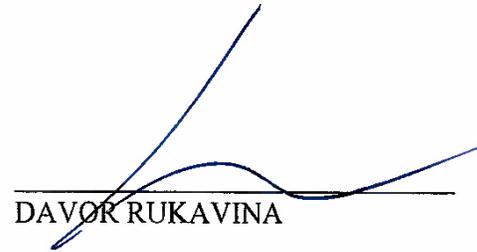
further after Dondero gave the alleged instruction, such as checking with him to see if they understood him correctly, advising him of the potential serious consequences of a default, trying to dissuade him, or at least asking him once again prior to December 31, 2020 whether the payment should be made.

16. On October 22, 2021, I began searching for a potential expert. On October 26, 2021, I contacted Steven J. Pully about the potential engagement. After clearing conflicts and coming to an agreement, Mr. Pully agreed to the engagement on October 28, 2021. The engagement letter has yet to be finalized and executed, but I have every confidence that it will and the urgency of the matter necessitates this Declaration at this time. I have been extremely diligent in searching for an finding an expert once NexPoint determined that the retention of an expert was appropriate, which did not occur until the Seery deposition on October 21, 2021.

17. Even though NexPoint has retained Mr. Pully as of October 28, 2021, it is not possible for Mr. Pully to formulate an opinion and prepare a report by October 29, 2021. Among other things, various deposition transcripts of important witnesses have yet to be received and reviewed by Mr. Pully, and Mr. Pully has yet to review the underlying documents. Assuming no undue delays with respect to deposition transcripts, Mr. Pully should be able to prepare a report by December 13, 2021.

18. NexPoint therefore seeks an extension of the expert designation and report deadline through December 13, 2021, in order that justice may be done and not for delay or any improper purpose, NexPoint not having designated an expert before due solely to the lack of knowledge that Waterhouse would testify as he did on October 19, 2021 and that Mr. Seery would testify as to his view that the Agreement did not require Waterhouse to do anything thereafter.

I hereby swear under oath and penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



DAVOR RUKAVINA

AMENDED AND RESTATED SHARED SERVICES AGREEMENT

This Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated effective as of January 1, 2018, is entered into by and between NexPoint Advisors, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

RECITALS

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Parties entered into that certain Shared Services Agreement, dated effective as of January 1, 2013 (the "Original Agreement");

WHEREAS, the Parties desire to amend and restate the Original Agreement and the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company, in each case, on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company; and

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee"), if any, is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree, and the Original Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

“Affiliate” shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term “control” means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

“Applicable Asset Criteria and Concentrations” means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

“Applicable Law” shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

“Client or Account” shall mean any fund, client or account advised by the Management Company, as applicable.

“Covered Person” shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

“Governmental Authority” shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission, corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

“Indebtedness” shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers’ acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) all capital lease obligations; (e) all indebtedness guaranteed by such Person or any of its subsidiaries; and (f) all indebtedness guaranteed by such Person or any of its subsidiaries.

“Operating Guidelines” means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a Client or Account.

“Portfolio” means the portfolio of securities and other assets, including without limitation, financial instruments, equity investments, collateral loan obligations, debt securities, preferred return notes and other similar obligations held directly or indirectly by, or on behalf of, Clients and Accounts from time to time;

“Securities Act” shall mean the Securities Act of 1933, as amended.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) “or” is not exclusive (unless preceded by “either”) and “include” and “including” are not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) “writing”, “written” and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) “hereof”, “herein”, “hereunder” and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and if applicable, to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.01 and subject to Section 2.04 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, investment research, trade desk services,

including trade execution and settlement, finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, expense reimbursement, vendor management, and information technology (including, without limitation, general support and maintenance (OMS, development, support), telecom (cellphones, telephones and broadband) and WSO);

(b) *Legal/Compliance/Risk Analysis.* Assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis;

(c) *Tax.* Assistance and advice with respect to tax audit support, tax planning and tax preparation and filing.

(d) *Management of Clients and Accounts.* Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any Client or Account from time to time.

(e) *Valuation.* Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(f) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a Client or Account managed by the Management Company, transactions involving the Management Company or a Client or Account managed by the Management Company, and any other rights and obligations of the Management Company or a Client or Account managed by the Management Company;

(g) *Marketing.* Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified Clients or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(h) *Reporting.* Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any Client or Account, including reports relating to (i) credit facility reporting and purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(i) *Administrative Services.* The provision of office space, information technology services and equipment, infrastructure, rent and parking and other related services requested or utilized by the Management Company from time to time;

(j) *Shared Employees.* To the extent applicable, the provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing; and

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any Client or Account or similar securitization, (c) the substantive investment management decisions with respect to any Client or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee, if any, shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. To the extent applicable, the Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees, if any, shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any Client or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a Client or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a Client or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.02 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the

Shared Employees, if any, with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a Client or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company

and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive a flat fee of \$168,000 per month (the "Staff and Services Fee"), payable monthly in advance on the first business day of each month.

Section 3.02 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.03 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms

of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance: Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records: Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its

rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Client or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such information as is routinely disclosed to the trustee, custodian or collateral administrator of any Client or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such Client or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the Clients or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Clients or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom.

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless it is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a “Disabling Conduct”) on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement. The exculpations set forth in this Section 6.02 shall exculpate any Covered Person regardless of such Covered Person’s sole, comparative, joint, concurrent, or subsequent negligence.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, causes of action (including, but not limited to, strict liability, negligence, statutory violation, regulatory violation, breach of contract, and all other torts and claims arising under common law), demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated (“Claims”), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or

arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons. Any Covered Person shall be indemnified under the terms of this Section 6.03 regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder shall be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the Clients or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has

substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, Client or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

- (a) If to the Management Company:

NexPoint Advisors, L.P.
200 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed as of the date hereof by its duly authorized representative.

NEXPOINT ADVISORS, L.P.

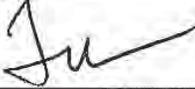
By: NexPoint Advisors GP, LLC, its
General Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

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

By: Strand Advisors, Inc., its General
Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

Davor Rukavina, Esq.
 Texas Bar No. 24030781
 Julian P. Vasek, Esq.
 Texas Bar No. 24070790
 MUNSCH HARDT KOPF & HARR, P.C.
 500 N. Akard Street, Suite 3800
 Dallas, Texas 75202-2790
 Telephone: (214) 855-7500
 Facsimile: (214) 978-4375

Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

Exhibit B

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 note expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF
(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF

(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

1 WATERHOUSE - 10-19-21
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 -----
6 IN RE:

7 HIGHLAND CAPITAL Chapter 11
8 MANAGEMENT, L.P., CASE NO.
9 19-34054-SGI11
10 Debtor.

11 -----
12 HIGHLAND CAPITAL MANAGEMENT, L.P.,

13 Plaintiff,

14 vs.

15 Adversary
16 Proceeding No.
17 21-03000-SGI

18 HIGHLAND CAPITAL MANAGEMENT
19 FUND ADVISORS, L.P.; NEXPOINT
20 ADVISORS, L.P.; HIGHLAND
21 INCOME FUND; NEXPOINT
22 STRATEGIC OPPORTUNITIES FUND;
23 NEXPOINT CAPITAL, INC.; and
24 CLO HOLDCO, LTD.,

25 Defendants.

REMOTE VIDEOTAPED DEPOSITION OF

FRANK WATERHOUSE

October 19, 2021

Reported by: Susan S. Klinger, RMR-CRR, CSR

Job No: 201195

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WATERHOUSE - 10-19-21

October 19, 2021

9:30 a.m.

Remote Deposition of FRANK WATERHOUSE,
held before Susan S. Klinger, a Registered
Merit Reporter and Certified Realtime Reporter
of the State of Texas.

1 WATERHOUSE - 10-19-21

2 A P P E A R A N C E S:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital
5 Management:

6 John Morris, Esq.

7 Hayley Winograd, Esq.

8 PACHULSKI STANG ZIEHL & JONES

9 780 Third Avenue

10 New York, New York 10017

11 Attorneys for the Witness:

12 Debra Dandeneau, Esq.

13 Michelle Hartmann, Esq.

14 BAKER MCKENZIE

15 1900 North Pearl Street

16 Dallas, Texas 75201

17 Attorneys for NexPoint Advisors, LP and
18 Highland Capital Management Fund Advisors,
19 L.P.:

20 Davor Rukavina, Esq.

21 An Nguyen, Esq.

22 MUNSCH HARDT KOPF & HARDD

23 500 North Akard Street

24 Dallas, Texas 75201-6659

25

1 WATERHOUSE - 10-19-21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,
3 and HCMS:

4 Deborah Deitsch-Perez, Esq.

5 Michael Aigen, Esq.

6 STINSON

7 3102 Oak Lawn Avenue

8 Dallas, Texas 75219

9

10 Attorneys for Dugaboy Investment Trust:

11 Warren Horn, Esq.

12 HELLER, DRAPER & HORN

13 650 Poydras Street

14 New Orleans, Louisiana 70130

15

16 Attorneys for Marc Kirschner as the trustee for
17 the litigation SunTrust:

18 Deborah Newman, Esq.

19 QUINN EMANUEL URQUHART & SULLIVAN

20 51 Madison Avenue

21 New York, New York 10010

22

23 Also Present:

24 Ms. La Asia Canty

25

1 WATERHOUSE - 10-19-21

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1 WATERHOUSE - 10-19-21

2 P R O C E E D I N G S

3 VIDEOGRAPHER: Good morning,
4 Counselors. My name is Scott Hatch. I'm a
5 certified legal videographer in association
6 with TSG Reporting, Inc.

7 Due to the severity of COVID-19 and
8 following the practice of social
9 distancing, I will not be in the same room
10 with the witness. Instead, I will record
11 this videotaped deposition remotely. The
12 reporter, Susan Klinger, also will not be
13 in the same room and will swear the witness
14 remotely.

15 Do all parties stipulate to the
16 validity of this video recording and remote
17 swearing, and that it will be admissible in
18 the courtroom as if it had been taken
19 following Rule 30 of the Federal Rules of
20 Civil Procedures and the state's rules
21 where this case is pending?

22 MR. HORN: Yes.

23 MS. DANDENEAU: Yes.

24 MR. MORRIS: Yes. John Morris. I
25 would just try to do a negative notice

1 WATERHOUSE - 10-19-21

2 here, as we did yesterday. If anybody has
3 a problem with what was just stated, can
4 you state your objection now?

5 Okay. No response, so everybody
6 accepts the stipulation and the instruction
7 that was just given.

8 VIDEOGRAPHER: Thank you. This is
9 the start of media labeled Number 1 of the
10 video recorded deposition of Frank
11 Waterhouse In Re: Highland Capital
12 Management, L.P., in the United States
13 Bankruptcy Court for the Northern District
14 of Texas, Dallas Division, Case Number
15 21-03000-SGI.

16 This deposition is being held via
17 video conference with participants
18 appearing remotely due to COVID-19
19 restrictions on Tuesday, October 19th, 2021
20 at approximately 9:32 a.m. My name is
21 Scott Hatch, legal video specialist with
22 TSG Reporting, Inc. headquartered at 228
23 East 45th Street, New York, New York. The
24 court reporter is Susan Klinger in
25 association with TSG Reporting.

1 WATERHOUSE - 10-19-21

2 Counsel, please introduce
3 yourselves.

4 MR. MORRIS: John Morris, Pachulski
5 Stang Ziehl & Jones for the reorganized
6 Highland Capital Management, L.P., the
7 plaintiff in these actions.

8 MS. DANDENEAU: Deborah Dandeneau
9 from Baker McKenzie. My partner, Michelle
10 Hartmann, is also in the room with me,
11 representing Frank Waterhouse individually.

12 MS. DEITSCH-PEREZ: Deborah
13 Deitsch-Perez from Stinson, LLP,
14 representing Jim Dondero, Nancy Dondero,
15 HCRA, and HCMS.

16 MR. HORN: Warren Horn with Heller,
17 Draper & Horn in New Orleans representing
18 Dugaboy Investment Trust.

19 MR. RUKAVINA: Davor Rukavina with
20 Munsch Hardt Kopf & Harr in Dallas
21 representing NexPoint Advisors, LP and
22 Highland Capital Management Fund Advisors,
23 L.P.

24 MR. AIGEN: Michael Aigen from
25 Stinson, and I represent the same parties

1 WATERHOUSE - 10-19-21

2 as Deborah Deitsch-Perez.

3 MS. NEWMAN: This is Deborah Newman
4 from Quinn Emanuel. We represent the
5 litigation -- Marc Kirschner as the trustee
6 for the litigation SunTrust.

7 MR. MORRIS: I think that is
8 everybody.

9 VIDEOGRAPHER: Thank you. Will the
10 court reporter please swear in the witness.

11 FRANK WATERHOUSE,
12 having been first duly sworn, testified as
13 follows:

14 EXAMINATION

15 BY MR. MORRIS:

16 Q. Please state your name for the
17 record.

18 A. My name is Frank Waterhouse.

19 Q. Good morning, Mr. Waterhouse. I'm
20 John Morris, as you know, from Pachulski Stang
21 Ziehl & Jones. You understand that my firm and
22 I represent Highland Capital Management, L.P. ;
23 is that right?

24 A. Yes.

25 Q. Okay. And do you understand that

1 WATERHOUSE - 10-19-21

2 we're here today for your deposition in your
3 individual capacity?

4 A. Yes.

5 Q. Did you review and -- did you
6 receive and review a subpoena that Highland
7 Capital Management, L.P., served upon you?

8 A. Yes.

9 Q. You have been deposed before; right?

10 A. Yes.

11 Q. How many times have you been
12 deposed?

13 A. About three or four times.

14 Q. Okay. And I defended you in one
15 deposition; isn't that right?

16 A. That is correct.

17 Q. So the general ground rules for this
18 deposition are largely the same as the
19 depositions you have given before. And that is
20 I will ask you a series of questions, and it is
21 important that you allow me to finish my
22 question before you begin your answer; is that
23 fair?

24 A. Yes.

25 Q. And it is important that I allow you

1 WATERHOUSE - 10-19-21

2 to finish your answers before I begin a
3 question, but if I fail to do that, will you
4 let me know?

5 A. I can certainly do that.

6 Q. Okay. Do you understand that this
7 deposition is being videotaped?

8 A. Yes.

9 Q. You understand that I may seek to
10 use portions of the videotape in a court of
11 law?

12 A. I did not know that, until you just
13 said that.

14 Q. Okay. And you are aware of that now
15 before the deposition begins substantively; is
16 that right?

17 A. Yes.

18 Q. So unlike I think the other
19 depositions that you have given, this one is
20 being given remotely. So that presents some
21 unique challenges, at least as compared to a
22 deposition that is taken in-person.

23 From time to time we're going to put
24 documents up on the screen, Mr. Waterhouse.

25 And it is important that I give you the

1 WATERHOUSE - 10-19-21

2 opportunity to review any portion of the
3 document that you think you need in order to
4 fully and completely answer the question.

5 So I would ask you to let me know if
6 there is a portion of a document that you need
7 to see in order to fully and completely answer
8 the question. Can you do that for me?

9 A. Yes.

10 MS. DANDENEAU: Mr. Morris, I would
11 just note that we do have hard copies of
12 the documents that you sent, so if you can
13 just refer to the exhibit number as
14 reflected in the documents that you sent,
15 Mr. Waterhouse will be able to look at the
16 hard copies of those documents.

17 MR. MORRIS: I appreciate that,
18 and -- and I will encourage him to do so.
19 There will be other documents that we did
20 not send to you that we'll be using today
21 though.

22 Q. Okay. With that as background, if
23 there is anything that I ask you, sir, that you
24 don't understand, will you let me know?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Are you currently employed?

3 A. Yes.

4 Q. By whom?

5 A. The Skyview Group.

6 Q. When did you become employed by the
7 Skyview Group?

8 A. I believe March 1st of 2021.

9 Q. Do you have a title at Skyview?

10 A. Yes.

11 Q. What is your title?

12 A. My title is chief financial officer.

13 Q. Do you report to anybody in your
14 role as CFO?

15 A. I don't, no.

16 Q. No. Is there a president or a CEO
17 of Skyview?

18 A. Yes.

19 Q. Who is that?

20 A. That is Scott Ellington.

21 Q. But you don't report to
22 Mr. Ellington; is that right?

23 A. I don't think so.

24 Q. Does Skyview Group --

25 MS. DANDENEAU: Excuse me, we --

1 WATERHOUSE - 10-19-21

2 A. I -- I -- I might. I just -- I
3 don't recall.

4 Q. Okay. Does Skyview Group provide
5 any services to any entity directly or
6 indirectly owned or controlled by Jim Dondero?

7 A. Yes.

8 Q. Can you name -- is that pursuant to
9 written contracts?

10 A. Yes.

11 Q. And do you know how many contracts
12 exist?

13 A. Approximately six or so.

14 Q. And is the Skyview Group made up of
15 individuals who were formerly employees of
16 Highland Capital Management, L.P.?

17 A. No.

18 Q. Do you know how many -- how many --
19 how many employees does Skyview have?

20 A. Approximately 35.

21 Q. And can you tell me how many of
22 those 35 are former officers, directors, or
23 employees of Highland Capital Management, L.P.?

24 A. I don't know the exact number.

25 Q. Is it more than 20?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Is it more than 30?

4 A. I don't know.

5 Q. Can you tell me what portion of
6 Skyview -- Skyview's revenue is derived from
7 entities that are directly or indirectly owned
8 or controlled by Jim Dondero?

9 MS. DANDENEAU: Mr. Morris, I mean,
10 you called Mr. Waterhouse here individually
11 for purposes of his testimony in connection
12 with the noticed litigation. I have given
13 you some leeway to ask him some background
14 information about Skyview Group, but this
15 is not a substitute for a deposition in
16 connection with any other pending disputes
17 that exist. And -- and we agreed to accept
18 the subpoena on the basis of he -- this is
19 testimony that he is giving in connection
20 with the noticed litigation.

21 I really think that you are now
22 going a little bit far afield from the
23 purpose of this deposition.

24 MR. MORRIS: Okay. It is -- I'm not
25 intending to use these -- the answers to

1 WATERHOUSE - 10-19-21

2 these questions for any purpose other than
3 this litigation. I think you understand
4 fully why I'm asking the questions, and I
5 just have a couple more, if you will bear
6 with me.

7 MS. DANDENEAU: Okay.

8 MS. DEITSCH-PEREZ: Can we have an
9 agreement that an objection by one is an
10 objection for any other party here?

11 MR. MORRIS: Sure. I would -- I
12 would encourage that, sure.

13 MS. DEITSCH-PEREZ: Thank you.

14 MR. MORRIS: It can't be sustained
15 or overruled more than one time, so...

16 Q. Mr. Waterhouse, can you answer my
17 question, please.

18 MS. DANDENEAU: Do you want to
19 repeat it, Mr. Morris, for his benefit?

20 MR. MORRIS: Sure.

21 Q. Can you -- can you tell me the
22 approximate portion of Skyview's revenue that
23 is derived from entities that are directly or
24 indirectly owned or controlled by Mr. Dondero?

25 A. I don't know the exact number.

1 WATERHOUSE - 10-19-21

2 Q. Is it more than 75 percent?

3 A. Yes.

4 Q. Is it more than 90 percent?

5 A. I don't know.

6 Q. Okay. Can I refer to Highland

7 Capital Management, L.P., as Highland?

8 A. Yes.

9 Q. All right. And you previously
10 served as Highland's CFO; correct?

11 A. Yes.

12 Q. When did you join Highland?

13 A. I don't recall the exact date.

14 Q. Can you tell me what year?

15 A. 2006.

16 Q. When did you -- in what year did you
17 become Highland's CFO?

18 A. I don't recall the exact date.

19 Q. I'm not asking you for the exact
20 date. I'm asking you if you recall the year in
21 which you were appointed CFO.

22 A. I don't recall the exact year.

23 Q. Can you tell me which years it is
24 possible that you were appointed to CFO of
25 Highland?

1 WATERHOUSE - 10-19-21

2 A. 2011 or 2012.

3 Q. Did you serve as Highland's CFO on a
4 continuous basis from in or around 2011 or 2012
5 until early 2021?

6 A. Yes.

7 Q. During that entire time you reported
8 directly to Jim Dondero; correct?

9 A. I -- I don't know.

10 Q. Is there anybody else you reported
11 to -- withdrawn.

12 Did you report to Mr. Dondero for
13 some portion of the time that you served as
14 CFO?

15 A. Yes.

16 Q. Is there a portion of time that you
17 don't recall who you reported to?

18 A. Yes.

19 Q. What portion of time do you have in
20 your mind when you can't recall who you
21 reported to?

22 A. From the 2011 to -- for
23 approximately a year or two.

24 Q. Okay. So is it fair to say that you
25 reported to Mr. Dondero in your capacity as CFO

1 WATERHOUSE - 10-19-21

2 from at least 2014 until the time you left
3 Highland?

4 MS. DANDENEAU: Objection to form.

5 A. I don't want to speculate the exact
6 or what year that changed or -- so I would like
7 to stick with my testimony.

8 Q. Can you recall when you began
9 reporting to Mr. Dondero?

10 A. I don't recall.

11 Q. Can you -- can you give me an
12 estimate of what year you think you might have
13 began reporting to Mr. Dondero?

14 A. I will go back to my prior
15 testimony.

16 Q. Okay. There is no -- you have no
17 ability to tell me when you began reporting to
18 Mr. Dondero.

19 Do I have that right?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall.

22 Q. Okay. Do you recall who you might
23 have reported to before you began reporting to
24 Mr. Dondero?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Who might you have reported to in
3 your capacity as CFO before you started
4 reporting to Mr. Dondero?

5 A. That would have been Patrick Boyce.

6 Q. Are you aware that Highland filed
7 for bankruptcy on October 19th, 2019?

8 A. Yes.

9 Q. And we refer to that as the petition
10 date?

11 A. Yes.

12 Q. Okay. Do you hold any professional
13 licenses, sir?

14 A. Yes.

15 Q. Can you tell me what professional
16 licenses you hold?

17 A. I'm a certified public accountant.

18 Q. Okay. Anything else?

19 A. No.

20 Q. Do you have any other professional
21 licenses or certificates?

22 A. When you say "professional license,"
23 that is not education?

24 Q. Tell me -- sure. Anything other
25 than a driver's license.

1 WATERHOUSE - 10-19-21

2 Do you have any other license or
3 certificate or certification?

4 A. Are you asking, like, where I went
5 to school and the --

6 Q. I am not. I am not. I didn't say
7 education. I didn't ask about degrees.

8 Do you know what a license is?

9 A. Well, yeah, I mean, a license is
10 something you get after you receive a certain
11 level of proficiency.

12 Q. Do you have any licenses or
13 certifications other than your CPA?

14 MS. DANDENEAU: Objection, form.
15 I assume you mean professional
16 licenses, Mr. Morris; correct?

17 Q. Can you answer my question, sir?

18 A. Mr. Morris, I'm thinking. I
19 don't -- I don't think I have any others.

20 Q. Are you familiar with an entity
21 called Highland Capital Management Fund
22 Advisors?

23 A. Yes.

24 Q. Were you ever -- can we refer to
25 that entity as HCMFA?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Were you ever employed by HCMFA?

4 A. Not that I recall.

5 Q. Were you ever -- did you ever hold
6 the title of an officer or director of HCMFA?

7 A. Yes.

8 Q. What title did you hold?

9 A. Treasurer.

10 Q. When did you become the treasurer of
11 HCMFA?

12 A. I don't recall.

13 Q. Can you tell me the year?

14 A. I don't -- I don't know the year.

15 Q. Can you approximate the year in
16 which you became the treasurer of HCMFA?

17 A. I don't know.

18 Q. Can you tell me if it was before or
19 after 2016?

20 A. I don't recall.

21 Q. Are you still the -- do you know if
22 you're still the treasurer of HCMFA today?

23 A. Today, I am the acting treasurer for
24 HCMFA.

25 Q. Is there a distinction between

1 WATERHOUSE - 10-19-21

2 treasurer and acting treasurer?

3 A. I said "acting treasurer" as I am an
4 employee of Skyview, as you previously
5 stated -- or asked.

6 Q. But you are the treasurer of HCMFA
7 today; correct?

8 A. I am -- I am the acting treasurer
9 for HCMFA.

10 Q. How did you become the treasurer of
11 HCMFA?

12 A. Are you asking how I became the
13 treasurer of HCMFA today?

14 Q. How did you become appointed to
15 serve as the treasurer of HCMFA?

16 A. Well, in -- in -- in what time
17 capacity?

18 Q. The first time that you were
19 appointed.

20 A. First time. I believe I was asked
21 to serve as treasurer for HCMFA the first time.

22 Q. By who? Who asked you to do that?

23 A. I don't recall.

24 Q. Is there anything that would refresh
25 your recollection as to who appointed you as

1 WATERHOUSE - 10-19-21

2 the treasurer of CF- -- HCMFA for the first
3 time?

4 A. I don't -- I mean, there would be
5 some documents, some legal documents. I don't
6 know where those are.

7 Q. How many times have you been
8 appointed the treasurer of HCMFA?

9 A. I don't know.

10 Q. Was it more than once?

11 A. I don't know.

12 Q. Can you tell me any period of time
13 since 2016 that you did not hold the title of
14 treasurer of HCMFA?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall.

17 Q. What are your duties and
18 responsibilities as the treasurer of HCMFA?

19 A. My duties are to do the best job
20 that I can as the -- as an accountant and
21 finance guy.

22 Q. What specific duties and
23 responsibilities do you have as the treasurer
24 of HCMFA?

25 A. My duties are to do the best job

1 WATERHOUSE - 10-19-21

2 that I can as the accounting and finance person
3 for HCMFA.

4 Q. As the accounting and finance person
5 for HCMFA, do you have any particular areas of
6 responsibility?

7 A. Yeah, it is to manage the accounting
8 and finance function for HCMFA.

9 Q. Would that include -- do you have
10 responsibility for overseeing HCMFA's annual
11 audit?

12 A. Can I please elaborate on my prior
13 question?

14 Q. Of course. You -- you are giving
15 answers. I'm asking questions.

16 A. Okay. Yes, so the -- it -- like I
17 said, it is to manage the accounting finance
18 aspect, but I am, as we discussed, the
19 treasurer. That is -- being treasurer is what
20 gives me that -- that management function.

21 Q. Does anybody report to you in your
22 capacity as treasurer of HCMFA?

23 A. I don't believe so.

24 Q. Does HCMFA have a chief financial
25 officer?

1 WATERHOUSE - 10-19-21

2 A. I don't -- I don't know.

3 Q. You don't know?

4 You're the treasurer of HCMFA but
5 you don't know if HCMFA has a chief financial
6 officer.

7 Do I have that right?

8 A. That's right.

9 Q. Okay. Have you heard of a company
10 called NexPoint Advisors?

11 A. Yes.

12 Q. We will refer to that as NexPoint.
13 Okay?

14 A. Okay.

15 Q. Were you ever employed by NexPoint?

16 A. I don't recall.

17 Q. Did you ever hold any title with
18 respect to the entity known as NexPoint?

19 A. Yes.

20 Q. What titles have you held in
21 relation to NexPoint?

22 A. Treasurer. I think it was only
23 treasurer.

24 Q. Can you tell me the approximate year
25 you became the treasurer of NexPoint?

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2 A. I don't know.

3 Q. Are you still the treasurer of
4 NexPoint today?

5 A. I am the acting treasurer for
6 NexPoint.

7 Q. When did your title change from
8 treasurer to acting treasurer?

9 A. I don't know.

10 Q. Did your duties and responsibilities
11 change at all when your title was changed from
12 treasurer to acting treasurer?

13 A. I don't -- I don't believe so.

14 Q. Why did --

15 A. I still manage the finance and
16 accounting function for NexPoint.

17 Q. Why did your title change from
18 treasurer to acting treasurer?

19 A. I don't -- I'm using the term
20 "acting treasurer" as I'm a Skyview employee.
21 I don't -- I don't know -- again, I am a -- as
22 I am the Skyview employee.

23 Q. Okay.

24 A. And we -- we provide officer
25 services.

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2 Q. And you serve as an officer of
3 HCMFA; correct?

4 A. I think we went over that with my
5 testimony. Yes, I'm the acting treasurer for
6 HCMFA.

7 Q. And you are an officer of NexPoint;
8 correct?

9 A. I think -- I am the acting treasurer
10 for NexPoint Advisors.

11 Q. And -- and who appointed you acting
12 treasurer of NexPoint Advisors?

13 A. I don't recall specifically.

14 Q. Do you have any recollection of who
15 might have appointed you the treasurer of
16 NexPoint?

17 A. I mean, it -- it -- I don't recall
18 exactly who it was.

19 Q. Who were the possibilities?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 Q. You can answer.

23 A. Someone in the legal group for
24 NexPoint. The other officers as well.

25 Q. Have you heard of a company called

1 WATERHOUSE - 10-19-21

2 Highland Capital Management Services, Inc.?

3 A. Yes.

4 Q. We will refer to that as HCMS.

5 Okay?

6 A. HCMS. Okay.

7 Q. Were you ever employed by HCMS?

8 A. No.

9 Q. Have you ever held any titles in
10 relation to HCMF -- I apologize -- HCMS?

11 A. Yes.

12 Q. What titles have you held in
13 relation to HCMS?

14 A. Treasurer and acting treasurer.

15 Q. When did you first become treasurer
16 or acting treasurer of HCMS?

17 A. I don't recall the exact dates.

18 Q. Can you recall -- can you
19 approximate the year that you became the
20 treasurer of HCMS?

21 A. I don't -- I don't know.

22 Q. Are you still the treasurer of HCMS
23 today?

24 A. I am the acting treasurer for HCMS.

25 Q. And are your duties and

1 WATERHOUSE - 10-19-21

2 responsibilities as the acting treasurer for
3 HCMS and the acting treasurer for NexPoint the
4 same as your duties and responsibilities in
5 your role as the acting treasurer of HCMFA?

6 A. More or less.

7 Q. Have you ever heard of a company
8 called HCRE Partners, LLC?

9 A. Yes.

10 Q. And do you understand that that
11 entity is now known today as NexPoint Real
12 Estate Partners?

13 A. I did not know that.

14 Q. All right. Can we refer to HCRE
15 Partners as HCRE?

16 MS. DANDENEAU: Objection to form.

17 Did you mean NexPoint Real Estate
18 Partners, Mr. Morris?

19 MR. MORRIS: No.

20 MS. DANDENEAU: Oh.

21 MR. MORRIS: He said he wasn't
22 familiar that it was succeeded by that
23 entity. So --

24 MS. DANDENEAU: Okay.

25 MR. MORRIS: -- let's go with what

1 WATERHOUSE - 10-19-21

2 the witness knows.

3 Q. You're familiar with an entity
4 called HCRE Partners, LLC; correct?

5 A. Yes.

6 Q. Okay. So that is the entity that we
7 will refer to as HCRE. If you're aware of any
8 successor, that is great. If not, let's just
9 define it as such.

10 Have you ever been employed by HCRE
11 or any entity that you know to have succeeded
12 HCRE?

13 A. No.

14 Q. Did you ever serve as an officer or
15 director of HCRE or any successor?

16 A. Not that I recall.

17 Q. Okay. Can we refer to NexPoint and
18 HCMFA as the advisors?

19 A. Yes.

20 Q. In general, the advisors provided
21 investment advisory services to certain retail
22 funds; correct?

23 A. Yes.

24 Q. And we will refer to the retail
25 funds that are served by the advisors

1 WATERHOUSE - 10-19-21

2 collectively as the retail funds; is that okay?

3 A. Okay.

4 Q. Each of the retail funds is governed
5 by a board; correct?

6 A. Yes.

7 Q. And do you know the people who serve
8 on the boards of the retail funds?

9 MS. DANDENEAU: Objection to form.

10 A. I don't know all of them.

11 Q. Do you know whether the same people
12 serve on the board of each of the retail funds
13 as we've defined that term?

14 A. Which -- so when you say "retail
15 funds" -- again, I want to be -- what retail
16 funds are you referring to, because there are
17 -- there are several distinctions?

18 What retail funds are you using when
19 you refer to them?

20 Q. That is why -- that is why I tried
21 to define the terms. So let me do it again.

22 Retail funds for the purposes of
23 this deposition means any retail fund to which
24 either of the advisors provides advisory
25 services. Okay?

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2 A. Okay.

3 Q. Okay. So do you know whether the
4 same people serve on the board of each of the
5 retail funds?

6 A. I don't know.

7 Q. Were you ever employed by any of the
8 retail funds?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Okay. Do you have any title with
13 respect to any of the retail funds?

14 A. Yes.

15 Q. What titles do you hold --
16 withdrawn.

17 Do you have the same titles with
18 respect to all of the retail funds or do
19 they -- or just something else?

20 MS. DANDENEAU: Objection to form.

21 Q. Withdrawn.

22 Do you have the same title with
23 respect to each of the retail funds?

24 A. No.

25 Q. Tell me which title you have with

1 WATERHOUSE - 10-19-21

2 respect to each retail fund.

3 Actually, let's do it a different
4 way. I withdraw the question.

5 Can you give me one title you have
6 in relation to any retail fund?

7 A. Yes.

8 Q. What title -- what title can you
9 give me?

10 A. Principal executive officer.

11 Q. Do you serve as principal executive
12 officer for each of the retail funds?

13 A. No.

14 Q. Can you identify for me the retail
15 funds in which you serve as the principal
16 executive officer?

17 A. Yes. Highland Funds 1, Highland
18 Funds 2, Highland Income Fund, Highland Global
19 Allocation Fund.

20 Q. I'm sorry, you said "Global
21 Allocation Fund"?

22 A. Yes.

23 VIDEOGRAPHER: Excuse me,
24 Mr. Morris. This is the videographer. I'm
25 concerned about the lighting in the

1 WATERHOUSE - 10-19-21

2 witness' camera.

3 Do you want to go off the record and
4 make some adjustments?

5 MR. MORRIS: Sure, but just for this
6 purpose. I don't want to take a break. We
7 just started.

8 MS. DANDENEAU: Yeah, that is fine.
9 That is fine. We're going to put you on
10 mute.

11 MR. MORRIS: All right.

12 MS. DANDENEAU: I'm going to try to
13 open up some of the shades.

14 VIDEOGRAPHER: We're going off the
15 record at 10:08 a.m.

16 (Recess taken 10:08 a.m. to 10:11 a.m.)

17 VIDEOGRAPHER: We are back on the
18 record at 10:11 a.m.

19 Q. Mr. Waterhouse, when did you become
20 the principal executive officer of the four
21 retail funds that you just identified?

22 A. I don't recall.

23 Q. Do you recall the approximate year
24 that you became the principal executive officer
25 of the four funds?

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2 A. 2021.

3 Q. Did you ever hold any title with
4 respect to any of the four funds you have just
5 identified other than principal executive
6 officer?

7 A. I don't recall.

8 Q. Is it possible that you held a
9 position or a title with the four funds you
10 just identified prior to 2021?

11 A. Yes.

12 Q. But you don't recall if you did or
13 not; do I have that right?

14 A. No. You -- I thought you asked, did
15 I hold other titles.

16 Q. Did you hold any title at the four
17 retail funds for which you now serve as
18 principal executive officer at any time prior
19 to 2021?

20 A. Yes.

21 Q. What titles did you hold?

22 A. I don't recall all the titles.

23 Q. Do you recall any of the titles?

24 A. Yes.

25 Q. What titles do you recall holding at

1 WATERHOUSE - 10-19-21

2 those four retail funds before 2021?

3 A. Principal executive officer.

4 Q. Were you the principal executive
5 officer of the four retail funds that you have
6 identified?

7 A. Sorry, could you repeat the
8 question?

9 Q. Were you the principal executive
10 officer for each of the four retail funds that
11 you have identified?

12 A. Yes.

13 Q. When did you become the principal
14 executive -- withdrawn.

15 Can you give me the approximate year
16 that you became the principal executive officer
17 for each of the four retail funds you've
18 identified?

19 A. I don't recall.

20 Q. What are your duties and
21 responsibilities as the principal executive
22 officer of these four retail funds?

23 A. It is to manage the finance and
24 accounting positions.

25 Q. So at the same time you serve as the

1 WATERHOUSE - 10-19-21

2 treasurer of the advisors, you also serve as
3 the principal executive officer of these four
4 retail funds; correct?

5 A. Yes.

6 Q. Did you ever hold any title with
7 respect to any other retail fund?

8 A. Not that I recall.

9 Q. During the period that you served as
10 Highland's CFO, from time to time Highland
11 loaned money to certain of its officers and
12 employees; correct?

13 A. Yes.

14 Q. During the period that you served as
15 Highland's CFO, from time to time Highland
16 loaned money to certain --

17 A. Let me -- let me retract that,
18 sorry, that -- you asked during the time I was
19 CFO, Highland loaned moneys to employees. I
20 don't -- I don't recall that during my tenure
21 of CFO.

22 Q. You have no recollection during the
23 time that you were the CFO of Highland of
24 Highland ever loaning any money to any officer
25 or director of Highland?

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2 A. I don't recall during my tenure of
3 Highland or my -- as CFO of Highland -- yeah,
4 if there are any loans as CFO of Highland.

5 Q. I'm just talking about officers and
6 employees right now. You have no recollection
7 of Highland ever making a loan to any of its
8 officers or employees during the time that you
9 served as CFO. Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. So I thought you were saying
12 officers and employees as CFO, right, so there
13 were -- I mean, okay, yes.

14 Q. I would ask you to listen carefully
15 to my question. If I -- if I'm not clear, let
16 me know, but I'm really trying to be as clear
17 as I can.

18 A. I'm listening as carefully as I can,
19 and you are asking very specific questions in a
20 timeline. And I'm trying to answer your
21 questions as specifically as I can, and I
22 apologize if -- if I'm going back. I am -- you
23 are asking very specific questions. Thank you.

24 Q. During the period that you served as
25 Highland's CFO, from time to time Highland

1 WATERHOUSE - 10-19-21

2 loaned money to certain corporate affiliates;
3 correct?

4 MS. DANDENEAU: Objection to form.

5 A. What are corporate affiliates?

6 Q. How about the ones that are in
7 Highland's audited financial statements under
8 the section entitled Loans to Affiliates. Why
9 don't we start with those. Do you have any
10 understanding of what the phrase "affiliates"
11 means?

12 MS. DANDENEAU: Objection to form.

13 A. I understand what affiliates are,
14 yet affiliates can have different meanings in
15 different contexts, so...

16 Q. Why don't you -- why don't you tell
17 me what your understanding of the term
18 "affiliate" is in relation to Highland Capital
19 Management, L.P.

20 A. Is that a -- it depends on the
21 context.

22 Q. How about the context of making
23 loans?

24 MS. DANDENEAU: Objection to form.

25 A. I didn't make the determination of

1 WATERHOUSE - 10-19-21

2 who an affiliate was or is at the time those --
3 I didn't -- that wasn't my job to make a
4 determination of who an affiliate is.

5 Q. All right. So as the CFO of
6 Highland, do you have any ability right now to
7 tell me which companies that were directly or
8 indirectly owned and/or controlled by
9 Mr. Dondero in whole or in part received loans
10 from Highland Capital Management, L.P.?

11 MS. DANDENEAU: Objection to form.

12 MS. DEITSCH-PEREZ: Objection, form.

13 A. Yes.

14 Q. Okay. Identify every entity that
15 you can think of that was directly or
16 indirectly owned and/or controlled by
17 Mr. Dondero in whole or in part that received a
18 loan from Highland Capital Management, L.P.

19 MR. RUKAVINA: Objection, legal
20 conclusion.

21 A. NexPoint Advisors, Highland Capital
22 Management Fund Advisors, HCM Services,
23 Dugaboy. Sorry, I don't think -- Dugaboy
24 doesn't fit that definition. You said owned
25 and controlled. I don't think that that

1 WATERHOUSE - 10-19-21

2 definition --

3 Q. I said owned and/or controlled.

4 A. I don't -- again, I'm not -- I'm not
5 the legal expert. I don't think it controls --
6 he controls Dugaboy, so again, I'm not the
7 legal person.

8 Q. I'm not asking you for a legal
9 conclusion, sir. I'm asking you for your
10 knowledge, okay, as the CFO -- the former CFO
11 of Highland Capital Management, other than
12 NexPoint, HCMFA, and HCMF -- HCMS, can you
13 think of any other entities that were owned
14 and/or controlled directly or indirectly in
15 whole or in part by Jim Dondero who received a
16 loan from Highland Capital Management, L.P.?

17 MS. DANDENEAU: Objection to form.

18 A. HCRE.

19 Q. Any others?

20 A. That is -- that is all I can think
21 of.

22 Q. And you're aware that from time to
23 time while you were the CFO, Highland loaned
24 money to Jim Dondero; correct?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Can we refer to the four
3 entities that you just named and Mr. Dondero as
4 the affiliates?

5 A. So that would be Jim Dondero,
6 NexPoint Advisors, Highland Capital Management
7 Fund Advisors, and HCRE.

8 Q. And HCMS?

9 A. And HCMS, okay.

10 Q. And can we refer to the loans that
11 were given to each of those affiliates as the
12 affiliate loans?

13 A. Yes.

14 Q. And is it fair to say that each of
15 the affiliates were the borrowers under the
16 affiliate loans as we're defining the term?

17 MR. RUKAVINA: Objection, legal
18 conclusion.

19 A. The borrowers are whoever were on
20 the notes. I don't -- I don't know. I'm not
21 the legal person.

22 Q. But you --

23 A. I don't know.

24 Q. You do know, as Highland's former
25 CFO, that each of the affiliates that you have

1 WATERHOUSE - 10-19-21

2 identified tendered notes to Highland; correct?

3 MR. RUKAVINA: Hey, John, will you
4 just give me a running objection to legal
5 conclusion to HCM --

6 MR. MORRIS: No. No, if you want to
7 object --

8 MR. RUKAVINA: I will object every
9 time. Object to legal conclusion.

10 MR. MORRIS: That is fine.

11 A. Sorry, can you repeat the question?

12 Q. Are you aware that each of the --
13 that each of the affiliates, as we have defined
14 the term, gave to Highland a promissory note in
15 exchange for the loans?

16 MR. RUKAVINA: Objection to the
17 extent that calls for a legal conclusion.

18 A. I don't.

19 Q. No, you don't know that?

20 A. No, they didn't -- you said they
21 exchanged a promissory note for a loan. I
22 don't -- I don't understand that question, so I
23 said no.

24 Q. At the time of the bankruptcy
25 filing, did Highland have in its possession

1 WATERHOUSE - 10-19-21

2 promissory notes that were signed by each of
3 the affiliates?

4 A. Yes.

5 Q. To the best of your knowledge,
6 during the time that you served as Highland's
7 CFO, did Highland disclose to its outside
8 auditors all of the loans that were made to
9 affiliates?

10 MR. RUKAVINA: Objection, that calls
11 for a legal conclusion.

12 MS. DEITSCH-PEREZ: I also couldn't
13 hear you, John, because there was some
14 garbling on -- on the -- on the call.

15 MR. MORRIS: Folks, I've got to tell
16 you this is not going well, and I'm
17 reserving my right --

18 MS. DANDENEAU: John, it was just
19 the end of that question. It was just the
20 end of that question. I couldn't hear it
21 either. Sorry, if you could repeat it,
22 please.

23 MR. MORRIS: That is less than an
24 hour into this, but folks are trying to run
25 out the clock, and so I'm just going to

1 WATERHOUSE - 10-19-21

2 state that now.

3 MS. DANDENEAU: You know, and,
4 Mr. Morris, I really object to that. I
5 mean --

6 MR. MORRIS: Okay.

7 MS. DANDENEAU: -- Mr. Waterhouse
8 just told you he's trying to listen to your
9 questions and answer them carefully, and
10 you have no basis for saying that.

11 MR. MORRIS: Okay.

12 MS. DANDENEAU: This does not --
13 this is not an experienced witness, so he's
14 trying to do the best he can.

15 Q. Mr. Waterhouse, during the time that
16 you served as Highland's CFO, did Highland
17 disclose to its outside auditors all of the
18 loans that it made to each of the affiliates
19 that you have identified?

20 MR. RUKAVINA: Objection, legal
21 conclusion.

22 A. Yes.

23 Q. To the best of your knowledge, while
24 you were Highland's CFO, were all of the
25 affiliate loans described in Highland's audited

1 WATERHOUSE - 10-19-21

2 financial statements?

3 MR. RUKAVINA: Objection, legal
4 conclusion.

5 A. When an audit was performed, any
6 loans that were made by Highland to the
7 affiliates were disclosed to auditors.

8 Q. Are you aware of any loan that was
9 made to any affiliate that was not disclosed to
10 the auditors?

11 A. I'm not aware.

12 Q. To the best of your knowledge, did
13 each of the affiliates who were --
14 (inaudible) -- loaned from Highland execute a
15 promissory note in connection with that loan?

16 MR. RUKAVINA: Objection, legal
17 conclusion.

18 A. Sorry, you -- halfway through the
19 question it got muffled.

20 Can you repeat that again?

21 Q. To the best of your knowledge, did
22 every affiliate execute a promissory note in
23 connection with each loan that it obtained from
24 Highland?

25 MR. RUKAVINA: Objection, legal

1 WATERHOUSE - 10-19-21

2 conclusion.

3 A. Yes.

4 Q. You are not aware of any loan that
5 any affiliate ever obtained from Highland where
6 the affiliate did not give a promissory note in
7 return; is that fair?

8 A. Yes, I'm not aware.

9 Q. And to the best of your knowledge,
10 did Highland loan to each affiliate an amount
11 of money equal to the principal amount of each
12 promissory note?

13 MR. RUKAVINA: Objection, legal
14 conclusion.

15 A. Yes.

16 Q. During the time that you served as
17 CFO, did Highland ever loan money to
18 Mark Okada?

19 A. I -- I don't recall.

20 Q. Did you ever see any promissory
21 notes executed by Mark Okada?

22 A. I don't recall.

23 Q. Do you know if Highland ever forgave
24 any loan that it ever made to Mr. Okada?

25 A. I don't recall.

1 WATERHOUSE - 10-19-21

2 Q. Do you recall if Mr. Okada paid back
3 all principal and interest due and owing under
4 any loan he obtained from Highland?

5 MS. DEITSCH-PEREZ: Objection to
6 form.

7 MS. DANDENEAU: Objection to form.

8 A. I don't recall.

9 Q. Do you recall whether -- during your
10 time as CFO, whether Highland ever loaned money
11 to Jim Dondero?

12 A. Yes.

13 Q. To the best of your knowledge, did
14 Mr. Dondero sign and deliver to Highland a
15 promissory note in connection with each loan
16 that he obtained from Highland?

17 A. If you are referring to the
18 promissory notes that, you know, part of
19 Highland's records, yes.

20 Q. Okay. You're not aware of any loan
21 that Mr. Dondero took from Highland that wasn't
22 backed up by -- by a promissory note with a
23 face -- with a principal amount equal to the
24 amount of the loan; correct?

25 A. Am I aware that Jim Dondero took a

1 WATERHOUSE - 10-19-21

2 loan?

3 Q. Without giving a -- let me ask a
4 better question. I'm sorry, Mr. Waterhouse.

5 Are you aware of any loan that
6 Mr. Dondero obtained from Highland where he
7 didn't give a promissory note in return?

8 A. I'm not aware.

9 Q. During the time that you served as
10 Highland's CFO, did Highland ever forgive any
11 loans, in whole or in part, that it made to
12 Mr. Dondero?

13 A. Not that I'm aware.

14 Q. At the time that you served as
15 Highland's CFO, did Highland ever forgive any
16 loan, in whole or in part, that it made to any
17 affiliate as we've defined the term today?

18 A. Not that I'm aware.

19 Q. During the time that you served as
20 Highland's CFO, did Highland ever forgive, in
21 whole or in part, any loan that it ever made to
22 any officer or employee?

23 A. Highland forgave loans to officers
24 and employees. It may not have been at the
25 time when my title was CFO.

1 WATERHOUSE - 10-19-21

2 Q. Okay. And so I appreciate the
3 distinction.

4 Is it fair to say that, to the best
5 of your knowledge, Highland did not forgive a
6 loan that it made to an officer or employee
7 after 2013?

8 MS. DANDENEAU: Objection to form.

9 A. I don't recall.

10 Q. To the best of your knowledge, did
11 Highland disclose to its auditors every
12 instance where it forgave, in whole or in part,
13 a loan that it had made to one of its officers
14 or employees?

15 A. No.

16 Q. Can you think of -- can you -- can
17 you identify any loan to an officer or employee
18 that was forgiven by Highland, in whole or in
19 part, that was not disclosed to Highland's
20 outside auditors?

21 A. Look, I don't recall all of the
22 loans and the loan forgiveness. I just know as
23 part of the audit process there is a
24 materiality concept.

25 So if there were loans to employees

1 WATERHOUSE - 10-19-21
2 that were of -- you know, that were deemed
3 immaterial, those items may not have been
4 disclosed by the team to the auditors.

5 Q. I appreciate that.

6 Do you have an understanding as to
7 what the level of materiality was?

8 A. I don't recall.

9 Q. As the CFO of Highland, to the best
10 of your knowledge, did Highland disclose to its
11 outside auditors every loan that was forgiven,
12 in whole or in part, that was material as that
13 term was defined by the outside auditors?

14 A. Yes.

15 Q. And do you recall where -- do you
16 recall where the definition of materiality can
17 be found for -- for this particular purpose?

18 MS. DANDENEAU: Objection to form.

19 A. No. You -- I don't determine
20 materiality.

21 Q. Okay. I'm just asking you if you
22 can help me understand where it is, but I think
23 we will find it in a few minutes.

24 You are aware that Highland has
25 commenced lawsuits against each of the

1 WATERHOUSE - 10-19-21

2 affiliates, as we've defined the term, to
3 collect under certain promissory notes; is that
4 right?

5 A. Yes.

6 Q. And are you familiar with the notes
7 that are issue -- at issue in the lawsuits?

8 MS. DANDENEAU: Objection to form.

9 A. Generally familiar.

10 Q. Can we refer to the lawsuits that
11 Highland has commenced against the affiliates
12 collectively as the lawsuits?

13 A. Yes. And, again, the affiliates are
14 NexPoint, HCMFA, HCMS, and HCRE.

15 Q. And Mr. Dondero?

16 A. Okay. See, that is a new -- and now
17 Mr. Dondero is included in your affiliate
18 definition.

19 Q. I just --

20 A. I thought affiliates -- I thought
21 affiliates were just the four prior entities,
22 so I just want to be clear.

23 Q. I appreciate that. So let's --
24 let's keep them separate and let's refer to the
25 four corporate entities as the affiliates, and

1 WATERHOUSE - 10-19-21

2 Mr. Dondero we will call Mr. Dondero. Okay?

3 A. Okay. Thank you. As you can see,
4 Mr. Morris, there is a lot of entities -- a lot
5 here. I just want to be clear.

6 Q. Okay. Now, the affiliates of
7 Mr. Dondero signed promissory notes that are
8 not subject to the lawsuit.

9 Do you understand that?

10 MS. DANDENEAU: Objection to form.

11 A. The affiliates and Mr. Dondero
12 signed --

13 Q. You know what? I will skip it.
14 That is okay. Okay.

15 From time to time while you were
16 Highland's CFO, payments were applied against
17 principal and interests that were due under the
18 notes that were tendered by the affiliates and
19 Mr. Dondero; correct?

20 MR. RUKAVINA: Objection to the
21 extent that calls for a legal conclusion.

22 A. Yes.

23 Q. Did Highland have a process where --
24 whereby payments would be applied against
25 principal and interest against the notes that

1 WATERHOUSE - 10-19-21

2 were given by the affiliates and Mr. Dondero?

3 A. Yes.

4 Q. Can you describe the process for me?

5 A. The process, payment should be
6 applied as laid out in the -- in the promissory
7 note.

8 Q. From time to time were payments made
9 that were not required under the promissory
10 notes?

11 MS. DANDENEAU: Objection to form.

12 A. Yes.

13 Q. Who was responsible for deciding
14 when and how much the payments would be made
15 with respect to each of the notes that were
16 issued by the affiliates and Mr. Dondero?

17 A. Who was responsible for deciding how
18 much was paid prior to the due date?

19 Q. Yes.

20 A. I don't know.

21 Q. Did you approve of each payment that
22 was made against principal and interest on the
23 notes that were given by the affiliates and
24 Mr. Dondero?

25 MS. DANDENEAU: Objection to form.

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2 A. Did I approve the payments? I
3 approve -- I approve -- if there was cash -- if
4 there was cash being repaid on a note payment,
5 yes, I approved in the general sense of being
6 made aware of the payment and the amount.

7 Q. And are you the person who
8 authorized Highland's employees to effectuate
9 those payments?

10 A. Yes.

11 Q. When you gave the instruction to
12 effectuate the payment, did you obtain
13 Mr. Dondero's prior approval?

14 A. I mean, it -- I mean, it -- it
15 depends.

16 Q. Can you think of any instance where
17 you directed Highland's employees to make a
18 payment of principal or interest against any
19 note that was tendered by an affiliate or
20 Mr. Dondero that Mr. Dondero did not approve of
21 in advance?

22 A. I can't recall specifically.

23 Q. Can you identify -- withdrawn.

24 Did Mr. Dondero ever tell you that a
25 payment that was made against principal and

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2 interest due under one of the notes that was
3 tendered by an affiliate or himself should not
4 have been made?

5 A. Yes.

6 Q. Can you identify the payment for me?

7 A. It would be for -- for NexPoint
8 Advisors.

9 Q. Okay. And when did Mr. Dondero tell
10 you that a payment that you had initiated on
11 behalf of NexPoint should not have been made?

12 A. I wasn't initiating payment. It was
13 in the context of the -- I think you used this
14 term, "the advisors," so NexPoint Advisors and
15 Highland Capital Management Fund Advisors had
16 overpaid on certain agreements with Highland
17 Capital Management, L.P. And as a part of that
18 process, the advisors -- what I was told at the
19 time were in talks and negotiations and
20 discussions with Highland Capital Management,
21 L.P., on offsets in relation to those
22 overpayments.

23 Q. When did this conversation take
24 place?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall specifically.

3 Q. Do you recall what year it was?

4 A. Yes.

5 Q. What year did the conversation with
6 Mr. Dondero take place that you just described?

7 A. 2020.

8 Q. Okay. Do you remember if it was
9 December 2020?

10 A. It -- it -- I don't -- I don't
11 recall what month specifically, but it would
12 have been November or December.

13 Q. And we're talking here about a
14 payment of principal and/or interest that was
15 due -- withdrawn.

16 We're talking here about a payment
17 of principal and interest that was applied
18 against NexPoint's note; correct?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall what that payment
21 consisted of.

22 Q. Is it possible that the payment you
23 have in mind related to the shared services
24 agreement?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Are you certain that the payment --
4 that the payment that you have in mind related
5 to the promissory note that NexPoint issued in
6 favor of Highland?

7 MS. DANDENEAU: Objection to form.

8 A. Yes.

9 Q. Okay. Other than that one payment,
10 can you identify any other instance where
11 Mr. Dondero told you that a payment should not
12 have been applied against principal and
13 interest under any promissory note tendered by
14 any affiliate or Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Objection to
17 form.

18 A. Not that I recall.

19 Q. Thank you very much.

20 Do you know if Mr. Dondero approved
21 in advance of each loan made to each affiliate
22 and himself during the time that you were the
23 CFO?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Yes, generally.

3 Q. Can you identify any loan that was
4 ever made to an affiliate or to Mr. Dondero
5 that Mr. Dondero did not approve of in advance?

6 A. Other than the ones that are in
7 dispute, I'm not aware.

8 Q. Do you believe that Mr. Dondero did
9 not approve of each of the loans that are in
10 dispute in advance of the time that the loan
11 was made?

12 MS. DANDENEAU: Objection to form.

13 A. Given what is in the dispute, you
14 know, and -- and -- and the way things might --
15 yeah, I mean...

16 Q. I am not asking about the dispute,
17 and it was probably my mistake to follow you
18 there.

19 Were you aware of every loan made by
20 Highland to each of its affiliates and
21 Mr. Dondero while you were the CFO at the time
22 each loan was made?

23 A. Was I aware of every loan, yes.

24 Q. Okay. And if you put yourself back
25 in time, do you recall that any of the loans

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2 that were made to one of the affiliates or
3 Mr. Dondero during the time that you were the
4 CFO was made without Mr. Dondero's prior
5 knowledge and approval?

6 A. Not that I recall.

7 Q. Thank you. In fact, do you -- as
8 the CFO, would you have allowed Highland to
9 loan money to an affiliate or to Mr. Dondero
10 without obtaining Mr. Dondero's prior approval?

11 MS. DANDENEAU: Objection to form.

12 A. I can't -- there was so many times
13 over the years, I can't speak for every single
14 one, but generally, yes, I -- I spoke to him.

15 Q. You -- you never -- you never --
16 withdrawn. I will just take that.

17 Can you recall any payment that was
18 ever made against principal and interest on a
19 note that was issued in favor of Highland by an
20 affiliate or Mr. Dondero that you personally
21 did not know about in advance?

22 A. There are so many through the years,
23 I don't -- I don't -- I don't recall every
24 single one.

25 Q. Okay. Can you identify any payment

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2 that was made against principal and interest on
3 any note tendered by any affiliate or
4 Mr. Dondero that you didn't know about in
5 advance?

6 A. I don't recall.

7 Q. Other than Mr. Dondero -- withdrawn.
8 Did anybody at Highland have the
9 authority to make a payment against principal
10 and interest due under a loan given to the
11 affiliates and Mr. Dondero without your
12 knowledge and approval?

13 MS. DANDENEAU: Objection to form.

14 A. Sorry, there was -- to make a
15 payment on an affiliate loan, what you are
16 saying would it require my knowledge and
17 approval, yes.

18 Q. Okay. I appreciate that. Thank
19 you.

20 Did anybody at Highland have the
21 authority, to the best of your knowledge, to
22 effectuate a loan to an affiliate without
23 Mr. Dondero's prior knowledge and approval?

24 MS. DANDENEAU: Objection to form.

25 A. I can't speak for all, but

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2 generally, yes.

3 Q. Did you personally communicate with
4 Mr. Dondero to let him know each time a payment
5 of principal or interest was being made against
6 any note that was tendered by an affiliate or
7 Mr. Dondero to Highland?

8 A. I don't -- are you saying, did I let
9 Mr. Dondero know if a payment was made on any
10 affiliate or loan to Mr. Dondero? I mean,
11 not -- not every -- no.

12 Q. Let me ask it this way: Did you
13 have a practice of informing Mr. Dondero when
14 payments were made against principal and
15 interest on any note that was tendered by an
16 affiliate or Mr. Dondero?

17 MS. DEITSCH-PEREZ: Objection to
18 form.

19 MS. DANDENEAU: Objection to form.

20 A. No, I did not.

21 Q. Did Mr. Dondero ever tell you that a
22 payment of principal or interest had been made
23 against a note that was tendered by an
24 affiliate or himself that he had been unaware
25 of?

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2 A. Not that I recall.

3 Q. Are you aware that Mr. Dondero and
4 the affiliates -- withdrawn.

5 Are you aware that Mr. Dondero
6 NexPoint, HCRE, and HCMS all contend that they
7 do not have to pay on any of the notes they
8 issued because they are subject to an oral
9 agreement between Mr. Dondero and Nancy
10 Dondero, in her capacity as the trustee of the
11 Dugaboy Investment Trust?

12 MS. DANDENEAU: Objection to form.

13 A. I didn't -- I didn't -- I didn't
14 know that it was all notes.

15 Q. Okay. Are you -- did you ever learn
16 that there was an oral agreement between Jim
17 Dondero and Nancy Dondero pertaining to any
18 notes issued by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. Yes.

22 Q. Do you have any understanding as to
23 the terms of that agreement?

24 A. Yes.

25 Q. What is your understanding of the

1 WATERHOUSE - 10-19-21

2 terms of the agreement?

3 A. That there were certain milestones
4 that had to be reached.

5 Q. Do you have any understanding of the
6 terms of the agreement between Mr. Dondero and
7 Nancy Dondero concerning any of the notes
8 issued by the affiliates or Mr. Dondero other
9 than that there have to be milestones reached?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 A. There are milestones, I found out
13 yesterday, or there was some --

14 MS. DANDENEAU: Okay. I'm just
15 going to object to the extent that you
16 learned anything in conversations with
17 counsel, please don't reveal -- that is
18 privileged, and don't reveal any privileged
19 communications.

20 THE WITNESS: Okay.

21 A. So I'm not aware of anything else.

22 Q. Do you know what the milestones
23 were?

24 MS. DANDENEAU: Objection to form.

25 A. I don't.

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2 Q. Do you know anything about -- do you
3 know what promissory notes the agreement
4 covered?

5 A. I don't.

6 Q. Do you know if -- if Jim and Nancy
7 Dondero entered into one agreement or more than
8 one agreement?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. I don't know.

12 Q. Do you know if the agreement is in
13 writing?

14 A. I don't know.

15 Q. How did you learn of the existence
16 of the agreement?

17 MS. DANDENEAU: Objection to form.
18 Again --

19 A. I don't -- I don't recall who told
20 me.

21 Q. You have no recollection of who told
22 you about this agreement between Jim and Nancy
23 Dondero?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. I don't recall.

3 Q. Do you recall how you learned of the
4 agreement?

5 Was it in a meeting? Was it in a
6 phone call? Was it in an email?

7 A. I don't recall.

8 Q. Do you recall when you learned of
9 the agreement?

10 A. Not specifically.

11 Q. Do you recall what year you learned
12 of the agreement?

13 A. In -- look, I mean, there are so
14 many notes. I may be getting -- I believe it
15 was 2020.

16 Q. All right. I'm not asking about
17 notes, sir. I'm asking about the agreement
18 that you testified you knew about between Jim
19 and Don- -- Nancy Dondero. Okay.

20 Do you understand my question now?
21 Should I ask my question again?

22 A. Yeah, sure. Go ahead.

23 Q. I'm going to use the word
24 "agreement" to refer to the agreement that
25 Mr. Dondero and Nancy Dondero entered into

1 WATERHOUSE - 10-19-21

2 where you understood that certain milestones
3 had to be reached. Okay?

4 A. Uh-huh.

5 MS. DANDENEAU: Objection.

6 MS. DEITSCH-PEREZ: Object to the
7 form.

8 MR. MORRIS: Just defining a term,
9 what is the objection.

10 MS. DEITSCH-PEREZ: The objection --

11 MR. MORRIS: I will move on. I will
12 move on.

13 MS. DEITSCH-PEREZ: John --

14 Q. Sir, are you okay with that
15 definition of agreement?

16 A. Okay.

17 Q. Okay. So you don't recall who --
18 who informed you of the existence of the
19 agreement; is that right?

20 A. I don't recall.

21 Q. You don't recall who told you the
22 terms of the agreement.

23 Do I have that right?

24 A. Correct.

25 Q. And you don't recall if you learned

1 WATERHOUSE - 10-19-21

2 about the agreement in a meeting, through an
3 email, or through a phone call.

4 Do I have that right?

5 A. I don't recall.

6 Q. Can you tell me when you learned of
7 the agreement?

8 A. I don't -- I don't -- I don't
9 remember specifically.

10 Q. Can you tell me if you learned of
11 the agreement before or after the petition
12 date?

13 A. It would have been -- it would have
14 been after.

15 Q. Can you tell me if you learned of
16 the agreement before or after January 9th,
17 2020?

18 A. It would have been after.

19 Q. Can you tell me if you learned of
20 the agreement before or after you left Highland
21 Capital Management in February of 2021?

22 A. I don't -- I don't -- I don't know.

23 Q. It is possible that you learned of
24 it while you were a Highland employee.

25 Do I have that right?

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2 A. I don't remember the -- I mean, it
3 was sometime in 2021. I don't remember when.

4 Q. All right. So to the best of your
5 recollection, it was in 2021 but you don't
6 recall if it was before or after you ceased to
7 be a Highland employee.

8 Do I have that right?

9 A. Yeah, I mean, it was -- it was
10 likely after I was -- after I left Highland
11 because, if I put myself back into the last
12 days of -- of 2021, it was -- you know, the
13 communications with Mr. Dondero were -- were --
14 were -- there weren't as many communications
15 because of the circumstances.

16 Q. And so based on that you believe
17 that it is most likely that you learned of this
18 agreement sometime after you left Highland
19 employment?

20 A. I wouldn't use the term "most
21 likely." I don't recall specifically. I don't
22 recall.

23 Q. Do you recall ever telling Jim Seery
24 about this agreement?

25 A. No, I don't -- I didn't tell

1 WATERHOUSE - 10-19-21

2 Jim Seery.

3 Q. Did you tell anybody at DSI about
4 this agreement?

5 A. No.

6 Q. Did you tell any of Highland's
7 independent directors about this agreement?

8 A. No.

9 Q. Did you tell anybody at Pachulski
10 Stang Ziehl & Jones about this agreement?

11 A. No.

12 Q. Did you tell any employee of
13 Highland about this agreement?

14 A. No.

15 MS. DANDENEAU: Mr. Morris, it has
16 been an hour and a half. Is this a good
17 time for a break?

18 MR. MORRIS: Sure.

19 Q. Mr. Waterhouse, I will just remind
20 you that during the break please don't speak
21 with anybody about the deposition, the
22 substance of your testimony or anything else
23 concerning the deposition. Okay?

24 A. Yes.

25 MR. MORRIS: So it is 11:02. We're

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2 at 11:02 your time. Let's come back, I
3 guess, at 15 -- at 11:15 your time.

4 VIDEOGRAPHER: We're going off the
5 record at 11:02 a.m.

6 (Recess taken 11:02 a.m. to 11:20 a.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 11:20 a.m.

9 Q. Mr. Waterhouse, did you speak with
10 anybody during the break about this deposition?

11 A. No.

12 MS. DANDENEAU: Other than -- other
13 than his counsel.

14 Q. Did you speak to your counsel about
15 the substance of your deposition today?

16 A. No, I didn't bring it up.

17 Q. I didn't ask you if you brought it
18 up. I asked you if you had any conversation
19 with your lawyer about the substance of your
20 deposition.

21 MS. DANDENEAU: Yes, he did.

22 Q. Can you tell me what the -- you
23 discussed?

24 MS. DANDENEAU: No, I object to
25 that. He's not going to answer. That is a

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2 privileged conversation.

3 MR. MORRIS: So I just want to make
4 sure that I understand. During the break
5 you spoke with your client about the
6 substance of this deposition; is that
7 right?

8 MS. DANDENEAU: Yes, John.

9 MR. MORRIS: And you refuse -- you
10 refuse to let your client tell me what was
11 discussed; is that right?

12 MS. DANDENEAU: That's correct.

13 MR. MORRIS: You know, I had given
14 the instruction prior to the break not to
15 speak with counsel. I would have
16 appreciated --

17 MS. DANDENEAU: No, you didn't --
18 actually, that is not true, Mr. Morris.
19 You said not to speak with anyone. We
20 never have interpreted that to mean
21 conversations with counsel. That's never
22 been -- I have never, ever heard that
23 instruction.

24 MR. MORRIS: Okay. We will -- we
25 will -- we will deal with it when and if we

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2 have to.

3 Q. Mr. Waterhouse, after learning about
4 the agreement, did you ask anybody if the
5 agreement was reflected in a writing?

6 MS. DANDENEAU: Objection to form.

7 A. No.

8 Q. Did you ask anybody if the terms of
9 the agreement were memorialized anywhere?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: What is the --

12 A. No.

13 MS. DANDENEAU: Well, because you
14 keep talking about this agreement and I --
15 I -- I think, Mr. Morris, that is really
16 not clear what you mean by "the agreement."
17 And maybe you can just go back and restate
18 what that is.

19 MR. MORRIS: Okay. Your client has
20 agreed with me twice on the definition, but
21 I will try one more time.

22 Q. Mr. Waterhouse, do you understand
23 that when I use the term "agreement," I'm
24 referring to the agreement between Jim and
25 Nancy Dondero concerning certain promissory

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2 notes where you learned that one of the terms
3 of the agreement was milestones reached?

4 A. Okay.

5 Q. And did you understand that that was
6 the -- the agreement that we were referring to
7 every time we used the word "agreement" in this
8 deposition?

9 A. I don't know anything about this
10 agreement. So, look, I do -- it -- I don't
11 know whether --

12 Q. Let's -- let's try this again.

13 A. Yeah. Look, I don't know what this
14 agreement relates.

15 MS. DEITSCH-PEREZ: John, John --

16 Q. Let me try --

17 MS. DEITSCH-PEREZ: John, please let
18 the witness finish.

19 MR. MORRIS: Please stop. Please
20 stop. Please stop talking.

21 MS. DEITSCH-PEREZ: No, you stop.
22 Let the witness --

23 MR. MORRIS: Stop talking.

24 MS. DEITSCH-PEREZ: -- finish -- you
25 interrupted him.

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2 MR. MORRIS: You know what, you
3 guys, this is really wrong. It is really,
4 really wrong. Okay?

5 I had the witness agree not once,
6 but twice to the definition of agreement.
7 Okay? I'm going to try and do it a third
8 time.

9 MS. DANDENEAU: No, but, please,
10 John, really --

11 MR. MORRIS: No, please stop
12 talking. Please. It is my deposition.
13 Object to questions.

14 MS. DANDENEAU: No, but also you
15 instructed him that -- that if you were
16 going -- if you were interrupting him, that
17 he should remind you that you're
18 interrupting him and -- and --

19 MR. MORRIS: Let him do that. Let
20 him do that.

21 MS. DANDENEAU: Okay. Well, you --

22 MR. MORRIS: Please stop talking.

23 A. Okay. I don't know any of the
24 details of these agreements. I don't know
25 anything about them. I heard -- someone -- I

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2 don't know who, I don't know when, as you
3 asked, sometime in '21, someone told me about
4 this -- or I don't honestly know -- I don't
5 even recall exactly how I was made aware of
6 this, but I was. I don't know -- I don't know
7 any of these details, and I'm getting -- again,
8 there is, you know, I -- I -- I had a passing
9 conversation with -- with Jim at some point
10 on -- on some -- on the executive comp, and I'm
11 getting confused of what is what, because
12 again, I don't know any of these details.

13 Q. Okay. Let me try again,
14 Mr. Waterhouse, and I apologize.

15 Are you aware of any agreement
16 between Jim Dondero and Nancy Dondero
17 concerning any promissory note that was given
18 to Highland by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. I've heard of an agreement. That
22 is -- that is -- I mean, if you are using aware
23 as heard, sure.

24 Q. And you understand that one of the
25 terms of the agreement is that it was based on

1 WATERHOUSE - 10-19-21

2 milestones that had to be reached; is that
3 right?

4 MS. DANDENEAU: Objection to form.

5 A. That was one of the words that was
6 used when I heard about it, yes.

7 Q. And when you heard about this
8 agreement that had a term in it concerning
9 milestones reached, did you ask the person who
10 was telling you about the agreement whether or
11 not it was in writing?

12 A. I did not.

13 Q. Did you ask any questions at all?

14 MS. DANDENEAU: Objection to form.

15 A. Not that I recall.

16 Q. But do you understand that going
17 forward, we're going to refer to the agreement
18 as the agreement that you just described that
19 you were --

20 MS. DANDENEAU: Object to the form.

21 A. Yes.

22 Q. Okay. You don't have any personal
23 knowledge concerning the terms of the
24 agreement; correct?

25 MS. DEITSCH-PEREZ: Object to the

1 WATERHOUSE - 10-19-21

2 form.

3 Q. You can answer.

4 A. I don't -- I heard about the
5 agreement. I don't know anything -- I heard
6 there was an agreement. That is -- again, as I
7 testified before -- I said before, heard about
8 it, don't know the details. I believe it was
9 sometime this year.

10 Q. Do you have any personal knowledge
11 about the terms of the agreement, sir?

12 MS. DANDENEAU: Objection to form.

13 A. Other than what I have previously
14 discussed, I don't -- I don't know.

15 Q. Did -- did Mr. Dondero tell you
16 about the existence of the agreement?

17 A. I don't recall.

18 Q. Do you recall the source of your
19 information when you learned about the
20 agreement?

21 A. No, I don't -- I don't recall. I
22 don't remember. I just -- I heard about it
23 generally. I don't remember -- I don't
24 remember who, how, if, how. I don't remember.

25 Q. You know, Mr. Waterhouse, I just

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2 want to be clear that I never would have asked
3 you to appear at this deposition if your name
4 hadn't been included in responses to discovery
5 as to somebody with knowledge about the -- who
6 was told about the existence of the agreement.

7 That is what prompted me do this,
8 and I really do feel compelled to tell you that
9 I otherwise would never have called you as a
10 witness. So I regret that you're being put
11 through this today. I had no intention of
12 burdening you or taking your time, but that is
13 the reason that we issued the subpoena is
14 because certain of the defendants identified
15 you as somebody --

16 MS. DEITSCH-PEREZ: Mr. Morris, you
17 are here to ask questions, not to have --

18 MR. MORRIS: I feel badly for the
19 guy. I really do.

20 MS. DEITSCH-PEREZ: I'm sure you do.

21 MR. MORRIS: I do. Stop.

22 MS. DEITSCH-PEREZ: You stop.

23 MR. MORRIS: I'm allowed.

24 MS. DEITSCH-PEREZ: No, you're not
25 allowed to have a chat with the witness.

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2 Q. Okay. Well, I hope that you
3 appreciate what I'm saying here,
4 Mr. Waterhouse.

5 MS. DANDENEAU: All right. Let's go
6 ahead and ask questions, and again, you're
7 entitled to probe his -- his knowledge
8 of -- whatever knowledge he has about
9 this -- this agreement and --

10 MR. MORRIS: That is what I'm doing.

11 MS. DANDENEAU: -- he will answer
12 the questions to the best that he can.

13 MR. MORRIS: That is what I'm doing.

14 Q. Mr. Waterhouse, I take it you do not
15 know which promissory notes issued by which
16 affiliates or Mr. Dondero are the subject of
17 this agreement; do I have that right?

18 A. Yes, I don't -- I don't know.

19 Q. Do you know of any way to determine
20 which promissory notes issued by the affiliates
21 and Mr. Dondero are the subject of this
22 agreement other than asking Jim or Nancy
23 Dondero?

24 MS. DANDENEAU: Objection to form.

25 A. I don't know.

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2 Q. Did you ever make --

3 A. I don't know anything about these
4 agreements.

5 Q. Did you ever make any effort to
6 determine which promissory notes are subject to
7 this agreement?

8 A. No.

9 Q. Did you ever ask anybody which
10 promissory notes are subject to this agreement?

11 A. No.

12 Q. Do you know if there is a list
13 anywhere of the promissory notes that are
14 subject to this agreement?

15 A. I'm not aware.

16 Q. Have you ever seen the terms of the
17 agreement written down anywhere?

18 A. No.

19 Q. Have you ever asked anybody whether
20 the terms of the agreement were written down
21 anywhere?

22 A. I have not.

23 Q. Did learning about the agreement
24 cause you to do anything in response?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Did anybody ever describe to you the
4 nature of the milestones that you referred to
5 earlier?

6 A. No, I don't -- I don't have any
7 details of this.

8 Q. That is fine.

9 PricewaterhouseCoopers served as
10 Highland's outside auditors prior to the
11 petition date; correct?

12 A. Yes.

13 Q. You refer to PricewaterhouseCoopers
14 as PwC?

15 A. Yes.

16 Q. PricewaterhouseCoopers audited
17 Highland's financial statements on an annual
18 basis; correct?

19 A. During my -- during my time as -- as
20 CFO, yes, PricewaterhouseCoopers was the
21 auditor.

22 Q. Do you know why Highland had its
23 annual financial statements audited each year?

24 A. Generally.

25 Q. Tell me your general understanding

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2 as to the reason why Highland had its annual
3 financial statements audited each year.

4 A. From -- from time to time, they were
5 used -- or asked for, as part of diligence or
6 transactions or -- or things of that nature.

7 Q. And were they given to third parties
8 for purposes of diligence or transactions from
9 time to time?

10 A. As far as I'm aware, yes.

11 Q. And was it your understanding as the
12 CFO that the third parties who received the
13 financial statements in diligence or
14 transactions was going to rely on those?

15 MS. DANDENEAU: Objection to form.

16 A. I don't know -- I don't know gen --
17 I don't know specifically what they were going
18 to rely on. You know, we would get requests
19 for audited financial statements. I don't know
20 what they were relying on.

21 Q. And --

22 A. You would have to ask them.

23 Q. Did you personally play a role in
24 PwC's annual audit and the conduct of the
25 audit?

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2 MS. DANDENEAU: Objection to form.

3 A. During my tenure as CFO, I played a
4 very minimal role.

5 Q. What was the minimal role that you
6 played?

7 A. You know, again, it was -- it was to
8 check in with the team, to make sure that, you
9 know, audit -- the deadlines were being hit,
10 information was being presented to the auditors
11 in a -- in a timely fashion, but, you know,
12 other than that, it was a very capable team
13 that are still current employees of Highland
14 and, you know, they -- they conducted 99
15 percent of -- look, I don't want to give
16 percentages. I mean, this is -- but I -- I --
17 I played a minimal role towards the end.

18 Before during my earlier years as
19 CFO, I did more, and then as time went on, I
20 did less in it.

21 Q. Okay. Was there a person at
22 Highland who was responsible for overseeing
23 Highland's participation in PwC's audit during
24 the time that you were the CFO?

25 A. Yeah. I mean, there was -- there

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2 was a -- there was a point -- it varies. It
3 varies by year, in function, in time and, you
4 know, depending on the request, but yes, I
5 mean, there is -- there is -- there is
6 generally a point person of communication.

7 Q. And who was the point person from
8 2016 until the time you left Highland?

9 A. I don't -- I don't know
10 specifically, but it would have been, you
11 know -- you know, someone on the corporate
12 accounting team.

13 Q. And was there a head of the
14 corporate accounting team?

15 A. Yes, so -- yes.

16 Q. Who was the head of corporate
17 accounting for the five years prior to the time
18 you left Highland?

19 A. I don't -- if you're asking from
20 2016 on, I don't -- it was Dave Klos, but,
21 again, there was -- there was changes to the
22 team and the reporting structure. I don't
23 remember exactly when that happened during --
24 you know, over the last -- since 2016.

25 Q. Did the folks who participated and

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2 ran the audit all report to you, directly or
3 indirectly?

4 A. Yes.

5 Q. And did you have any responsibility
6 for making sure that the audit report was
7 accurate before it was finalized?

8 A. Yeah. I mean, you know, that --
9 that is -- my responsibility to the auditors
10 was -- again, is -- and the CFO is to -- we are
11 providing accurate financial statements; right?

12 And -- and -- and as part of any
13 audit, we disclose all relevant information as
14 part of any audit.

15 Q. Okay. And as the CFO, did you take
16 steps to make sure that the audit report was
17 accurate?

18 A. I mean, I would say in a general
19 sense, yes. But, again, I mean, I had a
20 very -- I had a very capable and competent
21 team. I wasn't managing them.

22 You know, part of what I do is I let
23 the team -- I want managers to grow. I want
24 managers to have rope. And that is -- you
25 know, I'm not a stand-behind-you type of guy.

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2 If you -- if you talk to my team members, I'm
3 not micromanaging people. I want people to
4 learn and grow in their function so they can go
5 on and do bigger and better things with their
6 careers.

7 And so, yes, generally I was
8 responsible for it, but I wanted the team to
9 learn and grow and be responsible for the bulk
10 of the audit.

11 Q. Did you personally review each audit
12 report before it was finalized to satisfy
13 yourself that it was accurate?

14 A. I don't -- I don't recall, you know,
15 for every single -- we're talking 2016, there
16 would have been three years, 2016 to '17, '18.
17 I don't -- we're -- we're going back
18 five years-plus. I don't -- you know, I don't
19 recall.

20 Q. Did you have a practice that you
21 employed to make sure that you were satisfied
22 that Highland's audit reports were true and
23 accurate to the best of your knowledge?

24 A. I mean, our -- the practice was set
25 up with our -- the -- the practice to put

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2 together accurate audited or accurate financial
3 statements is to your control environment.

4 So, you know, the -- so the practice
5 was to maintain a stable control environment
6 which then the output is -- is accurate
7 financial statements.

8 So -- so, you know, if I was
9 comfortable that the control environment was
10 operating, then, you know, that would dictate
11 how I would -- you know, what I might or might
12 not do in a given year.

13 Q. Okay. Do you recall ever being
14 uncomfortable with the control environment
15 during the period that you served as CFO?

16 A. Yeah. I mean, look, yes, there are
17 times -- you know, nothing is perfect. So
18 there were -- there were times when, yes, you
19 know -- there are times I learned I was
20 uncomfortable with the control environment, and
21 that is part of the management of the process
22 and having, you know -- and -- and working
23 through whatever obstacles present themselves.

24 Q. Okay. Were you ever uncomfortable
25 with the control process as it related to

1 WATERHOUSE - 10-19-21

2 reporting and disclosures of loans to
3 affiliates and Mr. Dondero?

4 MS. DANDENEAU: Objection to form.

5 A. I don't -- I don't recall --

6 Q. So you don't recall --

7 A. -- the --

8 MS. DANDENEAU: Mr. Morris --

9 A. I don't recall being uncomfortable.

10 But, again, we're going back several years. I

11 don't -- you know, the practice in an audit is

12 to disclose all information to the auditors.

13 And I don't -- I don't recall.

14 Q. As part of the process of the audit,
15 did you sign what is sometimes referred to as a
16 management representation letter?

17 A. Yes.

18 MR. MORRIS: Can we put up on the
19 screen a document that we have premarked as
20 Exhibit 33.

21 (Exhibit 33 marked.)

22 MS. DANDENEAU: Mr. Morris, that is
23 not in the binder; correct?

24 MR. MORRIS: Correct.

25 Q. So you will see, Mr. Waterhouse,

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2 this is a letter dated June 3rd. And if we
3 could go to the signature page.

4 And do you see that you and
5 Mr. Dondero signed this document?

6 A. Yes.

7 Q. That is your signature; right?

8 A. Yes.

9 MR. MORRIS: Okay. Can you go back
10 to the top.

11 MS. DANDENEAU: Mr. Morris, can you
12 have somebody post this in the chat so that
13 we have can have a copy of this, please.

14 MR. MORRIS: Yeah, sure. Asia, can
15 you do that, please.

16 Q. Okay. Do you see at the bottom of
17 the second paragraph there is a reference to
18 materiality?

19 A. Yes.

20 Q. Okay. It says, Materiality used for
21 purposes of these representations is
22 \$1.7 million.

23 Do you see that?

24 A. I do.

25 Q. And did PwC set that level of

1 WATERHOUSE - 10-19-21

2 materiality?

3 A. Yes.

4 Q. And for purposes of the audit, did
5 PwC set the level of materiality each year?

6 A. Yes.

7 Q. Did that number change over time?

8 A. I'm not aware of what materiality is
9 every single year, so -- but, you know, this
10 number would likely fluctuate.

11 Q. Okay. I'm going to go back to a
12 question I asked you earlier today. And that
13 is in connection -- this letter is issued in
14 connection with the audit for the period ending
15 12/31/2018; correct?

16 A. Yes.

17 Q. Okay. And is it fair to say that if
18 any -- actually, withdrawn. I'm going to take
19 it outside of this.

20 If Highland ever forgave the loan to
21 any affiliate or any of its officers or
22 employees, in whole or in part, to the best of
23 your knowledge, would that forgiveness have
24 been disclosed in the audited financial
25 statements if it exceeded the level of

1 WATERHOUSE - 10-19-21

2 materiality that PwC established?

3 MS. DANDENEAU: Objection to form.

4 A. So, again, during my tenure as CFO,
5 and -- Highland -- it was -- it is required to
6 disclose any affiliate loans that are in excess
7 of materiality.

8 Now, the forgiveness of those loans
9 may or may not -- I mean, since materiality
10 fluctuates every year, a -- you know, if a loan
11 was forgiven, it may or may not, you know --
12 and, look, I would want to consult the guidance
13 around this.

14 It is not something we do -- you
15 know, it is not -- you know, GAAP can be and
16 disclosures can be very specialized so, again,
17 we want to consult the guidance. But we would
18 see if and what would need to be disclosed if
19 it were deemed immaterial.

20 Q. Did you and Mr. Dondero sign
21 management representation letters of this type
22 in each year in which you served as Highland's
23 CFO?

24 A. I -- I -- I will speak for myself.
25 I signed them. There may have been others that

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2 signed as well. I don't -- I don't recall.

3 Q. But to the best of your knowledge,
4 you, personally, signed a management
5 representation letter in connection with
6 Highland's audit each year that you served as
7 the CFO; correct?

8 A. I would say generally speaking,
9 Mr. Morris. I don't recall for every single
10 year, you know, generally, but I would want to
11 refer to all the rep letters and see who signed
12 them.

13 Q. Do you recall Highland having its
14 financial statements audited in any year during
15 the period that you were a CFO where you didn't
16 sign the management representation letter?

17 A. I don't recall. But, John, we're
18 going back five, six, seven, eight, nine,
19 decade. I don't -- I don't remember.

20 Q. I don't want to go back that many
21 decades, but I'm just asking you if you recall
22 that there was you didn't sign it?

23 A. I -- I -- I don't, but my memory
24 is -- again, I -- I -- I can't tell you what I
25 did in 2012. I mean, I think generally, yes,

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2 but I don't -- I don't know for sure, and I
3 would want to rely on the document.

4 Q. Let me ask the question a little bit
5 differently then.

6 Do you have any reason to believe
7 that Highland had its annual financial audit
8 and you did not sign a management
9 representation letter in connection with that
10 audit?

11 MS. DANDENEAU: Objection to form.

12 A. I don't believe it would, but,
13 again, I would want to -- I don't recall and I
14 would want to confirm it to -- to make, you
15 know, an affirmative -- to give an affirmative
16 answer.

17 Q. Do you know whether PwC required
18 management to sign management representation
19 letters?

20 MS. DANDENEAU: Objection to form.

21 A. Yes. I mean, it -- management
22 representation letters are signed by
23 management.

24 Q. Okay. And do you know -- do you
25 have any understanding as to why PwC requires

1 WATERHOUSE - 10-19-21

2 management to sign management representation
3 letters?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't know why PwC's -- what PwC's
7 specific practice is. I know generally what
8 management representation letters are.

9 Q. Okay. Do you personally -- I'm not
10 asking about PwC. I'm asking for you -- I'm
11 asking about you, do you have an understanding
12 as to why the auditor asks for management
13 representation letters?

14 A. Okay. So you're asking me in my
15 personal capacity, yes, I have a general
16 understanding of why.

17 Q. Can you give me the general
18 understanding that you have as to why
19 management representation letters are required?

20 A. They are -- they are required to --
21 they are -- they are one of the items required
22 in an audit to help verify completeness.

23 Q. Do you have any -- any other
24 understanding as to why management
25 representation letters are required?

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2 A. That is -- that is -- other than
3 what I said, it is -- it is -- it is required
4 so -- to ensure that the -- you know, there
5 is -- there is completeness in what is being
6 audited.

7 Q. Did you -- did you have a practice
8 whereby you and Mr. Dondero conferred about the
9 management representation letters before you
10 signed them?

11 A. No.

12 Q. Did you have a practice --
13 withdrawn.

14 Do you see just the next sentence
15 after the materiality, there is a sentence that
16 states: We confirm, to the best of our
17 knowledge and belief, as of June 3rd, 2019, the
18 date of your report, the following
19 representations made to you during your audit.

20 Do you see that sentence?

21 A. Yes.

22 Q. Okay. Did you understand when you
23 signed this letter that you were confirming the
24 representations that followed?

25 A. When I signed this management

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2 letter -- representation letter, yes.

3 Q. Okay. Did you discuss this letter
4 with Mr. Dondero before you signed it?

5 A. I don't recall.

6 Q. Do you recall if Mr. Dondero asked
7 you any questions before he signed the letter?

8 A. I don't recall.

9 Q. Do you recall if you asked
10 Mr. Dondero any questions before you signed
11 this letter?

12 A. I don't recall.

13 Q. Is it fair to say that Mr. Dondero
14 did not disclose to you the existence of the
15 agreement that we have -- as we've defined that
16 term prior to the time you signed this letter?

17 MS. DANDENEAU: Objection to form.

18 A. I don't think I understand the
19 question. So, again, you are saying, did
20 Mr. Dondero not disclose to me the existence of
21 this letter?

22 Q. No, I apologize.

23 Did Mr. Dondero disclose to you the
24 existence of the agreement prior to the time
25 you signed this letter on June 3rd, 2019?

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2 A. The agreement -- the agreement that
3 we talked about earlier?

4 Q. Correct.

5 A. Look, as I said earlier, the first
6 time I heard of this agreement was sometime
7 this year.

8 Q. Okay. Can we turn -- let's just
9 look at a couple of items on the list. If we
10 can go to page 33416. Do you see in Number 35
11 it talks about the proper recording or
12 disclosure in the financial statements of ND
13 relationships and transactions with related
14 parties.

15 Do you see that?

16 A. I do.

17 Q. As the CFO, do you have any
18 understanding as to whether Dugaboy is a
19 related party?

20 A. I don't recall.

21 Q. Do you know whether any of the
22 affiliates are related parties?

23 A. If -- if it was NexPoint, HCMFA,
24 HCMS, HCRE, yeah, if -- if that is the
25 affiliate definition, and there. In ASC 850 --

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2 again, I mean, I haven't looked at ASC 850 in
3 quite some time, but, you know, if -- if there
4 is a control language, you know, ASC 850, would
5 that -- that section in GAAP would -- would
6 pick up and define what are related parties.

7 So, you know, like I said, if -- one
8 of the four entities I just described, if -- if
9 they are in that control definition of ASC 850,
10 they would be picked up in 35D.

11 Q. Do you -- do you have any reason to
12 believe that they would be picked up in that
13 definition, based on your knowledge and
14 experience?

15 A. I -- I believe that entities
16 controlled under GAAP are -- are affiliates.

17 Q. Okay. Would Mr. Dondero also
18 qualify as a related party for purposes of
19 Section 35D, to the best of your knowledge?

20 A. Yeah, I don't -- I don't know. I
21 would think -- I would have to read the code
22 section to see if someone personally -- is it
23 talking about related parties. So, look, if
24 your own in control, yeah, I mean, I would have
25 to read the section.

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2 Q. To the best of your knowledge, was
3 the existence of the agreement ever disclosed
4 to PwC?

5 A. I'm not -- I'm not aware.

6 Q. Do you recall if the agreement was
7 ever disclosed in Highland's audited financial
8 statements?

9 A. I don't -- I don't remember if it
10 was in every Highland's audited financial
11 statements during my tenure. We would have to
12 read the financial statements to see what was
13 disclosed, but I'm not -- I mean, as I sit here
14 today, I'm not aware.

15 Q. That is all I'm asking for.

16 A. I'm not aware.

17 Q. Can we go to the next page, please,
18 and look at 36. 36 says, we have disclosed to
19 you the identity of the partnership's related
20 party relationships and all the related party
21 relationships and transactions of which we are
22 aware.

23 Do you see that?

24 A. Yes.

25 Q. To the best of your knowledge, as of

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2 June 3rd, 2019, did Highland disclose to PwC
3 the identity of the partnership's related
4 parties and all the related party relationships
5 and transactions of which it was aware?

6 A. I mean, I can speak for myself as
7 signer of this representation letter. I
8 disclosed what -- what, you know, what --
9 what -- what I knew. Sorry, look, yes, so I --
10 I disclosed what I knew.

11 Q. Okay. Can we go to page 419. Do
12 you see at the end there is a reference to
13 events that occurred since the end of the
14 fiscal year and the date of the letter?

15 A. Yes.

16 Q. And were you aware of that -- of
17 that provision of the management representation
18 letter before you signed the document?

19 A. Yes.

20 Q. Do you have an understanding as to
21 why PwC asked for that confirmation of that
22 particular part of the management
23 representation letter?

24 A. It is -- it is -- it is just -- it
25 is a typical audit request.

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2 Q. And do you understand -- do you have
3 an understanding that PwC wanted to know that
4 as of the date of the audit whether any
5 material changes had occurred since the end of
6 the fiscal year, using the definition of
7 materiality that is in this particular
8 management representation letter?

9 A. It -- it is -- it is -- it is a --
10 it is as described. It is just a poorly worded
11 question, so it is hard for me to say yes.

12 Q. If I asked you this, I apologize,
13 but did you ever learn when the agreement was
14 entered into?

15 A. I don't -- I don't -- like I said
16 before, I don't know or have any details of the
17 agreement.

18 Q. Okay. Did you ever ask anybody when
19 the agreement was entered into?

20 A. I did not.

21 Q. Let's look at the audited financial
22 statements. We will put up on the screen a
23 document that has been premarked as Exhibit 34.

24 (Exhibit 34 marked.)

25 MS. DANDENEAU: And again, if Ms. La

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2 Canty could please put that in the chat
3 room, that would be great.

4 MR. MORRIS: I will assure you we
5 will put every document in the chat room.

6 Q. Now, I'm just going to ask you
7 questions that are related to the provisions of
8 this report that concern the affiliate loans,
9 but again, Mr. Waterhouse, if there is any part
10 of the document that you need to see or that
11 you think you might need to see in order to
12 refresh your recollection to answer any of my
13 questions, will you let me know that?

14 A. Yes.

15 Q. Because this is a pretty lengthy
16 document, but do you see that the cover page
17 here is the Highland consolidated financial
18 statements for the period ending December 31st,
19 2018?

20 A. Yes.

21 Q. If we can go to -- I think it is the
22 next one, looking for PwC's signature line.

23 MS. CANTY: I'm sorry, John, did you
24 say something?

25 MR. MORRIS: Yes, can we turn the

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2 page. I think it is 215. Yes, stop right
3 there, just above -- I'm sorry, I want to
4 see just the date of the report.

5 Q. Okay. Do you see at the bottom of
6 that page there, Mr. Waterhouse,
7 PricewaterhouseCoopers has signed this audit
8 report?

9 A. Yes, I see their signature.

10 Q. Okay. And it is the dated same day
11 as your management representation letter; is
12 that right?

13 A. It is -- yes, it is the same day.

14 Q. Was that the practice to sign the
15 management representation letter on the same
16 day that the audit report was signed?

17 A. Yes, that is typical in every audit.

18 Q. Can we just scroll down to the
19 balance sheet on the next page.

20 Do you see that there is a line
21 there that says, Notes and Other Amounts Due
22 from Affiliates?

23 A. Yes.

24 Q. Does that line, to the best of your
25 knowledge, include the amounts that were due

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2 under the affiliate under the notes signed by
3 the affiliates and Mr. Dondero?

4 MR. RUKAVINA: Objection to the
5 extent that calls for a legal conclusion.

6 A. I mean, I would want to see the
7 detail and the build to this \$173,398,000, but,
8 yes, I mean, if -- if -- given what we
9 discussed before, you know, it -- it should
10 capture that.

11 Q. And -- and while you were the CFO of
12 Highland, were all notes held by Highland that
13 were issued by an affiliate or Mr. Dondero
14 carried as assets on Highland's balance sheets?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Object to form.

17 A. I don't -- I don't know how else
18 they would be carried.

19 Q. Okay. Can you think of any -- are
20 you aware of any promissory note issued by an
21 affiliate or Mr. Dondero that was not carried
22 on Highland's audited financial balance sheets?

23 A. I'm -- I'm -- I'm not aware.

24 Q. Okay. Are you aware of any category
25 of asset on Highland's balance sheet in which

1 WATERHOUSE - 10-19-21

2 any of the promissory notes issued by an
3 affiliate or Mr. Dondero would have been
4 included?

5 MS. DANDENEAU: Objection to form.

6 A. Sorry, am I aware of any asset of an
7 affiliate being included --

8 Q. That -- let me -- let me try again.

9 Do you see there is a number of
10 different assets that are described on this
11 balance sheet?

12 A. Yes.

13 Q. One of the assets that is described
14 is Notes and Other Amounts Due from Affiliates;
15 right?

16 A. Yes.

17 Q. And it is reasonable to conclude
18 that the notes from the affiliates and
19 Mr. Dondero are included in that line item;
20 right?

21 A. Yes, based on this description.
22 Again, I would want to see a build of this to
23 100 percent confirm, but based on the
24 description, the asset description, it is -- it
25 is likely.

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2 Now, does that mean absolute? I
3 don't know.

4 Q. Do you have any reason to believe
5 that the promissory notes would have been
6 carried on the balance sheet in a category
7 other than Notes and Other Amounts Due from
8 Affiliates?

9 A. If they were deemed -- no. If they
10 were deemed an affiliate, you know, under GAAP,
11 they should be carried in that line.
12 Otherwise, it would go into another line.

13 Q. Okay. And do you see the total
14 asset base as of December 31st, 2018, was
15 approximately \$1.04 billion?

16 A. Yes.

17 Q. Is my math correct that the Notes
18 and Other Amounts Due from Affiliates
19 constituted approximately 17 percent of
20 Highland's assets as of the end of 2018?

21 A. Well, so how are you defining
22 Highland?

23 Q. Highland Capital Management, L.P.,
24 the entity that this audit is subject to -- or
25 the subject of.

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2 A. On a consolidated or unconsolidated
3 basis?

4 Q. I'm looking at the balance sheet.
5 It is a consolidated balance sheet. Okay?

6 Does the Notes and Other Amounts Due
7 from Affiliates constitute approximately
8 17 percent of the total assets of Highland
9 Capital Management, L.P., on a consolidated
10 basis?

11 MS. DANDENEAU: Objection to form.

12 A. I don't have a calculator in front
13 of me but I will take your math, if you are
14 taking the 173 divided by the billion.

15 Q. Okay.

16 A. If that is accurate, yes. But,
17 again, on a consolidated basis.

18 Q. And on an unconsolidated basis the
19 percentage would be higher; correct?

20 A. I -- no. I don't know.

21 Q. Well, okay. That is fair.

22 MR. MORRIS: Can we turn to
23 page 241, please.

24 Q. Do you see that this is a section of
25 the audit report that is entitled Notes and

1 WATERHOUSE - 10-19-21

2 Other Amounts Due from Affiliates?

3 A. Sorry, I can't see the -- the --

4 Q. It is at the top.

5 A. Notes and Other Amounts Due from

6 Affiliates, yes, I see that. I don't -- I

7 don't have a page number, but I'm on a page

8 that says at the top: Notes and Other Amounts

9 Due from Affiliates.

10 Q. Okay. And that is the same title of

11 the line item on the balance sheet that we just

12 looked at; right? Notes and Other Amounts Due

13 from Affiliates?

14 A. Yes.

15 Q. And is it your understanding, based

16 on your experience and knowledge as the CFO,

17 that this is the section of the narrative that

18 ties into the line item that we just looked at?

19 A. Yes.

20 Q. And is this section of the audit

21 report intended to describe and disclose all of

22 the material facts concerning the Notes and

23 Other Amounts Due from Affiliates?

24 MS. DANDENEAU: Objection, form.

25 A. This -- these notes -- these notes

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2 of the financial statements are -- the purpose
3 is to disclose any material items in relation
4 to that balance sheet line item.

5 Q. Okay. And all of the information,
6 to the best of your knowledge, that is set
7 forth in this section of the audit report was
8 provided by Highland; correct?

9 A. Yes, it would have been provided by
10 the corporate accounting team.

11 Q. Okay. And the corporate accounting
12 team, did that team report to you in the
13 organizational structure?

14 A. Yes.

15 Q. And did you have any concerns about
16 the controls that were in place to make sure
17 that the information provided with respect to
18 Notes and Other Amounts Due from Affiliates was
19 accurate and complete?

20 MS. DANDENEAU: Objection to form.

21 A. Not that I recall.

22 Q. Okay. Do you recall ever being
23 concerned that any portion of the Notes and
24 Other Amounts Due from Affiliates in any audit
25 report was inaccurate, incomplete, or not

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2 reliable?

3 A. I didn't -- I had concerns about,
4 you know, like I talked about before, of there
5 were -- there were potentially issues in the
6 control environment. But as far as it relates
7 to the audited financial statements, any -- the
8 team would work with the auditors to disclose
9 all -- all notes in Highland's possession.

10 And any -- any notes that were
11 deemed material by the auditor, right, these
12 were disclosed in these -- in this section, you
13 know, in -- in the notes to the consolidated
14 financial statements as you presented.

15 Q. Do you recall ever having a
16 conversation with anybody at any time
17 concerning the accuracy of the section of audit
18 reports that relates to Notes and Other Amounts
19 Due from Affiliates?

20 MS. DANDENEAU: Objection to form.

21 A. You know, as -- as -- I didn't have
22 direct conversations with
23 PricewaterhouseCoopers as I had, you know --
24 I -- I had the team that managed this.

25 Again, I wasn't anywhere chose to

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2 being the point person of this audit. And I
3 can't recall, you know, when -- you know, I
4 don't even know if I was ever the point person
5 during my tenure as CFO.

6 I don't know if PwC had any concerns
7 when they were performing those audit
8 procedures. They may have and they may have --
9 and it may not have been communicated to me. I
10 don't know.

11 MR. MORRIS: All right. I move to
12 strike.

13 Q. And I'm going to ask you to listen
14 carefully to my question.

15 Did you -- do you recall ever having
16 a conversation with anybody at any time
17 concerning the accuracy of the reporting
18 provided in the audited financial statement on
19 the topic of Notes and Other Amounts Due?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall for this, but that
22 doesn't mean that it didn't exist.

23 Q. Okay. But you have no reason to
24 believe, as you sit here right now, that you
25 ever discussed with anybody concerns over the

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2 accuracy of the section of the audit reports
3 called Notes and Other Amounts Due from
4 Affiliates; correct?

5 MS. DANDENEAU: Object to the form.

6 MS. DEITSCH-PEREZ: Objection to
7 form.

8 A. I don't recall having any
9 conversations. But, again, I mean, this is --
10 this is two years ago.

11 Q. I'm just asking for your
12 recollection, sir.

13 A. Yes.

14 Q. If you don't recall, this will --

15 A. Yeah.

16 Q. (Overspeak) -- if you don't
17 recall --

18 A. Yeah, I don't -- I don't recall.

19 Q. Do you know who was responsible for
20 drafting the audit report?

21 A. Are you asking the actual Highland
22 employee responsible? I mean, it was
23 Highland's responsibility, so, I mean, that
24 is --

25 Q. Right.

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2 A. -- Highland's responsibility.

3 Highland's responsibility.

4 Q. Who, at Highland, was responsible
5 for drafting this section of the audit report?

6 A. I -- I don't know the answer to
7 that. Again, there was a team who worked on
8 this. And I don't know, you know, whether it
9 was the staff or the manager.

10 Again, this is where I let the teams
11 manage. And, you know, there may be a
12 corporate accountant who worked on this. I
13 just -- you know, I wasn't part of that process
14 to give that person experience. I don't know.

15 Q. Do you recall having any
16 communications with anybody at any time
17 concerning this section of the report?

18 A. Yeah, I don't recall.

19 Q. Do you recall whether you ever told
20 anybody at any time that any aspect of this
21 section of the report was inaccurate or
22 incomplete?

23 A. I don't recall.

24 Q. As you sit here today, do you have
25 any reason to believe that this section of the

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2 audit report is incomplete or inaccurate in any
3 way?

4 And I'm happy to give you a moment
5 to -- to look at it, if you would like.

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Same.

8 A. I mean, I would have to look at -- I
9 would have to look at the bill to the note
10 schedule to make sure I know you presented me
11 with materiality, but again, there might be a
12 note as of 12/31/18 that somehow was -- was
13 under materiality not disclosed. I don't -- I
14 don't know. I would need more information.

15 Q. Okay. But without more information,
16 you have no reason to believe anything this
17 section is inaccurate; correct?

18 MS. DANDENEAU: Objection to form.

19 A. I don't. I mean, you know, this was
20 part of the audit.

21 Q. Thank you. Now, you will see if we
22 could scroll just a little bit more that each
23 of the first five paragraphs concerns
24 specifically the four affiliates that we've
25 been discussing and Mr. Dondero.

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2 MR. MORRIS: If we could go the
3 other way, La Asia. We don't need Okada.
4 We're going to have to thread the needle.
5 Okay. Good, perfect.

6 Q. Do you see those five paragraphs
7 certain the four affiliates and Mr. Dondero as
8 we've been referring to today?

9 A. Yes.

10 Q. Okay. And do you see at the end of
11 every paragraph it states, quote: A fair value
12 of a partnership's outstanding notes receivable
13 approximates the carrying value of the notes
14 receivable?

15 A. Yes, I see that.

16 Q. Do you have an understanding of what
17 that means?

18 A. Yes.

19 Q. What is your understanding of that
20 sentence?

21 A. It is the -- again, the -- the fair
22 value, right, which is -- which is what the --
23 what Highland could sell that asset for. This
24 statement is comparing the fair value of the
25 notes to the carrying value, so the carrying

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2 value is the line item that you showed me
3 earlier that is in Notes and Other Amounts Due
4 from Affiliates.

5 Q. Okay. Is another way to say this is
6 that the fair market value of the notes equals
7 the principal amount and -- withdrawn.

8 Is the fair way to interpret this
9 that the fair market value of the notes equals
10 all remaining unpaid principal and interest due
11 under the notes?

12 MS. DANDENEAU: Object to the form.

13 MS. DEITSCH-PEREZ: Objection, form.

14 A. I don't know the answer to that,
15 because I don't recall where -- where any --
16 where -- in what line item was the interest
17 component reported.

18 Q. All right. Well, if we look in this
19 audit report, you will see in the middle of the
20 first paragraph, for example, it states that as
21 of December 31st, 2018, total interest and
22 principal due on outstanding promissory notes
23 was approximately \$5.3 million.

24 Do you see that?

25 A. I do.

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2 Q. Is that the carrying value or the
3 fair value?

4 A. That would be the carrying value --

5 Q. And is the last --

6 A. -- in my opinion.

7 Q. Okay. And it is in your opinion as
8 the chief financial officer of Highland during
9 the period of time that you described; right?
10 It is an educated opinion?

11 A. I'm reading this at face value. I'm
12 taking that as that is carrying value.

13 Q. Okay. And does the last sentence
14 say that the carrying value is roughly
15 approximate to the fair market value?

16 MS. DANDENEAU: Objection to form.

17 MS. DEITSCH-PEREZ: Objection, form.

18 A. Again, this note to the financial
19 statement is specific to notes and other
20 amounts due from affiliates.

21 Q. Correct.

22 A. If the interest component is
23 reported elsewhere on the balance sheet, you
24 know, it -- it -- it could be off. Again, I
25 don't have the detail. I don't know, but yes,

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2 look, I mean, if you -- I mean, if you are
3 saying the 5.3 million is in the notes and
4 other amounts due from affiliates, then the
5 last statement is saying the fair value
6 approximates 5.3 million. That is what that
7 last sentence is saying.

8 Q. Do you see in the middle of the
9 first paragraph -- not in the middle, the next
10 to last sentence there is a statement that the
11 partnership will not demand payment on amounts
12 that exceed HCMFA's excess cash availability
13 prior to May 31st, 2021.

14 Do you see that?

15 A. I do.

16 Q. Do you know when Highland agreed not
17 to demand payment as described in that
18 sentence?

19 A. I don't know specifically.

20 Q. Do you know why Highland agreed not
21 to demand payment on HCMFA's notes until May
22 2021?

23 A. Yes.

24 Q. Why was that decision made?

25 A. You know, well, it -- it -- that

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2 decision was made as to not put HCMFA into a
3 position where it didn't have sufficient assets
4 to pay for the demand note.

5 Q. And at the time the agreement was
6 entered into, pursuant to which the partnership
7 wouldn't demand payment, did HCMFA have
8 insufficient assets to satisfy the notes if a
9 demand had been made?

10 MS. DANDENEAU: Objection to form.

11 A. I don't have HCMFA's financial
12 statements in front of me as of 12/31/18.

13 Q. Was there a concern that HCMFA would
14 be unable to satisfy its demands under the
15 notes if demand was made?

16 MS. DANDENEAU: Objection to form.

17 A. Well, there is -- I don't recall --
18 I mean, there is something, right, in place to
19 basically not demand payment until May 31, 2021
20 as detailed here.

21 Q. And who made the decision to enter
22 into -- who made the decision on behalf of
23 Highland not to demand payment until May 31st,
24 2021?

25 A. I'm trying to remember. I don't

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2 remember exactly -- I don't remember if it was
3 myself or -- or Jim Dondero who -- who -- there
4 was -- there was something signed, from what I
5 recall, that -- that -- that backed up this
6 line item in the -- in the notes I'm -- look,
7 I'm, I'm --

8 Q. We will get to that.

9 A. You --

10 Q. I'm just --

11 A. You have -- I mean --

12 Q. We're going to give that to you.

13 I'm going to give that to you.

14 A. You -- you -- you have all the
15 documents. I don't have the documents, and
16 that is what makes it so hard. I don't have
17 any documents to prepare for this deposition;
18 right? You have all -- I don't -- I don't -- I
19 don't remember, but, you know, again, it would
20 probably be myself or Jim.

21 Q. Do you know if Highland received
22 anything in return for its agreement not to
23 make a demand for two years?

24 A. I don't -- I don't think it referred
25 anything.

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2 Q. And did you and Mr. Dondero discuss
3 HCMFA's ability to satisfy the notes if a
4 demand was made at the time this agreement was
5 entered into?

6 MS. DANDENEAU: Objection to form.

7 A. I don't -- I don't -- I don't recall
8 having a specific conversation, if I did, or --
9 or David Klos.

10 Q. Okay. I'm just asking if you recall
11 any conversations that you had.

12 A. I don't recall.

13 Q. Okay. Do you know why Highland
14 loaned the money to HCMFA that is the subject
15 of the notes described in this paragraph?

16 A. I don't remember specifically why
17 5.3 million was loaned. I mean, I -- it would
18 have to be put in the context.

19 Q. Do you have any recollection at all
20 as to why Highland ever loaned any money to
21 HCMFA?

22 A. Yes.

23 MS. DANDENEAU: Objection to form.

24 Q. What do you remember about that?

25 A. There was a Highland Global

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2 Allocation Fund, which was a -- a fund managed
3 by Highland Capital Management Fund Advisors.
4 There was a -- we -- I'm just telling you,
5 there was -- there was -- there was a -- a
6 ultimately a NAV error found in this fund while
7 it was an open-ended fund and, you know, there
8 were amounts owed by the advisor in -- in
9 relation to that NAV error.

10 There were also, for the same fund,
11 that same fund was ongoing an
12 open-end-to-close-end conversion, and as part
13 of that proposal, shareholders who voted for
14 the conversion received compensation from the
15 advisor.

16 Q. All right. Now, the events that
17 you're describing occurred in the spring of
18 2019; right?

19 A. These started back -- I think, I
20 mean --

21 Q. I apologize.

22 A. -- that -- I mean, the answer to
23 that is no.

24 Q. I apologize, the loans that were
25 made in connection with the events that you're

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2 describing occurred in May 2019; right?

3 MR. RUKAVINA: Objection to the
4 extent that calls for a legal conclusion.

5 A. I don't recall specifically what
6 amounts of money were moved when, for what
7 purpose.

8 Q. Okay. Fair enough. Going to the
9 next paragraph, do you recall that NexPoint
10 Advisors had obtained a number of loans from
11 Highland, and they rolled up those loans into
12 one note in approximately 2017?

13 A. This is for NexPoint Advisors?

14 Q. Yes.

15 A. I -- I mean, I don't -- I don't
16 recall the NexPoint Advisors loan being a
17 roll-up loan, but --

18 Q. Do you know why?

19 A. But, look, if you have documents
20 that show -- I mean, look, I just don't recall.

21 Q. Okay. That is fair. Do you know
22 why -- do you have any recollection as to why
23 Highland loaned money to NexPoint?

24 A. Yes.

25 Q. Why did High -- why do you recall --

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2 what is the reason you recall Highland lending
3 money to NexPoint?

4 A. I mean, I was just -- I just -- I
5 just recall. I mean, I just -- I don't
6 remember why.

7 Q. I understand. And I'm asking you if
8 you recall --

9 A. Oh, why -- I thought you say --
10 NexPoint Advisors was launching a fund which
11 is -- I believe that the legal name is NexPoint
12 Capital, Inc. And it -- it provided a
13 co-invest into that fund.

14 And, from what I remember, the --
15 the -- that NexPoint borrowed money from
16 Highland at the time to make that co-invest.

17 Q. So this was an investment that
18 NexPoint was required to make; is that right?

19 MS. DANDENEAU: Objection to form.

20 A. I don't know if it was required to
21 make, I don't recall that, or if it just made
22 it.

23 Q. Okay. But your recollection is that
24 NexPoint made an investment and they borrowed
25 money from Highland to finance the investment.

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2 Do I have that right?

3 A. Yes.

4 Q. How about HCRE? Do you know why
5 HCRE borrowed money from Highland?

6 A. I don't remember specifically.

7 Q. Do you remember generally?

8 A. Generally, yeah -- I mean, yes.

9 Q. Can you tell me your general
10 recollection as to why Highland loaned money to
11 HCRE?

12 A. For -- for -- for investment
13 purposes.

14 Q. So HCRE made the investment and it
15 obtained a loan, or loans, from Highland in
16 order to finance that investment or those
17 investments.

18 Do I have that right?

19 A. I mean, I -- you know, generally.

20 Q. Okay. How about Highland Management
21 Services, Inc.?

22 Do you have any recollection as to
23 why HCMS borrowed money from Highland?

24 A. Generally.

25 Q. What is your general recollection as

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2 to why HCMS borrowed money from Highland?

3 A. For -- for investment purposes.

4 Q. So it is the same thing, HCMS wanted
5 to make investments and it borrowed money from
6 Highland in order to finance those investments;
7 is that right?

8 A. I mean, yes, generally. I mean, I
9 can't -- I don't -- on the services, there --
10 there are several loans in these schedules.
11 You know, I can't remember why every single one
12 of these were made, but I would say, yeah, I
13 mean, generally.

14 Q. Okay. I appreciate that.

15 MR. MORRIS: Let's go to the page
16 with Bates No. 251. La Asia, are you
17 there?

18 MS. CANTY: Sorry, John. It went
19 out for a minute. Can you say that again.
20 I don't know what is going on.

21 MR. MORRIS: The page with Bates
22 No. 251, can we go to that.

23 MS. CANTY: Yes, sorry.

24 MR. MORRIS: Keep going to the
25 bottom. Yeah, there you go.

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2 Q. Do you see, Mr. Waterhouse, that
3 there is a section there called Subsequent
4 Events?

5 A. I do.

6 Q. And does this relate to the last
7 sentence above the signature line on the
8 management representation letter that we talked
9 about earlier where you made the representation
10 that you disclosed subsequent events?

11 A. I mean, it relates to it, but not in
12 its entirety.

13 Q. Okay.

14 MR. MORRIS: If we can scroll up to
15 capture the entirety of this section right
16 here.

17 Q. And what do you mean by that, sir?

18 MR. MORRIS: Yeah, right there.
19 Perfect.

20 A. There are -- there are different
21 subsequent events in -- under GAAP. So there
22 are -- and -- and -- so what we see in the
23 notes to the financial statements are one type
24 of subevent.

25 Q. Okay. And -- and would the type of

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2 subsequent event relating to affiliate loans be
3 captured in this section if they were -- if
4 they were made after the end of the fiscal year
5 and prior to the issuance of the audit report?

6 A. Yes, if they were deemed material or
7 disclosable.

8 Q. Okay. I appreciate that.

9 Do you see the next to the last
10 entry there? It says, Over the course of 2019
11 through the report date, HCMFA issued
12 promissory notes to the partnership in the
13 aggregate amount of \$7.4 million?

14 A. Yes.

15 Q. And does that refresh your
16 recollection that those are the notes that
17 related to the NAV error that you mentioned
18 earlier?

19 A. I don't -- I don't remember the
20 exact. Again, there are -- I mentioned two
21 line items; right?

22 Q. Yes.

23 A. I mean, it was the GAAP conversion
24 process plus the -- the NAV error. I don't
25 have the details. I don't recall specifically

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2 if -- you know, what -- if that 7.4 million was
3 solely attributable to the NAV error.

4 Q. Okay. But there is no question that
5 Highland told PricewaterhouseCoopers that over
6 the course of 2019 HCMFA issued promissory
7 notes to the partnership in the aggregate
8 amount of \$7.4 million; correct?

9 A. In the course of the audit, we would
10 have produced all promissory notes in our
11 possession, including the ones that are
12 detailed here.

13 Q. Do you recall that you signed the
14 two promissory notes that are referenced in
15 that provision?

16 MS. DANDENEAU: Objection to form.

17 A. I didn't recall initially but I've
18 been reminded.

19 Q. Okay. And -- and do you recall that
20 those notes are dated May 2nd and May 3rd,
21 2019?

22 A. Yes.

23 Q. So that was just a month before the
24 audit was completed; correct?

25 A. Yes. I think we had a June 3rd

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2 date, right, if -- if my memory serves me
3 right.

4 Q. Yes, I will represent to you that
5 your memory is accurate in that regard.

6 Did anybody ever instruct you as the
7 CFO to correct this statement that we're
8 looking at in subsequent events?

9 A. So let me understand. You're saying
10 when I was CFO at Highland Capital did anyone
11 ever ask me to correct the -- over the course
12 of 2019 through the report date HCMFA issued
13 promissory notes, this statement?

14 Q. Right.

15 A. Not that I'm aware.

16 Q. While you were the CFO of Highland,
17 did anybody ever tell you that that sentence
18 was wrong?

19 A. Not that I'm aware.

20 Q. Highland -- withdrawn.

21 HCMFA disclosed these notes in its
22 own audited financial statements; right?

23 MR. RUKAVINA: Objection, form.

24 A. I assume that these would be
25 material -- if these are material financial

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2 statements, yes, they -- they -- they should be
3 and they were likely disclosed.

4 Q. Now, there is no statement
5 concerning the 2019 notes about the forbearance
6 that we looked at in the affiliated note
7 section of the report; right?

8 MS. DANDENEAU: Objection to form.

9 Q. I'll withdraw. That was bad.

10 Do you recall when we were looking
11 at the paragraph concerning HCMFA earlier it
12 had that disclosure about the agreement whereby
13 Highland wouldn't ask for demand on the -- on
14 the HCMFA notes?

15 A. Yes.

16 Q. That forbearance disclosure is not
17 made with respect to the 2019 notes; right?

18 A. Not -- look, not that I can recall,
19 unless -- unless it was done at a subsequent
20 day.

21 Q. Right. And it is not in the
22 subsequent event section that we're looking at
23 right now where the 2019 notes are described;
24 right?

25 A. Right. But this is through

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2 June 3rd. It could have been done on June 4th.

3 I don't -- I don't -- I don't recall.

4 Q. Okay.

5 MR. MORRIS: Can we put up on the
6 screen the HCMFA audit report. And while
7 we're --

8 MS. DANDENEAU: What exhibit is
9 this?

10 MR. MORRIS: La Asia, what number is
11 that?

12 MS. CANTY: 45.

13 MR. MORRIS: So this will be marked
14 as Exhibit 45.

15 (Exhibit 45 marked.)

16 MS. CANTY: Yeah, and I will put it
17 in the chat.

18 MS. DANDENEAU: Thank you.

19 Q. Okay. All right. Do you see that
20 this is the consolidated financial statements
21 for HCMFA for the period ending 12/31/18?

22 A. Yes.

23 Q. As the treasurer of HCMFA at the
24 time, did you have to sign a management
25 representation letter similar to the one that

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2 we looked at earlier for Highland?

3 A. I would imagine I would have been
4 asked to. I don't recall if I did.

5 Q. Do you recall ever being asked by an
6 auditor to sign a management representation
7 letter and then not doing it?

8 A. No.

9 MR. MORRIS: Can we just scroll down
10 again. I just want to see the date of the
11 document.

12 A. I mean, let me -- you know, there
13 are different versions to management
14 representation letters I will qualify.

15 Yes, there are certain -- from time
16 to time auditors can make representations
17 that -- in the rep letter that is being
18 proposed that are inaccurate or out of scope or
19 things like that and they've asked for
20 signature.

21 In that context, yes. I mean, you
22 know -- I mean, if I have been asked to sign
23 and make those representations and those
24 representations are invalid, yes, I would not,
25 I mean, I -- I wouldn't sign that.

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2 Q. Okay. PricewaterhouseCoopers served
3 as HCMFA's outside auditors as well; correct?

4 A. Yes.

5 Q. Do you see that this audit report is
6 signed on June 3rd, 2019, just like the
7 Highland audit report?

8 A. That is correct.

9 Q. And did the process of -- of
10 preparing HCMFA's audit report, was that the
11 same process that Highland followed when it did
12 its audit report at this time?

13 A. I mean, it is a different entity.
14 There are different assets. You know, it --
15 it -- it is -- as you saw, Highland's
16 financials are on a consolidated basis. This
17 is different, so it is under the same control
18 environment and team.

19 Q. Okay. I appreciate that. So the
20 same control environment and team participated
21 in the preparation of the audit for Highland
22 and for HCMFA at around the same time; correct?

23 A. Yes.

24 MR. MORRIS: Can we go to page 17 of
25 the report. I don't have the Bates number.

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2 Q. Okay. Do you see that just like
3 Highland's audited financial report, HCMFA's
4 audited financial report also has a section
5 related to subsequent events?

6 A. Yes.

7 Q. And am I reading this correctly that
8 just as Highland had done, HCMFA disclosed in
9 its audited financial report a subsequent event
10 that related to the issuance of promissory
11 notes to Highland in the aggregate amount of
12 \$7.4 million in 2019?

13 A. That is what I see in the report.

14 Q. And you were the treasurer of HCMFA
15 at the time; right?

16 A. Yes, to the best of my knowledge.

17 Q. And did anybody ever tell you prior
18 to the time of the issuance of this audit
19 report that that sentence relating to HCMFA's
20 2019 notes was inaccurate or wrong in any way?

21 A. Not that I recall.

22 Q. As you sit here right now, has
23 anybody ever told you that that sentence is
24 inaccurate or wrong in any way?

25 A. Not that I recall.

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2 Q. I apologize if I asked you this
3 already, but has anybody ever told you at any
4 time that you are not authorized to sign the
5 promissory notes that are the subject of the
6 sentence we're looking at?

7 A. Not that I recall.

8 Q. Did anybody ever tell you at any
9 time that you had made a mistake when you
10 signed the promissory notes that are the
11 subject of this sentence?

12 A. Say that again. Did anyone ever say
13 that I made a mistake?

14 Q. Let me ask the question again.
15 Did anybody ever tell you at any
16 time that you made a mistake when you signed
17 the two promissory notes in Highland's favor on
18 behalf of HCMFA in 2019?

19 A. Not that I recall.

20 MR. MORRIS: Let's just look at the
21 promissory notes quickly. Can we please
22 put up Document Number 1, and so this is in
23 the pile that y'all have. We'll just go
24 for a few more minutes and we can take our
25 lunch break.

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2 Q. All right. So I don't know if you
3 have seen this before, sir. Do you see that
4 this is a complaint against HCMFA?

5 A. Yes, I am looking at it on the
6 screen.

7 Q. Okay. And have you ever seen this
8 document before?

9 A. I went through some of these
10 documents with my counsel here yesterday.

11 MR. MORRIS: All right. Can we go
12 to Exhibit 1 of this document.

13 Q. Do you see Exhibit 1 is a
14 \$2.4 million promissory note back in 2019?

15 A. Yeah, I found it in the book. Yes,
16 I have it here in front of me.

17 Q. And this is a demand note, right, if
18 you look at Paragraph 2?

19 A. Yes.

20 Q. And this is a note where the maker
21 is HCMFA, and Highland is the payee; right?

22 A. Yes.

23 MR. MORRIS: And if we can scroll
24 down, can we just see Mr. Waterhouse's
25 signature.

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2 Q. Is that your signature, sir?

3 A. Yes, it is.

4 Q. And did you sign this document on or
5 around May 2nd, 2019?

6 A. I don't recall specifically signing
7 this, but this is my signature.

8 Q. Okay. And do you recall that
9 Highland transferred \$2.4 million to HCMFA at
10 or around the time you signed this document?

11 A. I don't recall specifically. I
12 would want to, as I sit here today, go back and
13 confirm that, but again, presumably that --
14 that -- that did happen.

15 Q. You wouldn't have signed this
16 document if you didn't believe that HCMFA
17 either received or was going to receive
18 \$2.4 million from Highland; is that fair?

19 A. I mean, it -- if -- if -- if there
20 wasn't a transfer of value, yeah, I mean, you
21 know, I would have no reason to -- to sign a
22 note.

23 Q. And -- and Highland wouldn't have
24 given this note to PricewaterhouseCoopers if --
25 withdrawn.

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2 HCMFA wouldn't have given this note
3 to PricewaterhouseCoopers if it hadn't received
4 the principal value of -- of the note in the
5 form of a loan; correct?

6 MR. RUKAVINA: Objection, legal
7 conclusion, speculation and form.

8 A. Again, we -- what we provided to PwC
9 were, as part of the audit, any promissory
10 notes executed and outstanding. You know, as a
11 part of the audit, they, you know, they -- they
12 have copies of all the bank statements,
13 things -- things of that sort.

14 MR. MORRIS: Okay. Can we go to
15 Exhibit 2.

16 (Exhibit 2 marked.)

17 Q. Do you see that this is a promissory
18 note dated May 3rd, 2019 in the amount of
19 \$5 million?

20 A. Yes.

21 Q. Do you believe this is also a demand
22 note if you look at Paragraph 2?

23 A. Yes.

24 Q. And do you see that HCMFA is the
25 maker, and Highland is the payee?

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2 A. Yes.

3 Q. And if we go to the bottom, can we
4 just confirm that that is your signature?

5 A. Yes.

6 Q. And together these notes are the
7 notes that are referred to both in Highland and
8 HCMFA's audited financial reports in the
9 subsequent event sections; correct?

10 MS. DANDENEAU: Objection to form.

11 A. They -- they -- they totaled
12 \$7.4 million, so presumably, yes.

13 Q. Okay. And you were authorized to
14 sign these two notes; correct?

15 MR. RUKAVINA: Objection, legal
16 conclusion.

17 A. Yeah. I mean, I'm -- I was the
18 officer of -- of HCMFA. You know, I -- I'm not
19 the legal expert on -- on what that -- what
20 that confers to me or what it doesn't. I mean,
21 that is my signature on the notes.

22 Q. And you believed you were authorized
23 to sign the notes; is that fair?

24 A. I signed a lot of documents in my
25 capacity, just because it is operational in

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2 nature. So, you know, to me this was just
3 another document, to be perfectly honest.

4 Q. Sir, would you have signed
5 promissory notes with the principal amount of
6 \$7.4 million if you didn't believe you were
7 authorized to do so?

8 MS. DANDENEAU: Objection to form.

9 Q. Are you frozen?

10 A. No. I'm just -- you know, it is --
11 you know, again, I typically don't sign
12 promissory notes, and I don't recall why I
13 signed these, but -- you know, but I did.

14 Q. All right. So listen carefully to
15 my question. Would you have ever signed
16 promissory notes with a face amount of
17 \$7.4 million without believing that you were
18 authorized to do so?

19 A. No. I mean, I'm -- I'm putting my
20 signature on there, so no.

21 Q. Okay. And would you have signed two
22 promissory notes obligating HCMFA to pay
23 Highland \$7.4 million without Mr. Dondero's
24 prior knowledge and approval?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. You know, from -- from what I recall
4 around these notes, you know, I don't recall
5 specifically Mr. -- Mr. Dondero saying to -- to
6 make this a loan.

7 So my conversation with Mr. Dondero
8 around the culmination of the NAV error as
9 related to TerreStar which was a -- a -- I
10 think it was a year and a half process. I
11 don't know, it was a multi-month process, very
12 laborious, very difficult.

13 When we got to the end, I had a
14 conversation with Mr. Dondero on where to, you
15 know, basically get the funds to reimburse the
16 fund, and I recall him saying, get the money
17 from Highland.

18 Q. And so he told you to get the money
19 from Highland; is that right?

20 A. That is what I recall -- in my
21 conversation with him, that is -- that is what
22 I can recall.

23 Q. Do you know who drafted these notes?

24 A. I don't.

25 Q. Did you ask somebody to draft the

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2 notes?

3 A. I didn't ask -- I don't specifically
4 ask people to draft notes really. I mean,
5 again, you know, the legal group at Highland is
6 responsible and has always been responsible for
7 drafting promissory notes.

8 Q. So based on your -- based on the
9 practice, you believe that somebody from the
10 Highland's legal department would have drafted
11 these notes. Do I have that right?

12 MS. DEITSCH-PEREZ: Object to the
13 form. John, I also asked you for the Word
14 versions of these notes so we could look at
15 the properties, and you have not provided
16 them. Are you intending to?

17 MR. MORRIS: No.

18 Q. Can you answer my question, sir?

19 A. Again, I --

20 MS. DANDENEAU: Do you want him to
21 repeat it?

22 A. Yeah, why don't you repeat it?

23 Q. Sure. Mr. Waterhouse, based on the
24 practice that you have described in your
25 understanding, do you believe that these notes

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2 would have been drafted by somebody in the
3 legal department?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Yes.

7 Q. Okay. And do you know who would
8 have instructed -- do you have any knowledge as
9 to who would have instructed the legal
10 department to draft these notes?

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 A. It was whoever was working -- I
14 mean, it was likely someone on the team. I
15 mean, I don't remember exactly on every note or
16 every document, but, again, a lot of these
17 things of this nature -- they're operational in
18 nature -- were handled by the team.

19 The team knows to -- I mean, we
20 don't draft documents. We're not lawyers.
21 We're not attorneys. It is not what I do or
22 accountants do.

23 So they are always instructed to go
24 and -- and go to the legal team to get
25 documents like this drafted. Also, when you go

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2 to the legal team, the -- you know, we always
3 loop in compliance. And compliance -- when you
4 go to the legal team, compliance is part of
5 legal team. They're made aware of -- of -- of
6 these types of transactions.

7 Q. And do you believe that you had
8 the -- withdrawn.

9 Did you ever tell Mr. Dondero --
10 (inaudible) -- did you see those?

11 A. Sorry.

12 MS. DEITSCH-PEREZ: I did not hear
13 the end of that question.

14 Q. Did you ever tell Mr. Dondero that
15 you signed these two notes?

16 A. I don't recall ever -- no, I don't
17 recall having a conversation with him.

18 Q. Did you ever discuss these two notes
19 with him at any time?

20 A. The conversation, I recall, was what
21 I described earlier. And that is the only time
22 I recall ever discussing this.

23 Q. Okay. But the corporate accounting
24 group had a copy of this -- of these two notes.
25 And pursuant to the audit process, the

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2 corporate accounting group gave the two notes
3 to PricewaterhouseCoopers in connection with
4 the audit; correct?

5 MS. DANDENEAU: Objection to form.

6 A. Yes. I mean, that is -- yeah, I
7 mean, they -- unless the legal team can also
8 retain copies of items like this. I mean, I
9 don't know everything that they would retain as
10 well.

11 The legal team would also, if they
12 had documents as part of audits, turn that over
13 to the auditors as well. So it could have been
14 the corporate accounting team. It could be
15 someone on the legal team.

16 Q. All right. So you didn't -- you
17 didn't draft this note; right?

18 A. I -- I -- I did not.

19 Q. But somebody at Highland did; is
20 that fair?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 A. I don't know. I mean, we can go to
24 the legal team. I don't -- I'm not sitting
25 behind someone in legal. Maybe they went to

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2 outside counsel. I have no idea.

3 Q. Did you have any reason to believe
4 you weren't authorized to sign this note,
5 either of these two notes?

6 A. I think I have already answered that
7 question.

8 Q. Okay. You didn't give these notes
9 to PricewaterhouseCoopers; correct?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall giving these to
12 PricewaterhouseCoopers.

13 Q. And in the practice that you have
14 described, somebody in the corporate accounting
15 group would have given these two notes to
16 PricewaterhouseCoopers; correct?

17 MS. DANDENEAU: Objection to form.

18 A. I think I've answered that. I said
19 either the corporate accounting team or maybe
20 the legal team.

21 MR. MORRIS: Okay. Why don't we
22 take our lunch break here.

23 VIDEOGRAPHER: We're going off the
24 record at 1:04 p.m.

25 (Recess taken 1:04 p.m. to 1:49 p.m.)

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2 VIDEOGRAPHER: We are back on the
3 record at 1:49 p.m.

4 Q. Mr. Waterhouse, did you speak with
5 anybody during the break about the substance of
6 this deposition?

7 A. I spoke to -- to Deb and Michelle.

8 Q. About the substance of the
9 deposition?

10 A. Yes.

11 Q. Can you tell me what you talked
12 about?

13 MS. DANDENEAU: No. We object on
14 the basis of privilege.

15 Q. Okay. You are going to follow your
16 counsel's objection here?

17 A. Yes.

18 Q. Okay.

19 MR. MORRIS: Can we put up on the
20 screen Exhibit 35.

21 (Exhibit 35 marked.)

22 Q. Are you able to see that document,
23 sir?

24 A. Yes.

25 Q. Have you ever seen an incumbency

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2 certificate before?

3 A. I have.

4 Q. Do you have a general understanding
5 of what an incumbency certificate is?

6 A. I have a general understanding.

7 Q. What is your general understanding?

8 A. You know, those -- my general
9 understanding is that the incumbency
10 certificate basically lists folks that can --
11 are like authorized signers.

12 Q. Okay. And do you see that this is
13 an incumbency certificate for Highland Capital
14 Management Fund Advisors, L.P.?

15 A. Yes.

16 Q. Okay. And if we could scroll down
17 just a little bit, do you see that it's dated
18 effective as of April 11th, 2019?

19 A. Yes, I see that.

20 Q. Okay. And is that your signature in
21 the middle of the signature block?

22 A. Yes, it is.

23 Q. And by signing it, did you accept
24 appointment as the treasurer of HCMFA effective
25 as of April 11th, 2019?

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2 A. Again, I'm not the legal -- I don't
3 know if this makes me the treasurer or the
4 appointment. I don't know -- I don't know
5 that, so I don't -- I don't know if that
6 document -- again, I think -- again, I'm not
7 the legal expert. I think isn't there --
8 aren't there other legal documents that detail
9 who the officers are that could be incorporated
10 or things like that? Again, I don't want to
11 play armchair attorney here.

12 Q. I'm not asking you for a legal
13 conclusion. I'm asking you for your knowledge
14 and understanding. When you signed this
15 document, did you understand that you were
16 accepting an appointment as the treasurer of
17 HCMFA?

18 MS. DANDENEAU: Objection to form.

19 MS. DEITSCH-PEREZ: Objection, form.

20 A. Again, I don't think this -- that
21 wasn't my understanding. I don't think this
22 makes -- this document makes me the treasurer.

23 Q. What do you think this document --
24 why did you sign this document?

25 MS. DEITSCH-PEREZ: Objection to

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2 form.

3 MR. MORRIS: You're objecting to the
4 form of the question when I asked him why
5 did you sign the document? What is the
6 basis for the objection?

7 MS. DEITSCH-PEREZ: Because, John, I
8 think that it does call for a legal
9 conclusion other than -- with him saying
10 because somebody told me to sign this
11 document. But if you want to go there,
12 that is fine.

13 MR. MORRIS: Okay.

14 MS. DANDENEAU: I don't think --
15 he's already said he's not a lawyer.

16 MR. MORRIS: I'll allow the witness
17 to answer this question.

18 Q. Why did you sign this document, sir?

19 A. I mean, our -- our legal group would
20 bring by these incumbency certificates from
21 time to time. I have no idea why they're being
22 updated, and I was asked to sign.

23 Q. Did you ask anybody, what is this
24 document?

25 A. No.

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2 Q. Did anybody tell you why they needed
3 you to sign the document?

4 A. Not that I can recall.

5 Q. You testified earlier that you
6 understood that you served as the acting
7 treasurer for HCMFA; correct?

8 A. Yes.

9 Q. How did you become the acting
10 treasurer of HCMFA?

11 MS. DANDENEAU: Objection to form.

12 A. I don't -- I don't know the legal --
13 I don't know the legal mechanic of how I became
14 the acting treasurer.

15 Q. I'm not asking for the legal
16 mechanic. I'm asking you as the person who
17 is --

18 MS. DANDENEAU: John, you said --

19 MR. MORRIS: Stop.

20 MS. DANDENEAU: -- how did you
21 become the treasurer. That is --

22 MR. MORRIS: Please stop.

23 MS. DANDENEAU: That is a legal
24 question.

25 MR. MORRIS: I am not asking any

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2 legal questions, to be clear. I'm asking
3 for this witness' understanding as to how
4 he became the acting treasurer of HCMFA.
5 If he doesn't know, he can say he doesn't
6 know, but this legal stuff is nonsense, and
7 I really object to it.

8 Q. Sir, I'm asking you a very simple
9 question.

10 MS. DANDENEAU: Argumentative.

11 Q. You testified -- you testified that
12 you became the acting treasurer of HCM --
13 HCMFA; correct?

14 A. Yes.

15 Q. How did that happen?

16 MS. DANDENEAU: Again, object to
17 form.

18 MR. MORRIS: I can't wait to do this
19 in a courtroom. Good God.

20 Q. Go ahead, sir.

21 A. I don't know the exact process of
22 how that happened.

23 Q. Do you have any idea whether signing
24 this document was part of the process?

25 MR. MORRIS: You know what --

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2 MS. DANDENEAU: Objection.

3 MR. MORRIS: -- withdrawn. You guys
4 want to do this, I can't wait. I can't
5 wait. This is the craziest stuff ever.

6 MS. DANDENEAU: John, he said he's
7 not a lawyer, and you are asking him for a
8 legal conclusion, and he says he doesn't
9 know, and you persist.

10 MR. MORRIS: Okay.

11 MS. DANDENEAU: So you can ask these
12 questions --

13 MR. MORRIS: Did anyone -- please
14 stop talking.

15 MS. DANDENEAU: -- at another
16 point -- no, no, no, I'm entitled to talk,
17 too; right? If you're going to make these
18 accusations as if we're trying to stonewall
19 you, this is not the witness to ask that
20 question.

21 MR. MORRIS: I can't -- I can't
22 wait -- I can't wait to do this in a
23 courtroom. I will just leave it at that.

24 MS. DANDENEAU: That's right, I'm
25 sure you can't.

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2 Q. Did anyone ever tell you, sir, that
3 even though you were the acting treasurer of
4 HCMFA, that you were not authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. I'm not sure I understand the
8 question. I wasn't -- I mean, I'm -- I'm the
9 current acting treasurer.

10 Q. Did anybody ever tell you at any
11 time that even though you were the acting
12 treasurer of HCMFA, that you were not
13 authorized to sign the two promissory notes
14 that we looked at before lunch?

15 MS. DANDENEAU: Objection to form.

16 A. Not that I recall.

17 Q. Did anybody ever tell you at any
18 time that you were not authorized to sign the
19 two promissory notes that we looked at before
20 lunch?

21 A. Not that I recall.

22 Q. Did anybody ever tell you at any
23 time that you should not have signed the two
24 promissory notes that we looked at before
25 lunch?

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2 A. Not that I recall.

3 Q. Did you ever tell anybody at any
4 time that you weren't authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. Not that I recall.

8 Q. Did you ever tell anybody at any
9 time that you made a mistake when you signed
10 the two promissory notes that we looked at
11 before lunch?

12 A. Not that I recall.

13 Q. As you sit here right now, do you
14 have any reason to believe that you were not
15 authorized to sign the two documents that we
16 looked at before lunch?

17 MS. DANDENEAU: Objection to form.

18 A. If -- if this is the -- the valid
19 incumbency certificate, I mean, this does --
20 this does detail who the signers are.

21 Q. Okay. And looking at that document,
22 does that give you comfort that you were
23 authorized to sign the two promissory notes
24 that we looked at before lunch?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 MS. DANDENEAU: Objection, form.

4 A. Yes.

5 Q. As of October 20th -- withdrawn.

6 I'm trying to take your mind back to
7 a year ago, October 2020. Do you recall at
8 that time that the boards of the retail funds
9 were making inquiries about obligations that
10 were owed by the advisors to Highland in
11 connection with their 15(c) review?

12 MS. DANDENEAU: Objection to form.

13 A. I don't -- I don't recall.

14 Q. As of October 2020, you had no
15 reason to believe you weren't authorized to
16 sign the two promissory notes that we just
17 looked at; correct?

18 MS. DANDENEAU: Objection, form.

19 MS. DEITSCH-PEREZ: Objection to
20 form.

21 A. I didn't think about it in October
22 of 2020, but I mean --

23 Q. Did you have any reason to believe
24 at that time that you weren't authorized to
25 sign the two notes that we just looked at?

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2 A. Not that I'm aware, no.

3 Q. Did you have any reason to believe a
4 year ago that you made a mistake when you
5 signed those two notes?

6 A. Not that I'm aware.

7 Q. A year ago you believed that HCMFA
8 owed Highland the unpaid principal amounts that
9 were due under those two notes; correct?

10 A. They're -- they're promissory notes
11 that were -- as you presented, that were --
12 that were executed. Whether they're valid or
13 if there's other reasons, I didn't -- I don't
14 know.

15 Q. I'm not asking you whether they're
16 valid or not. I'm asking you for your state of
17 mind. A year ago you believed that HCMFA
18 was -- was obligated to pay the unpaid
19 principal amount under the two notes that you
20 signed; correct?

21 A. Yeah, I'm -- I'm -- yes.

22 Q. Thank you. Are you aware -- you're
23 aware that -- that in 2017, NexPoint issued a
24 note in favor of Highland in the approximate
25 amount of \$30 million; correct?

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2 A. I'm -- I'm -- I'm generally aware.

3 Q. Okay. And are you generally aware
4 that from time to time, after the note was
5 issued by NexPoint, that moneys were applied to
6 principal and interest that were due under the
7 NexPoint note?

8 A. Yes, I'm generally aware.

9 Q. Okay. And did anybody ever tell you
10 that the payments that were made against the
11 NexPoint notes were made by mistake?

12 A. Yes.

13 Q. And is it the one payment that we
14 talked about earlier today?

15 A. We talked about a lot of things
16 today. What payment are we talking about?

17 Q. Okay. Who told you that any payment
18 made against the NexPoint note was made by
19 mistake?

20 A. D.C. Sauter.

21 Q. When did Mr. Sauter tell you that?

22 A. I don't -- I don't remember
23 specifically.

24 Q. Do you remember what payments --

25 A. Sometime -- sometime this year.

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2 Q. Sometime in 2021?

3 A. Yes.

4 Q. Do you remember what payment he was
5 referring to?

6 A. It was the -- the payment made in
7 January of 2021 or -- yeah, January of -- of
8 this -- January of 2021.

9 Q. Okay. So did anybody ever tell you
10 at any time that any payment that was made
11 against principal --

12 A. And -- and -- and -- hold on, and it
13 may have been other -- again, it may have been
14 that payment or -- or there may have been what
15 he was explaining, a misapplication of prior
16 payments as well.

17 Q. Can you -- can you give me any
18 specificity -- withdrawn.

19 Withdrawn. Can you tell me
20 everything that Mr. Sauter told you about --
21 about errors in relation to payments made
22 against principal and interest due under the
23 NexPoint note?

24 MS. DANDENEAU: Can I just --

25 MR. RUKAVINA: Hold on. Hold on.

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2 I'm going to object here, and I'm going to
3 instruct the witness not to answer
4 depending on the discussion that you had --
5 Mr. Waterhouse, I'm the lawyer for
6 NexPoint, and as everyone here knows, D.C.
7 Sauter is in-house counsel.

8 So if you and Mr. Sauter were having
9 a factual discussion and him preparing his
10 affidavit, et cetera, then go ahead and
11 answer that. But if you were having a
12 discussion as to our legal strategy in this
13 lawsuit, or anything having to do with
14 that, then do not answer that.

15 And if you need to talk to either
16 your counsel or me about that, then we need
17 to have that discussion now.

18 A. Okay. Yeah, I don't -- I don't
19 really know how to make that distinction, so
20 maybe I need to talk to counsel before I
21 answer, or if I can answer.

22 Q. Let me just ask you this question:
23 Did -- did you have any conversation with
24 Mr. Sauter about any payment of principal and
25 interest prior to the time that you left

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2 Highland's employment, or did it happen after
3 you left Highland's employment?

4 A. I don't -- I don't recall if -- I
5 don't recall. I mean, it was sometime in 2021.
6 I don't remember if it was before or after I
7 was let go from Highland.

8 Q. Okay. So -- so nobody told you
9 prior to 2021 that any error or mistake was
10 made in the application of payments against
11 principal and interest due on the NexPoint
12 note. Do I have that right?

13 A. Yeah, I don't -- I don't recall this
14 being in 2020.

15 Q. Okay. And it didn't happen in 2019;
16 correct?

17 A. I don't recall that happened.

18 Q. And it didn't happen in 2018;
19 correct?

20 A. I don't -- I don't recall that
21 happening.

22 Q. And it didn't happen in 2017;
23 correct?

24 A. I don't recall.

25 Q. But -- but you believe the

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2 conversation took place in 2021. You just
3 don't remember if it was before or after you
4 left Highland's employment. Do I have that
5 right?

6 A. It was sometime this year. I
7 don't -- I don't remember.

8 Q. Okay. Did you report this
9 conversation to Mr. Seery at any point?

10 A. I don't believe so.

11 Q. Did you report this conversation to
12 anybody at DSI at any time?

13 A. I don't recall.

14 Q. Do you have -- you don't have a
15 recollection of ever doing that; correct?

16 A. Yeah, that's right. I don't recall
17 doing that.

18 Q. Do you recall telling anybody at
19 Pachulski Stang about the conversation you
20 recall with Mr. Sauter?

21 A. No, I don't -- I don't recall.

22 Q. Did you tell any of the independent
23 board members about your conversation with
24 Mr. Sauter?

25 A. I don't recall.

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2 Q. Did you tell any of the employees at
3 Highland before you left Highland's employment
4 about this call that you had with Mr. Sauter?

5 MS. DANDENEAU: Objection to form.

6 A. No, I don't -- no, I don't recall.

7 Q. NexPoint -- to the best of your
8 knowledge, did NexPoint ever file a proof of
9 claim against Highland to try to recover moneys
10 that were mistakenly paid against the principal
11 and interest due under the note?

12 A. Okay. Hold on. You are saying did
13 NexPoint Advisors file a proof of claim to
14 Highland for errors related to payments under
15 the NexPoint note to Highland?

16 Q. Correct.

17 A. I'm -- I'm -- I'm not -- I'm not
18 aware.

19 Q. Are you aware --

20 A. I'm not the legal person here, I
21 don't know.

22 Q. I'm just asking for your knowledge,
23 sir.

24 A. Yeah, I don't know. I'm not aware.

25 Q. Are you aware of any claim of any

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2 kind that NexPoint has ever made to try to
3 recover the amounts that it contends were -- or
4 that Mr. Sauter contend were mistakenly applied
5 against principal and interest due under the
6 NexPoint note?

7 A. I'm not aware.

8 MS. DANDENEAU: Objection to form.

9 Q. Okay. The advisors' agreements with
10 the retail funds are subject to annual renewal;
11 correct?

12 A. Yes.

13 Q. And do you participate in the
14 renewal process each year?

15 A. Yes.

16 Q. What role do you play in the renewal
17 process?

18 A. I'm -- I'm asked by the retail board
19 to walk-through the advisors financials.

20 Q. And do you do that in the context of
21 a board meeting?

22 A. Yes, it is -- yes, it is typically
23 done in a board meeting.

24 Q. And do you recall the time --
25 does -- does the renewal process happen around

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2 the same time each year?

3 A. Yes, it is -- it is around the same
4 time every year.

5 Q. And what -- what time period of the
6 year does the renewal process occur?

7 A. Approximately the September
8 timeframe.

9 Q. During that process, in your
10 experience, does the board typically conduct
11 its own diligence and ask for information?

12 A. Does the board ask for lots of -- I
13 mean, just -- I mean, lots of information as a
14 part of that -- that -- as part of that board
15 meeting and that process.

16 Q. Okay. And do you recall that the
17 process in 2020 spilled into October?

18 A. Yes. Yes.

19 Q. Okay. And as part of the process in
20 2020, the retail board asked -- asked what are
21 referred to as 15(c) questions; right?

22 A. I guess I don't want to be -- they
23 asked 15(c) -- are you saying they asked 15(c)
24 questions and this is why it went into October
25 or --

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2 Q. No, I apologize.

3 Do you have an understanding of
4 what -- of what 15(c) refers to in the context
5 of the annual renewal process?

6 A. Yes, generally.

7 Q. All right. What is your general
8 understanding of the term "15(c)" in the
9 context of the annual renewal process?

10 A. I -- I think 15(c) is the section
11 that -- that -- you know, that -- that the
12 board has to evaluate every year, the retail
13 board. They have to, you know, go through,
14 evaluate, and go through that approval process
15 on a yearly basis.

16 Q. Okay.

17 MR. MORRIS: Can we put up on the
18 screen Exhibit 36, please.

19 (Exhibit 36 marked.)

20 MR. MORRIS: I guess let's just
21 start at the bottom so Mr. Waterhouse can
22 see what is here.

23 Q. You see this begins with an email
24 from Blank Rome to a number of people.

25 MR. MORRIS: And if we can scroll

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2 up -- keep going just a little bit.

3 Q. You will see that there is an email
4 from Lauren Thedford to Thomas Surgent and
5 others where she reports that she was attaching
6 and reproducing below additional 15(c)
7 follow-up questions from the board.

8 Do you see that?

9 A. Yes.

10 Q. And do you see Question No. 2 asks
11 whether there are any material outstanding
12 amounts currently payable or due in the future
13 (e.g., notes) to HCMLP by HCMFA or NexPoint
14 Advisors or any other affiliate that provides
15 services to the funds?

16 Do you see that?

17 A. Yes.

18 Q. And -- and did you -- do you recall
19 that in -- in October of 2020 the retail boards
20 were asking for that information?

21 A. I don't recall it, but there --
22 they're obviously asking in this email.

23 Q. Okay.

24 MR. MORRIS: Can we scroll up a
25 little bit, please.

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2 Q. And then do you see that
3 Ms. Thedford includes you on the email string
4 on Tuesday, October 6th, at 5:52?

5 A. Yes.

6 Q. And she asks you and Dave Klos and
7 Kristin Hendrix for advice on that particular
8 Request No. 2 that I have just read; right?

9 A. Yes.

10 Q. Okay. Can you tell me who
11 Ms. Thedford is?

12 A. She was an attorney that was in the
13 legal group.

14 Q. At Highland Capital Management,
15 L.P.?

16 A. I'm -- I'm -- I'm -- I don't
17 remember if she was an employee of Highland or
18 any of the advisors.

19 Q. Okay. Do you know if she served as
20 the corporate secretary for both HCMFA and
21 NexPoint?

22 A. Yes.

23 Q. And -- okay.

24 Do you know whether Ms. Thedford
25 held any positions in relation to the retail

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2 funds as we defined that term?

3 A. Yes.

4 Q. What is your understanding of the
5 positions that Ms. Thedford held at the retail
6 funds?

7 A. I -- I recall her being an officer.
8 I don't recall her title.

9 Q. Okay. Is she still an officer at
10 any of the retail funds today?

11 A. No.

12 Q. Do you know when she ceased to be an
13 officer of the retail funds?

14 A. Approximately.

15 Q. And when did she approximately cease
16 to be an officer of the retail funds?

17 A. It was in -- it was in early of
18 2021.

19 Q. Okay. Do you know when she became
20 an officer of the retail funds?

21 A. I don't recall.

22 Q. To the best of your recollection,
23 was she an officer of the retail funds in
24 October of 2020?

25 A. I believe so.

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2 Q. Okay. Do you know what title she
3 held in her capacity as an officer, if any?

4 A. I told you I don't remember.

5 Q. Okay. So she sends this email to
6 you at 5:52 p.m. on October 6th.

7 And if we can scroll up to the
8 response, you responded a minute later with a
9 one-word answer: Yes.

10 Do you see that?

11 A. Yes.

12 Q. And -- and yes is -- yes was in
13 response to the retail board's Question No. 2,
14 right, whether there are any material
15 outstanding amounts currently payable or due in
16 the future?

17 A. Yes.

18 MR. MORRIS: And can we scroll up to
19 see what happened next.

20 Q. So Ms. Thedford writes back to you a
21 few minutes later and she asks whether you
22 could provide the amounts.

23 Do you see that?

24 A. Yes.

25 Q. And then you respond further and you

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2 refer her to the balance sheet that was
3 provided to the board as part of the 15(c)
4 materials.

5 Do you see that?

6 A. Yes.

7 Q. And -- and did the advisors provide
8 to the board certain balance sheets in 2020 in
9 connection with the 15(c) review?

10 A. Yes, they did.

11 Q. Okay. And were the amounts that
12 were outstanding or that were to be due in the
13 future by the advisors to Highland included in
14 the liability section of the balance sheet that
15 was given to the retail board?

16 A. Yes. Notes would be reflected as
17 liabilities.

18 Q. Okay. And --

19 A. If I'm understanding your question
20 correctly.

21 Q. You are. And -- and -- and those
22 liabilities you -- you were -- you believed
23 were responsive to the retail board's question;
24 correct?

25 A. Yes.

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2 Q. Okay. And then if we can scroll up,
3 you see Ms. Thedford responds to you
4 nine minutes later with a draft response.

5 Do you see that?

6 A. Yes.

7 Q. And she says that she is taking from
8 the 6/30 financials certain information about
9 amounts that were due to HCMLP and affiliates
10 as of June 30th, 2020.

11 Do you see that?

12 A. I do.

13 Q. Okay. And did you believe, as the
14 treasurer of NexPoint and HCMFA and as the CFO
15 of Highland, that the information that
16 Ms. Thedford obtained from the 6/30 financials
17 was accurate and responsive in relation to the
18 retail fund board's question?

19 A. I just want to make sure I
20 understand the question.

21 Are you saying that the financial
22 information provided to the retail board as
23 part of the 15(c) process, which included
24 financial statements as of June 30th of 2021,
25 did I feel like those were responsive to their

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2 questions?

3 Q. Yes.

4 A. Yes.

5 Q. Thank you.

6 MS. DEITSCH-PEREZ: John, it is not
7 in the chat yet. Can you just make sure it
8 gets put in there.

9 MR. MORRIS: Sure.

10 MS. CANTY: I put it in there. I
11 think maybe I just sent it directly, so let
12 me make sure it says to everyone. But I
13 did put it in there. I will try again.

14 MR. MORRIS: Thank you, La Asia.

15 MS. DANDENEAU: What number is it.

16 MR. MORRIS: What, the Bates number?

17 MS. DEITSCH-PEREZ: No, the --
18 this -- yeah, 36 is not in the chat.

19 MR. MORRIS: Okay. We'll get it.

20 MS. DANDENEAU: I think that
21 Ms. Canty just sent it to me originally.
22 Sorry.

23 MR. MORRIS: Okay. We will get it
24 there.

25 MS. CANTY: Okay. It is there now

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2 for everyone.

3 MS. DEITSCH-PEREZ: Got it. Thank
4 you.

5 Q. Do you recall if the proposed
6 response that Ms. Thedford crafted was
7 delivered to the retail board with the -- with
8 the yellow dates having been completed?

9 A. I don't know.

10 MR. MORRIS: Davor, I'm going to ask
11 that the advisors and -- the advisors of
12 both HCMFA and NexPoint produce to me any
13 report that was given to the retail board
14 concerning the promissory notes at issue,
15 including the obligations under the notes.

16 Q. Do you know -- do you know if
17 ultimately NexPoint informed the retail board
18 in response to its question that NexPoint owed
19 Highland approximately 23 or \$24 million?

20 MS. DANDENEAU: Objection to the
21 form.

22 A. Sorry, are you asking, did NexPoint
23 tell the retail board that it owed Highland?

24 Q. Let me ask a better question,
25 Mr. Waterhouse.

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2 Did -- do you know if anybody ever
3 answered the retail board's question that was
4 Number 2?

5 A. I don't -- I can't say for sure.

6 Q. Okay. Do you recall -- I think you
7 testified earlier that you walked through the
8 advisors' financials with the retail board;
9 correct?

10 A. Yes.

11 Q. And as part of that process, did you
12 disclose to the retail board the obligations
13 that NexPoint and HCMFA had to Highland under
14 promissory notes?

15 A. The retail board, as I stated
16 earlier, receives financial information,
17 balance sheet, income statement information
18 from the advisors. That information is
19 provided to the retail board in connection with
20 the 15(c) process.

21 So any notes between the advisors
22 and the Highland would be -- anything would be
23 detailed in those financial statements.

24 Q. Do you recall in 2020 ever speaking
25 with the retail board about the advisors'

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2 obligations under the notes to Highland?

3 MS. DANDENEAU: Objection to form.

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall specifically.

7 Q. Do you have any general recollection
8 of discussing with the retail board the
9 advisors' obligations to Highland under the
10 notes that they issued?

11 MS. DANDENEAU: Object to the form.

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. I just recall generally just -- it
15 is just -- I present the financial statements,
16 and if they have questions, I answer their
17 questions and walk them through.

18 I don't recall what they asked. I
19 don't recall where the discussion went. I
20 don't recall anything of that nature.

21 Q. Okay. Do you know if anybody on
22 behalf of HCMF -- HCMFA ever told the retail
23 board that HCMFA had no obligations under the
24 two 2019 notes that you signed? Withdrawn.

25 Do you know whether anybody on

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2 behalf of HCMFA ever told the retail boards
3 that you weren't authorized to sign either of
4 the two 2019 notes?

5 MS. DANDENEAU: Objection to form.

6 A. I'm not aware.

7 Q. Are you aware of anybody on behalf
8 of HCMFA ever telling the retail boards that
9 your execution of the two 2019 notes was a
10 mistake?

11 MS. DANDENEAU: Objection to form.

12 A. I'm not aware.

13 Q. Are you aware of anybody on behalf
14 of HCMFA ever telling the retail boards that
15 HCMFA did not have to pay the amounts reflected
16 in the two notes that you signed in 2019?

17 A. I'm not aware.

18 Q. Do you know whether anybody ever
19 told the retail boards -- withdrawn.

20 Do you know whether anybody ever
21 told the retail boards that Highland has
22 commenced a lawsuit to recover on the two notes
23 that you signed in 2019?

24 A. I'm not aware.

25 Q. Are you aware of anybody informing

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2 the retail boards that Highland has sued to
3 recover on the NexPoint note?

4 A. I'm not aware.

5 Q. Do you know whether anybody ever
6 told the retail board that Highland had
7 declared a default with respect to the two
8 HCMFA notes that you signed in 2019?

9 A. I'm not aware.

10 Q. Are you aware of anybody ever
11 informing the retail boards that Highland had
12 declared a default under the NexPoint note?

13 A. I'm not aware.

14 Q. Are you aware of anybody telling the
15 retail board that Highland made a demand for
16 payment under the 2019 notes that you signed on
17 behalf of HCMFA?

18 A. I'm not aware.

19 Q. Let's -- let's see if there is a
20 response to Ms. Thedford's email, if we can
21 scroll up.

22 Do you see you responded to
23 Ms. Thedford five minutes after she provided
24 the draft response to you?

25 A. Yes.

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2 Q. Okay. And do you see that Dustin
3 Norris is copied on this email?

4 A. Yes, he is.

5 Q. Great. Do you know whether
6 Mr. Norris held any positions at either of the
7 advisors as of October 6, 2020?

8 A. I will go back to -- I'm not the
9 legal expert of what appoints you or how or
10 why, but you did see Dustin's name on the
11 incumbency certificate that you produced
12 earlier.

13 Q. Do you know what his title was in
14 October of 2020?

15 MS. DANDENEAU: Objection to form.

16 A. I don't -- I don't recall.

17 Q. Was he -- did he have a title with
18 each of the advisors, to the best of your
19 recollection?

20 A. I don't recall.

21 Q. Do you know why he is included on
22 this email string?

23 A. I didn't add Dustin. It looks like
24 Lauren did. I don't know why she added him or
25 not. You would have to ask her.

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2 Q. Does Mr. Norris play a role in
3 formulating the advisors' responses to the
4 questions asked by the retail board in
5 connection with the 15(c) annual review?

6 MS. DANDENEAU: Objection to form.

7 A. He -- Dustin Norris is there in the
8 board meetings. But -- so he has a role, yes.

9 Q. Okay. And does Mr. Norris hold any
10 positions, to the best of your knowledge, in
11 relation to any of the retail funds?

12 A. I don't -- I don't believe he does.

13 Q. How about Mr. Post, do you know
14 whether Mr. Post holds any position in either
15 of the advisors?

16 A. I mean, he -- he -- yes.

17 Q. What is your understanding of the
18 positions that Mr. Post holds in relation to
19 the advisors?

20 MS. DANDENEAU: Objection to form.

21 A. He is an employee of NexPoint
22 Advisors. He is also the chief compliance
23 officer for -- for NexPoint.

24 Q. Who is the chief compliance officer
25 for HCMFA, if you know?

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2 MS. DANDENEAU: Objection to form.

3 A. That would be Jason as well.

4 Q. Okay. Now, looking at your
5 response, you noted initially that nothing was
6 owed under shared services. Do I have that
7 right in substance?

8 A. Yeah. I think I'm being responsive
9 to Lauren's question here, whether any of the
10 shared service invoices are outstanding.

11 Q. Right.

12 A. Yes.

13 Q. And that is because -- and that is
14 because the retail the retail board has asked
15 for the disclosure of all material obligations
16 that were owed to HCMLP either then or in the
17 future; isn't that right?

18 MS. DANDENEAU: Objection to form.

19 Q. We can go back down and look.

20 A. Look, I don't know if that's a
21 material item, I mean, again, but sure.

22 Q. Okay. But there were no shared
23 services outstanding; correct?

24 MS. DANDENEAU: Objection to form.

25 A. That is what this email seems to

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2 indicate.

3 Q. And you wouldn't have written it if
4 you didn't believe it to be true at the time;
5 correct?

6 A. Correct.

7 Q. And when you referred to shared
8 services outstanding, what you meant there was
9 that neither NexPoint nor HCMFA owed Highland
10 any money under the shared services agreements
11 that they had with Highland as of October 6th,
12 2020; right?

13 A. I don't know if it is as of October
14 6, 2020 or if it was from -- like through the
15 financials -- through the date of the
16 financials as of June 30.

17 Q. Okay. And then you noted that
18 HCMA -- the HCMFA note is a demand note; right?

19 A. Yes.

20 Q. And then you referred Ms. Thedford
21 to Kristin Hendrix for the term of the NexPoint
22 note. Do I have that right?

23 A. Yes.

24 Q. And then you refer to that agreement
25 that is referenced in the 2018 audited

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2 financials about Highland's agreement not to
3 make demand upon HCMFA until May 2021; correct?

4 A. Correct.

5 Q. And then -- and then the next thing
6 you write is that the attorneys think that BK
7 doesn't change that, but don't know for sure at
8 the end of the day.

9 Do you see that sentence?

10 A. Yes.

11 Q. Which attorneys were you referring
12 to?

13 A. I don't remember.

14 Q. Did you have a conversation with
15 attorneys concerning whether the bankruptcy
16 would change or alter in any way the agreement
17 not to make a demand under the HCMFA note?

18 A. Look, yeah, I mean, I don't
19 specifically remember, but generally, I mean,
20 it is in this email. I don't -- I don't -- I
21 don't -- I don't remember who I talked to or,
22 you know, was it inside counsel, outside
23 counsel, but obviously I talked to somebody.

24 Q. Do you have any recollection --

25 A. Well, I don't even know if it's --

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2 actually, it may not even have been me. I say
3 the attorneys in, you know, a lot of -- like I
4 talked about the team.

5 It could have been someone on the
6 team, like, hey, we need to run this down, and
7 maybe they talked to attorneys again and
8 relayed that information to me.

9 So I really don't know if I spoke or
10 someone else did or -- or, I mean, and maybe it
11 wasn't even from corporate accounting. Maybe
12 it was, you know, other -- I'm kind of
13 summarizing, you know, again, so I don't really
14 know -- I can't really say for sure. I don't
15 remember how I came about of this knowledge.

16 Q. I appreciate your efforts,
17 Mr. Waterhouse, but I will just tell you that
18 if I ask a question and you don't know the
19 answer or you don't recall, I'm happy to accept
20 that. I don't -- I don't want you to
21 speculate, so I want to be clear about that.
22 So I appreciate it.

23 Let me just ask you simply: Do you
24 know what attorneys -- can you identify any of
25 the attorneys who thought that the bankruptcy

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2 process didn't change the agreement?

3 A. I don't recall.

4 Q. Okay. Perfect.

5 And then let's look at the last
6 sentence. It says, quote: The response should
7 include, as I covered in the board meeting,
8 that both entities have the full faith and
9 backing from Jim Dondero, and to my knowledge
10 that hasn't changed.

11 Do you see that?

12 A. Yes.

13 Q. Okay. Prior to October 6th, 2020,
14 had you told the retail board that HCMFA and
15 NexPoint have the full faith and backing from
16 Jim Dondero?

17 A. Yes.

18 Q. Do you remember in the context in
19 which you told the retail board that?

20 A. I mean, generally, yes.

21 Q. Tell me what you recall.

22 A. So we were walking through the
23 financials from the advisors; right? So as I
24 described to you, you have got HCMFA and NPA.
25 And these -- the financials, you know, show

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2 they have liabilities on them that exceed
3 assets.

4 So the retail board has asked, okay,
5 you know, how -- you know, if -- if these
6 liabilities come due or they're payable, you
7 know, how does that come about?

8 And, you know, the response is,
9 well, the advisors have the -- the full faith
10 and backing from -- from Jim Dondero.

11 Q. And how did you know that the
12 advisors had the full faith and backing from
13 Jim Dondero? What was the basis for that
14 statement that you made to the retail board?

15 A. I talked to Jim about it at some
16 point in the past.

17 Q. And did you tell Mr. Dondero that
18 you were going to inform the retail board that
19 the advisors had his full faith and backing
20 before you actually told that to the retail
21 board?

22 A. I don't recall having that
23 conversation.

24 Q. Do you recall if you ever informed
25 Mr. Dondero that you had disclosed or told the

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2 retail board that the advisors had the full
3 faith and backing of Mr. -- Mr. Dondero?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall discussing that with
7 him at the time.

8 Q. When you told this to the board, was
9 Mr. Dondero participating in the discussion?

10 A. Not that I recall.

11 Q. Withdrawn. Was it not -- withdrawn.

12 Do you recall whether -- when you
13 covered this issue with the board, was that in
14 a -- a Zoom call or a Webex call? Was it a
15 telephone call? Was it in-person? Like where
16 were you physically in relation to the board?

17 A. I believe I was at home.

18 Q. Okay. Can you identify every person
19 that you recall who was present for this
20 disclosure other than -- other than the board
21 members themselves?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't recall everyone on the call.

25 Q. Can you identify anybody who was on

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2 the call?

3 A. Other than the board members?

4 Q. Yes.

5 A. Lauren Thedford. I mean, there
6 are -- there are many -- my section is just one
7 of many sections that are just -- you know, as
8 you can appreciate, this is a long board
9 meeting.

10 I can't recall specifically, really
11 even generally, or who was on when this was
12 discussed. But Lauren was typically on for the
13 entire time.

14 Q. I apologize if I asked you this, but
15 do either of Mr. Norris or Mr. Post hold any
16 positions relative to the retail funds?

17 A. I think you asked me this already,
18 John.

19 Q. Okay. I just don't recall. Can you
20 just refresh my recollection if I did, in fact,
21 ask you the question?

22 A. I don't believe -- if we can go
23 back. I don't believe Mr. Norris has a title
24 at the retail funds. Mr. -- and Mr. Post is
25 the CCO of the advisor, the advisors.

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2 Q. Okay. Do you know if either of them
3 have a position with the retail board -- with
4 the retail funds?

5 A. I don't believe Mr. Norris has a
6 position with the retail funds.

7 Q. All right. What about Mr. Post?

8 A. Mr. Post is the CCO of the advisors.

9 Q. Okay. Does he hold any position --

10 A. I don't believe so.

11 Q. -- with the retail funds?

12 A. I don't believe so.

13 Q. Okay.

14 A. I don't know if being the CCO for
15 the advisor conveys something for the retail
16 funds. Again, I am not -- that is the legal
17 compliance part of it. I don't know.

18 Q. Why did you tell the retail board
19 that the advisors have the full faith and
20 backing from Mr. Dondero?

21 MS. DANDENEAU: Objection to form.

22 A. It is -- it is -- it is what has
23 been discussed with them prior.

24 Q. And were you -- were you trying to
25 give them comfort that even though the

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2 liabilities exceeded the assets that the
3 advisors would still be able to meet their
4 obligations as they become due?

5 MS. DANDENEAU: Objection to form.

6 MS. DEITSCH-PEREZ: Object form.

7 A. I -- I can't -- I don't remember
8 specifically the conversation, but generally --
9 you know, generally, yes. And that is why --
10 but, you know, again, in this email saying, you
11 know, I am sure I qualified it with the retail
12 board, you know, as I said I like -- you know,
13 to my knowledge, that hasn't changed. But,
14 again, generally -- generally that is what I
15 remember.

16 Q. Okay. Do you recall if in the
17 advisors' response to the retail board's
18 question if the response included any statement
19 concerning Mr. Dondero and -- and the full
20 faith and backing that he was giving to the
21 advisors?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't -- I don't remember
25 specifically what was provided.

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2 Q. Okay.

3 A. And I don't really -- I don't really
4 remember generally either.

5 Q. Okay.

6 MR. MORRIS: So -- so, again, I'm
7 just going to ask Mr. Rukavina if your
8 clients can produce as soon as possible the
9 15(c) response, the written response that
10 the advisors made, if any, to the board's
11 Question No. 2.

12 I'm not looking for the whole
13 response, but I certainly want the response
14 to Question No. 2.

15 Q. Do you have a general understanding
16 as to the amount by which -- withdrawn.

17 Did -- did the assets of --
18 withdrawn.

19 Did the liabilities of HCMFA exceed
20 its assets in 2020?

21 MS. DANDENEAU: Objection to form.

22 MS. DEITSCH-PEREZ: Objection, form.

23 A. I believe I have already answered
24 that question earlier, I think. I believe I
25 said yes.

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2 Q. Okay. And did the liabilities of
3 NexPoint exceed its assets in 2020?

4 MS. DEITSCH-PEREZ: Objection to
5 form.

6 A. I don't believe so.

7 Q. Okay. So -- so it was only one of
8 the two advisors who had liabilities that
9 exceeded the value of the assets.

10 Do I have that right?

11 MS. DEITSCH-PEREZ: Objection to
12 form.

13 MS. DANDENEAU: Form.

14 A. Yes.

15 Q. And do you know, ballpark, the
16 amount by which the value of HCMFA's
17 liabilities exceeded their assets in 2020?

18 MS. DANDENEAU: Objection to form.

19 A. I don't -- I don't recall.

20 MR. MORRIS: I had specifically
21 requested in discovery the audited
22 financial reports for both advisors and
23 NexPoint. I think I may have gotten one
24 for NexPoint but I'm still waiting for the
25 balance. And I'm going to renew my request

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2 for those documents too.

3 Q. Let's go to the next exhibit, which
4 is Number 10. So I think it is in your stack,
5 Mr. Waterhouse.

6 MR. MORRIS: And we can take the one
7 down from the screen and put up Number 10
8 for everybody.

9 (Exhibit 10 marked.)

10 Q. And I don't know if you have ever
11 seen this before, but I'm really putting it up
12 on the screen for purposes of turning to the
13 very last page of the document.

14 So this is a document that we have
15 been -- that we premarked as Exhibit 10. And
16 we're turning to the last page of the document,
17 which is a document that was filed in the
18 adversary proceeding 21-3004. And -- no, I
19 apologize, I think we -- right there. Perfect.

20 And it is page 31 of 31.

21 MR. MORRIS: I think there may have
22 been some something erroneously stapled to
23 the hard copy that I gave you folks, but
24 I'm looking for page 31 of 31 in the
25 document that begins with the first page of

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2 Exhibit 10.

3 Q. Do you have that, Mr. Waterhouse?

4 A. I don't have it yet. I'm looking.

5 Q. All right. If you look at the top
6 right-hand corner, you will see it says page
7 hopefully something of 31?

8 A. Yes, I've got it now.

9 Q. Okay. You have got 31 of 31. You
10 can take a moment to read that, if you would
11 like.

12 A. (Reviewing document.) Okay.

13 Q. Have you ever seen this before?

14 A. I don't know if I have seen this
15 specific document, but, you know, I've --
16 I'm -- I'm aware of it.

17 Q. And is this the document that you
18 had in mind when you sent that email to
19 Ms. Thedford that we just looked at where you
20 said that Highland had agreed not to make a
21 demand upon HCMFA until May 2021?

22 A. Honestly, I don't -- it wasn't this
23 document. I mean, it's something like this,
24 yes. I mean, yes.

25 Q. Well --

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2 A. It is something like this, but I
3 don't think it was this specific document.

4 Q. Well, but this document does say in
5 the last sentence that Highland agreed not to
6 seek -- not to demand payment from HCMFA prior
7 to May 31, 2021; right?

8 A. Yes.

9 Q. And are you aware of any other
10 document that was ever created pursuant to
11 which Highland agreed not to demand payment on
12 amounts owed by HCMFA before May 31, 2021?

13 A. Hold on. Are you asking, am I aware
14 of a document that by HCMFA that basically says
15 otherwise?

16 Q. No. Let me try again.

17 Are you aware of any other document
18 pursuant to which -- pursuant to which Highland
19 agreed not to make a demand on HCMFA until May
20 31st, 2021?

21 A. I'm -- I think there was something
22 in connection with -- with the -- with the
23 audit that basically says the same thing.

24 Q. Okay. And do you think that the
25 audit is referring to this particular document?

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2 A. I don't know.

3 Q. All right. This document is dated
4 April 15, 2019. Do you see that?

5 A. I do.

6 Q. And do you remember that the audit
7 was completed on June 3rd, 2019?

8 A. Yes.

9 Q. And do you recall that the audited
10 financials -- and I'm happy to pull them up if
11 you would like, but do you recall that the
12 audited financials included a reference to the
13 agreement pursuant to which Highland agreed not
14 to make a demand until May 31st, 2021?

15 A. Yes, I remember.

16 Q. And as part of the process, would
17 you have expected the corporate accounting team
18 to have provided a copy of this document to
19 PwC?

20 MS. DANDENEAU: Objection to form.

21 A. Yes, I would have expected something
22 like this, or again, you know, some document
23 that basically states -- states the deferral
24 till May 31 of 2020.

25 Q. Okay.

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2 A. May 31 of 2021, excuse me.

3 Q. And this document states the
4 deferral that you just described; correct?

5 A. It does.

6 Q. And this document states the
7 deferral that was described in the audited
8 financial statements that we looked at before;
9 correct?

10 A. It does.

11 MR. MORRIS: Okay. Can we scroll
12 down just a little bit to see who signed on
13 behalf of the acknowledgment there.

14 Q. Okay. So Mr. Dondero signed this
15 document on behalf of both HCMFA and Highland;
16 do you see that?

17 A. I do.

18 Q. Okay. Did you discuss this document
19 or the -- withdrawn.

20 Did you discuss the concept of the
21 deferral with Mr. Dondero in the spring of
22 2019?

23 A. I think I testified I don't recall.

24 Q. Okay. Do you know whose idea it was
25 to issue the acknowledgment in this form?

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2 A. I don't recall.

3 MR. MORRIS: Can we scroll back up
4 to the document, please.

5 Q. Do you see in the beginning it says,
6 reference is made to certain outstanding
7 amounts loaned from Highland to HCMFA for
8 funding ongoing operations.

9 Do you see that?

10 A. Yes.

11 Q. And were you aware as the CFO of
12 Highland and as the treasurer of HCMFA that as
13 of April 15, 2019, Highland had made certain
14 loans to HCMFA to fund HCMFA's ongoing
15 operations?

16 A. Yes.

17 Q. And were you aware that those loans
18 were payable on demand and remained outstanding
19 as of December 31st, 2018?

20 A. Yes.

21 Q. And were you aware that those
22 amounts were payable on demand, and they
23 remained outstanding as of April 15, 2019?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Well, this -- this document dated
3 April 15, 2019 says they have been deferred to
4 May 31, 2021.

5 Q. Right. But I'm just sticking to the
6 first paragraph where they refer to the
7 outstanding amounts. And in the end it says
8 the -- it remained outstanding on December
9 31st, 2018, and I think you told me that you
10 understood that, and then I'm just trying to
11 capture the last piece of it.

12 Did you understand that there were
13 amounts outstanding from the loan that Highland
14 made to HCMFA to fund ongoing operations as of
15 April 15th, 2019?

16 A. Yes.

17 Q. Thank you. Let's look at the next
18 sentence. HCMFA expects that it may be unable
19 to repay such amounts should they become due
20 for the period commencing today and continuing
21 through May 31st, 2021.

22 Do you see that?

23 MS. DANDENEAU: Objection to form.

24 A. I do.

25 Q. As the CFO -- withdrawn.

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2 As the treasurer of HCMFA, did you
3 believe that -- do you believe that statement
4 was true and accurate at the time it was
5 rendered?

6 A. I mean, it -- it -- the answer to
7 that is I really didn't have any -- I didn't
8 have an opinion really.

9 Q. Did you do anything to educate
10 yourself in April of 2019 on the issue of
11 whether HCMFA could repay the amounts that it
12 owed to Highland should they become due?

13 A. I don't believe so.

14 Q. Did you at any time form any
15 opinions as to HCMFA's ability to repay all
16 amounts due to Highland should they become due?

17 A. Not really. I guess I don't...

18 Q. Well, you told the retail board that
19 HCMFA's liabilities exceeded their assets in
20 2020; correct?

21 A. Yes.

22 Q. Based on the work that you did to
23 prepare for the retail board, did you form any
24 view as to whether HCMFA would be unable to
25 repay the amounts that it owed to Highland

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2 should they become due?

3 MS. DANDENEAU: Objection to form.

4 A. I mean, I -- when you look at that,
5 to answer you, completely, you know, again,
6 if -- the response I gave the retail board was,
7 you know, the -- the advice -- HCMFA advisors
8 have the -- have the full faith and backing of
9 Jim Dondero. So I didn't form an opinion of
10 whether the advisor could pay it or not.

11 Q. Did you form any view as to whether
12 the advisors could repay the amounts that it
13 owed to Highland should they become due without
14 the full faith and backing of Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Form.

17 A. I mean, if you -- if you -- if you
18 take that last statement out, I mean, it would
19 be difficult for HCMFA to pay back demand notes
20 at that time.

21 Q. And it was precisely for that reason
22 that you told the retail board that -- that the
23 retail -- that the advisors had the full faith
24 and backing of Mr. Dondero; correct?

25 MS. DANDENEAU: Objection to form.

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2 A. I mean, yes, as the mouthpiece, I
3 was relaying information.

4 Q. Okay. And you relayed that
5 information with the knowledge and approval of
6 Mr. Dondero; correct?

7 MS. DEITSCH-PEREZ: Object to the
8 form.

9 A. As I stated in the email, I don't
10 believe, and I think I testified I don't
11 believe I had conversations with Mr. Dondero at
12 the time of that board meeting.

13 Q. Did you tell the retail board that
14 the advisors had the full faith and backing of
15 Mr. Dondero without Mr. Dondero's prior
16 approval?

17 A. Yeah, I -- I -- yes, I'm -- like I
18 said, I think I testified earlier, I'm sure I
19 qualified it as well.

20 Q. What do you mean by that?

21 MS. DANDENEAU: Objection to form.

22 A. Again -- again, like I said in the
23 email, it has the full faith and backing of Jim
24 Dondero unless that has changed.

25 Q. Actually that is not what you said,

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2 so let's put the email back up.

3 A. It is -- it is -- it is in the
4 email.

5 Q. Let's put the email back up. You
6 didn't say unless it has changed. You said you
7 believe it hasn't changed; right?

8 A. Okay. And to my knowledge that
9 hasn't changed, that is what it says.

10 Q. That's right.

11 A. But, again, I mean, that is -- I
12 don't know everything. And I'm not in every
13 conversation. I'm not -- to presume that I am,
14 is -- and you have to put myself -- as you
15 started this out, Mr. Morris, I was at home in
16 October of 2020 with COVID -- or, you know,
17 under these COVID times that we described is
18 very difficult.

19 We have all been working at home for
20 really the first time ever, undergoing
21 processes, procedures, control environments
22 that have been untested, and there is poor
23 communication.

24 So I am relaying, as I'm telling you
25 now, what is in the email. And unless

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2 something has changed -- to my knowledge, it
3 hasn't changed, but it could have changed.

4 Q. When you say that the advisors have
5 the full faith and backing from Mr. Dondero,
6 did you intend to convey that, to the extent
7 the advisors were unable to satisfy their
8 obligations as they become due, Mr. Dondero
9 would do it for them?

10 MS. DANDENEAU: Object to the form.

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 And, John, we have given you a lot
14 of leeway here but this does not seem
15 relevant to this case. You seem sort of
16 taking a complete sort of diversion into
17 the allegations and the complaint just
18 filed on Friday, and so I would ask you to
19 move on because --

20 MR. MORRIS: And I will tell you --
21 I will tell you that I have never read that
22 complaint cover-to-cover. I have nothing
23 to do with the prosecution of those claims.
24 And this issue that we're talking about
25 right now is related solely to the

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2 promissory notes that your clients refuse
3 to pay.

4 So I'm going to continue to ask my
5 questions, and I would ask the court
6 reporter to read back my last question.

7 (Record read.)

8 MS. DEITSCH-PEREZ: And then I
9 believe there were objections to form.

10 Q. You can answer the question.

11 A. Yes.

12 Q. Thank you very much, sir.

13 MR. MORRIS: Can we go back to the
14 other document, please?

15 Q. Mr. Waterhouse, do you know if this
16 document was ever shared with the retail board?

17 A. I don't recall.

18 Q. Did you ever share it with the
19 retail board?

20 A. I don't recall.

21 Q. Did you ever tell the retail board
22 about the substance of this document?

23 A. I don't recall.

24 Q. Did you ever tell the retail board
25 that Highland had agreed not to make a demand

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2 against HCMFA until May 2021?

3 A. I don't recall.

4 Q. Do you know whether anybody on
5 behalf of the advisors ever informed the retail
6 board that Highland had agreed on April 15,
7 2019, not to make a demand against HCMFA under
8 the promissory notes?

9 A. I don't recall.

10 Q. Did you instruct Ms. Thedford or
11 anybody else responding to the retail board's
12 15(c) inquiry to disclose this document?

13 A. Did I instruct Ms. Thedford or
14 anyone else to -- to -- to produce this, to
15 disclose this document? Is that what you -- I
16 just want to make sure.

17 Q. Uh-huh.

18 A. Yeah, I don't -- I don't recall.

19 Q. Did you instruct anybody to inform
20 the retail board, in response to their question
21 as part of the 15(c) process, to -- to tell the
22 retail board about Highland's agreement not to
23 make a demand until 2021?

24 MS. DANDENEAU: Objection to form.

25 A. I don't recall.

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2 Q. Did you ever inform PwC that HCMFA's
3 liabilities exceeded its assets?

4 MS. DANDENEAU: Object to the form.

5 A. I don't -- I don't think I told
6 them. I mean, they -- they audited the
7 financial statements.

8 Q. Did -- do you know if anybody on
9 behalf of Highland ever informed
10 PricewaterhouseCoopers that HCMFA may be unable
11 to repay amounts owing to Highland, should they
12 become due?

13 MS. DANDENEAU: Objection to form.

14 A. Yes. Again, I think I testified
15 earlier that -- that this was communicated to
16 the auditors.

17 Q. Ideally --

18 A. I don't know who exactly did that.
19 I don't recall doing it, but, yeah, it was --
20 it was communicated. And that is why -- I
21 mean, there is a disclosure in the financial
22 statements; right?

23 Q. There is, and that disclosure
24 relates to the last sentence of this document;
25 correct?

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2 A. Yes.

3 Q. Do you recall looking in the
4 document and seeing anything that was disclosed
5 with respect to the sentence above that?

6 A. No.

7 Q. Do you know whether anybody on
8 behalf of Highland ever informed
9 PricewaterhouseCoopers that HCMFA expects that
10 it may be unable to repay amounts due and owing
11 to Highland should they become due?

12 MS. DEITSCH-PEREZ: Object to the
13 form. I think that is the third time.

14 A. I don't recall. Again, as I said,
15 we -- all of this was given to the auditors.

16 Q. Do you know if Highland received
17 anything of value in exchange for its agreement
18 not to demand payment on amounts owed by HCMFA
19 prior to May 31st, 2021?

20 MS. DEITSCH-PEREZ: Object to the
21 form. That is the second time.

22 MS. DANDENEAU: Object to the form.

23 A. I have answered this question.

24 MR. RUKAVINA: Hold on. Object to
25 legal conclusion. Go ahead.

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2 A. I have answered this question
3 before.

4 Q. And the answer was no?

5 A. I'm not aware.

6 Q. Now, this acknowledgment can't
7 possibly apply to the two notes that you signed
8 on behalf of HCMFA because those notes were
9 signed on May 2nd and May 3rd, 2019; is that
10 right?

11 MS. DANDENEAU: Objection to form.

12 A. Unless there is a drafting error.

13 Q. Okay. Are you aware of a drafting
14 error?

15 A. I'm not aware. I didn't -- I wasn't
16 part of -- I didn't sign this note or this
17 acknowledgment. I didn't draft it.

18 Q. But you do see it is dated April 15,
19 2019; right?

20 A. Yes.

21 Q. And this was a document that was
22 actually included by the advisors in a pleading
23 they filed with the Court; right?

24 MR. RUKAVINA: Well, I don't know
25 that so I object to form.

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2 Q. Okay. Let's go to the first page of
3 the document and just confirm that.

4 MR. AIGEN: Mr. Morris, I just note
5 that you already said there was some error
6 with the document that is listed as
7 exhibit --

8 MR. MORRIS: No. No, no, no.

9 MS. DEITSCH-PEREZ: Oh, okay.

10 MR. MORRIS: What I said is that
11 there is a few pages that were mistakenly
12 stapled to the end of the document.

13 MS. DEITSCH-PEREZ: Okay.

14 MR. MORRIS: There is no problem
15 with this document.

16 MS. DEITSCH-PEREZ: And just so
17 we're clear that the document -- the pages
18 that start with defendant's amended answer
19 are not intended to be part of this
20 document?

21 MR. MORRIS: That's correct.

22 MS. DEITSCH-PEREZ: And that the --
23 but it is your representation that the rest
24 of the document is -- is -- is correct
25 because we don't -- we don't have any way

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2 of verifying that, we're just --

3 MR. MORRIS: You do, actually. You
4 could just go to Docket No. 21-3004.

5 MS. DEITSCH-PEREZ: If you want to
6 stop this deposition so we can go and pull
7 that document up, we're happy to do it. So
8 I am just asking you for your
9 representation.

10 MR. MORRIS: Sure. I gave that.

11 MS. DEITSCH-PEREZ: Okay.

12 Q. So do you see that this is a
13 document that was actually filed with the Court
14 by Highland Capital Management Fund Advisors?

15 A. No. I get with the first page in
16 the section. Maybe I'm looking at the wrong
17 thing. It says, Highland Capital Management.

18 Q. Don't worry about it. Don't worry
19 about it.

20 A. Maybe I went back -- okay.

21 MR. MORRIS: All right. Can we put
22 up on the screen Exhibit 2.

23 (Exhibit 2 marked.)

24 MR. MORRIS: I think it is
25 Exhibit 1.

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2 MS. DANDENEAU: I'm sorry, John, did
3 you say Exhibit 2 or Exhibit 1?

4 MR. MORRIS: It is Exhibit 2 in the
5 binders so it is premarked Exhibit 2. And
6 now I'm asking -- right there -- going to
7 Exhibit 1 to the document that was marked
8 as Exhibit 2.

9 MS. DANDENEAU: Got it. In the
10 binder there is no --

11 MS. DEITSCH-PEREZ: There is no
12 Exhibit 1.

13 MR. MORRIS: All right. So look at
14 the one on the screen.

15 Q. Do you see, Mr. Waterhouse, that
16 this is a promissory note dated May 31st, 2017,
17 in the approximate amount of \$30.7 million?

18 A. Yes.

19 Q. And do you see that the maker of the
20 note is NexPoint?

21 A. Yes.

22 Q. And that Highland is the payee; is
23 that right?

24 A. Yes.

25 Q. Okay. And do you see in Paragraph 2

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2 this is an annual installment note?

3 A. Can you scroll down.

4 Q. Sure.

5 MR. MORRIS: Can we scroll down --
6 yeah, there you go.

7 A. Right there, yeah. Yes.

8 MR. MORRIS: And can we scroll down
9 to the signature line.

10 Q. And do you recognize that as
11 Mr. Dondero's signature?

12 A. Yes.

13 Q. And is this the promissory note that
14 we talked about earlier where NexPoint had made
15 certain payments in the aggregate amount of
16 about 6 to \$7 million against principal and
17 interest?

18 A. I don't recall discussing the
19 aggregate principal amounts of 6 to \$7 million,
20 but -- so I don't -- I don't recall that prior
21 discussion with those amounts.

22 Q. All right. Let's take a look.
23 NexPoint always included this promissory note
24 as a liability on its audited financial
25 statements; right?

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2 A. Yes.

3 Q. And NexPoint had its financial
4 statements audited; isn't that correct?

5 A. Yes.

6 Q. And was the process of NexPoint's
7 audit similar to the process you described
8 earlier for Highland and HCMFA?

9 A. Yes, it is similar.

10 Q. Okay.

11 MR. MORRIS: Can we put up
12 NexPoint's audited financials and let
13 everybody know what exhibit number it is,
14 La Asia?

15 MS. CANTY: It is going to be
16 Exhibit 46.

17 (Exhibit 46 marked.)

18 Q. And do you see, sir, that we've put
19 up NexPoint Advisors' consolidated financial
20 statements and supplemental information for the
21 period ending December 31st, 2019?

22 A. Yes.

23 Q. Did you participate in the process
24 whereby these audited financial statements were
25 issued?

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2 A. I didn't participate directly, as
3 I've described before, about the -- the team
4 performing the audit.

5 Q. Do you recall when the audit of
6 NexPoint's financial statements for the period
7 ending December 31st, 2019 was completed?

8 A. Yes.

9 Q. And when do you recall it being
10 completed?

11 A. In January of 2021.

12 Q. Do you know why the 2019 audit
13 report wasn't completed until January of 2021?

14 A. Yes.

15 Q. Why was the NexPoint audit report
16 for the period ending 12/31/19 not completed
17 until January 2021?

18 A. Because we had to deal with working
19 from home from -- with COVID, and on top of all
20 of our daily responsibilities and job duties
21 at -- at providing -- at Highland providing
22 services to NexPoint, we had to do all of this
23 extra work for a bankruptcy that was filed in
24 October of 2019.

25 MR. MORRIS: Can we go to the

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2 balance sheet on page 3? Okay. Stop right
3 there.

4 Q. Do you see under the liabilities
5 section, the last item is note payable to
6 affiliate?

7 A. Yes.

8 Q. And is that the note that we just
9 looked at?

10 MS. DANDENEAU: Objection to form.

11 Q. Withdrawn.

12 Is that the approximately
13 \$30 million note that we just looked at that
14 was dated from 2017?

15 MS. DANDENEAU: Objection to form.

16 A. I believe no.

17 Q. Okay. You're not aware of any other
18 note that was outstanding from NexPoint to
19 Highland as of the end of the year 2019, other
20 than that one \$30 million note; right?

21 A. I don't recall.

22 Q. And as of the end of 2019, the
23 principal amount that was due on the note was
24 approximately \$23 million; right?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. Approximately.

4 Q. And does that refresh your

5 recollection that between the time the note was

6 executed and the end of 2019, that NexPoint had

7 paid down approximately \$7 million?

8 A. Yes. If we are just doing the math,

9 yes.

10 Q. Okay. Did NexPoint complete its

11 audit from 2020?

12 A. Sorry, you kind of broke up. Do

13 NexPoint complete?

14 Q. The audit of its financial

15 statements for the period ending December 31st,

16 2020?

17 A. No.

18 Q. No, it's not complete?

19 A. No, it is not complete.

20 Q. Did HCMFA complete its audit for the

21 year ending December 31st, 2020?

22 A. No.

23 MR. MORRIS: Can we go to page 15,

24 please, the paragraph at the bottom.

25 Q. Do you see that NexPoint has

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2 included under notes payable to Highland a
3 reference to the amounts that were outstanding
4 as of the year-end 2019 under the note that we
5 looked at just a moment ago?

6 A. Yes. Are you talking about the
7 second paragraph?

8 Q. I'm actually talking about first
9 paragraph. Do you understand that the first
10 paragraph is a reference to the 2017 note, and
11 the amounts that were -- the principal amount
12 that was outstanding as of the end of 2019?

13 MS. DANDENEAU: Objection to form.
14 John, do you mean the first paragraph of
15 that page?

16 MR. MORRIS: No, the first paragraph
17 under notes payable to Highland.

18 A. Yeah, I see the paragraph, and
19 again, this is what I answered earlier. I
20 believe so, just because I don't -- again, this
21 is a number in a balance sheet, and without
22 matching it up and seeing the detail with the
23 schedule like I kind of talked about for
24 Highland's financial statements, it is a little
25 bit more difficult to tie everything in

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2 perfectly together.

3 Q. Okay. But you're not aware of any
4 note that was outstanding at the end of 2019
5 from NexPoint to Highland other than whatever
6 principal was still due and owing under the
7 \$30 million note issued in 2017; correct?

8 A. Well, it -- I don't -- there is
9 reference in the second paragraph. I don't --
10 I don't -- I don't recall what that is
11 referring to, so I don't -- I don't know.

12 Q. Well, if you listen carefully to my
13 question, right, I'm asking about notes that
14 were outstanding at the end of 2019, and if we
15 look at the paragraph you just referred to, it
16 says that during the year there were new notes
17 issued totaling \$1.5 million, but by the end of
18 the year, no principal or interest was
19 outstanding on the notes.

20 Do you see that?

21 A. Oh, I do, yes.

22 Q. So does that refresh your
23 recollection that there were no notes
24 outstanding from NexPoint to Highland other
25 than the principal remaining under the original

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2 \$30 million 2017 note that we looked at a
3 moment ago?

4 A. Well, we're at the bottom of the
5 page. Is there anything on page 16?

6 Q. That is a fair question, sure. That
7 is it.

8 A. Okay. So it appears that that is
9 the only note that is detailed in the notes in
10 the financial statement.

11 Q. And you don't have any memory of any
12 other note other than the 2017 note, right,
13 being outstanding as of the end of the year?

14 A. I deal with thousands of
15 transactions every year. I don't really have a
16 very specific memory for what exactly was
17 outstanding.

18 MR. MORRIS: Why don't we take a
19 break now. We've been going for a little
20 while. It's 3:26. Let's come back at
21 3:40.

22 VIDEOGRAPHER: We're going off the
23 record at 3:26 p.m.

24 (Recess taken 3:26 p.m. to 3:39 p.m.)

25 VIDEOGRAPHER: We are going back on

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2 the record at 3:39 p.m.

3 Q. All right. Mr. Waterhouse, we -- I
4 don't think we have a lot more here.

5 To the best of your knowledge and
6 recollection, were all affiliate loans and all
7 loans made to Mr. Dondero recorded on
8 Highland's books and records as assets of
9 Highland?

10 MS. DANDENEAU: Object to the form,
11 asked and answered.

12 A. To my knowledge, yes.

13 Q. Okay. Can you recall any loan to
14 any affiliate or Mr. Dondero that was not
15 recorded on Highland's books and records as an
16 asset?

17 A. Like during my time as CFO? I don't
18 recall.

19 Q. How about after the time that you
20 were CFO? Did you recall that there was a loan
21 by Highland to an affiliate or to Mr. Dondero
22 that hadn't been previously recorded on
23 Highland's books as an asset?

24 MS. DANDENEAU: Objection to form.

25 A. I guess I don't understand the

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2 question. I left Highland as of -- I'm not
3 aware of -- I left Highland in February --
4 probably the last day of February of 2021.

5 Q. Okay.

6 A. I'm not -- I'm not aware of any --
7 I'm not aware of anything past that date.

8 Q. Okay. While you were the CFO at
9 Highland, did Highland prepare in the ordinary
10 course of business a document that reported
11 operating results on a monthly basis?

12 A. Yes.

13 Q. And are you generally familiar with
14 the monthly operating reports?

15 A. Yeah. You are referring to the
16 reports that we filed to the Court every month?

17 Q. I apologize, I'm not. I'm taking
18 you back to the pre-petition period. There was
19 a report that I have seen that I'm going to
20 show you, but I'm just asking for your
21 knowledge.

22 MR. MORRIS: Let's put it up on the
23 screen, Exhibit 39.

24 (Exhibit 39 marked.)

25 Q. Do you see this is a document that

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2 is called operating results?

3 A. Yeah, that's the title of it.

4 Q. Okay. And was a report of operating
5 results prepared by Highland on a monthly basis
6 during the time that you served as CFO?

7 A. No.

8 Q. Are you familiar with a document of
9 this type? And we can certainly look at the
10 next page or two to refresh your recollection.

11 A. I'm just looking at the title. I
12 don't really -- again, as I discussed before, I
13 don't have any records or documents or emails
14 or appointments or anything that I was able to
15 use prior to -- prior to this deposition, so
16 I'm doing the best I can.

17 Q. Okay. You don't need to apologize.
18 I'm just asking you if you are familiar with
19 the document called Operating Results that was
20 prepared on a monthly basis at Highland?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 Q. If you're not, you're not.

24 A. I don't believe this was prepared on
25 a monthly basis.

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2 Q. Okay. Do you see that this one
3 is -- is dated February 2018?

4 A. Yes.

5 Q. Do you have -- do you believe --
6 have you ever seen a document that was
7 purporting to report operating results for
8 Highland?

9 MS. DANDENEAU: Objection to form.

10 A. Yes.

11 Q. Okay. And when you say that you
12 don't believe it was produced on a monthly
13 basis, was it produced on any periodic bases to
14 the best of your recollection?

15 A. I believe it was -- it was prepared
16 on an annual basis.

17 Q. Okay.

18 MR. MORRIS: Can we look at the next
19 page.

20 Q. Do you see that there is a statement
21 here called: Significant items impacting
22 HCMLP's balance sheet?

23 And it is dated February 2018.

24 A. Yes.

25 Q. Do you recall that there was a

1 WATERHOUSE - 10-19-21

2 report that Highland prepared that identified
3 significant items impacting the balance sheet?

4 A. A report that was prepared.

5 Q. Let me ask a better question: Did
6 Highland prepare reports to the best of your
7 recollection that identified significant items
8 that impacted its balance sheet?

9 A. Well, so Highland prepared a -- a
10 monthly close package. And maybe I'm
11 getting -- and -- and maybe change names at one
12 time or maybe I'm just -- again, just
13 misremembering -- but in that, yes, there is a
14 page that would detail just changes in -- you
15 know, just changes month over month on the
16 balance sheet.

17 Q. Okay. And maybe it is my fault.
18 Maybe I didn't know the proper name for it.
19 But let's use the phrase "monthly close
20 package."

21 Did Highland prepare a monthly close
22 package in the ordinary course of business
23 during the time that you served as CFO?

24 MS. DANDENEAU: Objection to form.

25 A. Yes.

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2 Q. And did the monthly close package
3 that Highland prepared include information
4 concerning significant items that impacted
5 Highland's balance sheet?

6 A. Yes, it had a page like that is --
7 that is on the screen that detailed items
8 like -- of that nature.

9 Q. And do you know who -- was there
10 anybody at Highland who was responsible for
11 overseeing the preparation of the monthly
12 reporting package?

13 A. That would have been -- again, it
14 varies over time during my tenure as CFO.
15 It -- it varied over -- over time, but -- but
16 typically a -- a corporate accounting manager.

17 Q. And who were the corporate
18 accounting managers during your tenure as CFO?

19 A. It would have been Dave Klos and
20 Kristin Hendrix.

21 Q. And did the corporate accounting
22 manager deliver to you drafts of the monthly
23 close package before it was finalized?

24 A. Sometimes.

25 Q. Was that the practice even if there

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2 were exceptions to the practice?

3 A. The practice meaning that they
4 sometimes lured them to me?

5 Q. That that was the expectation even
6 if circumstances prevented that from happening
7 from time to time.

8 MS. DEITSCH-PEREZ: Object to the
9 form.

10 A. I -- I would say it started out that
11 way but over the years it -- it was not
12 enforced.

13 Q. Okay. So you were -- you reviewed
14 and approved monthly -- monthly reporting
15 packages for a certain period of time and then
16 over time you stopped doing that.

17 Do I have that right?

18 MS. DANDENEAU: Objection to form.

19 A. Yes, I mean, if you're talking about
20 a formal meeting where we sit down and go
21 through and approve it. I would say that was
22 standard practice a decade -- you know, early
23 on. And as time went on that -- that -- that
24 practice wasn't followed.

25 Q. Okay.

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2 A. And, quite frankly, I don't even
3 know if these were -- these were sent to me
4 even in any capacity.

5 Q. What was the purpose of preparing
6 the monthly reporting package -- withdrawn.

7 What was the purpose of preparing
8 the monthly close package?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. The -- the original purpose was so
12 that it would just -- it would be a report that
13 was reviewed monthly with senior management.

14 Q. Who was included in the idea of
15 senior management?

16 A. You know, I think originally when
17 this was conceived that would have been like
18 Jim Dondero and Mark Okada.

19 Q. Were monthly reporting -- withdrawn.

20 Were monthly close packages prepared
21 to the best of your knowledge until the time
22 you left Highland?

23 A. To my knowledge -- I don't know,
24 actually. I mean, to my knowledge, I believe
25 it was being -- that was still being done. I

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2 don't know because, again, I wasn't reviewing
3 them. I hadn't reviewed a close package for --
4 for a long time. But I believe the standard
5 practice that was still being carried out.

6 Q. Did you ever have any discussions
7 with the debtor's independent board concerning
8 any promissory notes that were issued by any of
9 the affiliates or Mr. Dondero?

10 A. I can't -- I can't -- I can't recall
11 specifically.

12 Q. Did you speak with the independent
13 board from time to time?

14 A. Yes, from -- from -- from time to
15 time I had discussions with the independent
16 board members, you know, either -- either, you
17 know, by themselves or wholly, you know, as --
18 as a -- as a combined work.

19 Q. Okay. Before we talk about
20 Mr. Seery, do you recall ever having a
21 conversation with Mr. Nelms or Mr. Dubel
22 concerning any promissory note that was
23 rendered by one of the affiliates or
24 Mr. Dondero to Highland?

25 A. I don't recall any conversations

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2 specifically.

3 Q. Do you know if the topic was ever
4 discussed, even if you don't remember it
5 specifically?

6 MS. DANDENEAU: Objection to form.

7 A. It -- it -- it may have. I don't
8 know. I don't recall.

9 Q. Do you recall ever discussing any
10 promissory note issued by any of the affiliates
11 or Mr. Dondero with James Seery?

12 A. I don't -- I don't recall
13 specifically.

14 Q. Do you recall generally ever
15 discussing the topic of promissory notes issued
16 by any of the affiliates or Mr. Dondero to
17 Highland with Mr. Seery?

18 A. Nothing -- nothing is really jumping
19 out at me.

20 Q. Do you recall if you ever told
21 Mr. Seery that any of the affiliates or
22 Mr. Dondero didn't have an obligation to pay
23 all amounts due and owing under their notes?

24 A. I don't recall having that
25 conversation.

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2 Q. Did you ever tell Mr. Seery that you
3 had any reason to believe that the amounts
4 reflected in the notes issued by the affiliates
5 and Mr. Dondero were invalid for any reason?

6 A. I don't -- I don't recall.

7 Q. Did you tell Mr. Dondero -- did you
8 tell Mr. Seery that you thought the promissory
9 notes issued by the advisors and Mr. Dondero
10 that were outstanding as of the petition date
11 were assets of the estate?

12 A. I don't recall having a specific
13 conversation about those -- you know, those
14 notes outstanding as -- as of the petition date
15 being assets on the estate. I mean, we put
16 together -- you know, they're in the books and
17 records of the financial statements. I don't
18 recall having a specific conversation.

19 Q. Did you ever prepare any documents
20 that were delivered to Mr. Seery that concerned
21 the promissory notes issued by any of the
22 affiliates or Mr. Dondero?

23 MS. DANDENEAU: Objection to form.

24 A. Did I produce any that concerned --
25 you mean did I just -- did I give Mr. Seery

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2 anything that -- that said I have concerns over
3 these notes?

4 Q. No. Let me try again. Maybe it was
5 my question.

6 Did you ever give Mr. Seery any
7 information concerning any of the notes that
8 were issued by any of the affiliates or
9 Mr. Dondero?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall if I did or not. I
12 don't -- I don't remember. I mean, you have my
13 emails. You may have asked. Again, I don't --
14 I don't know.

15 MR. MORRIS: Can we put up the
16 document that has been premarked as Exhibit
17 39?

18 MS. DANDENEAU: John, that is this
19 document, isn't it?

20 MR. MORRIS: Oh, yeah, it might be,
21 as a matter of fact. Let's go to Number
22 40.

23 (Exhibit 40 marked.)

24 Q. During the bankruptcy,
25 Mr. Waterhouse, did you prepare documents that

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2 were filed with the bankruptcy court?

3 A. I didn't -- I didn't prepare them
4 personally.

5 Q. Did people prepare them under your
6 direction?

7 A. Yes. There were members of the team
8 that prepared them, and they worked in -- you
9 know, there were members of DSI that were
10 involved in the process as well.

11 Q. To the best of your knowledge, did
12 DSI rely on the employees of Highland for the
13 information that they used to prepare the
14 bankruptcy filings?

15 A. Yes. The books and records were
16 with the Highland personnel.

17 Q. Okay. And do you see on the screen
18 here, there is a document that we have marked
19 as Exhibit 40 that is -- that is titled Summary
20 of Assets and Liabilities?

21 A. Uh-huh.

22 Q. Okay. And do you recall reviewing
23 any summary of assets and liabilities before it
24 was filed with the bankruptcy court?

25 A. Yes, I recall reviewing this at a

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2 high level.

3 Q. And did you believe that it was
4 accurate at the time it was filed?

5 A. I didn't have any other reason to
6 believe otherwise.

7 Q. Okay. Do you see that the total
8 value of all properties listed in Part 1 is
9 approximately \$410 million?

10 MS. DEITSCH-PEREZ: Objection to
11 form.

12 A. Yes, it is in 1c.

13 Q. Yes.

14 A. Yes, I see that.

15 Q. Okay. If we go to the second page,
16 now I think I may just have excerpts here, just
17 so everybody is clear, but if we scroll down to
18 the second page, you will see that there is
19 a -- a little further. There you go. You will
20 see there is a reference to Item 71, notes
21 receivable.

22 Do you see that?

23 A. I do.

24 Q. And that was a reference to the
25 notes receivable from the affiliates and

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2 Mr. Dondero, among others; is that right?

3 MS. DANDENEAU: Objection to form.

4 A. Yes. The affiliate notes and the
5 Dondero notes were in this amount, but they
6 weren't -- again, like you said, and among
7 others.

8 Q. Okay. We will look at the
9 specificity because I'm not playing gaming
10 here, but do you know if the \$150 million of
11 notes receivable was included within the
12 \$410 million of total value of the debtor's
13 assets?

14 MS. DANDENEAU: Objection to form.

15 A. I -- I -- I believe so.

16 Q. Right. And so is it fair to say
17 that as of the date this document was prepared,
18 the notes receivable were more than one-third
19 of the value of the debtor's assets?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 MS. DANDENEAU: Object to the form.

23 A. Again, if you are just taking the
24 math, 150 divided by whatever the \$400 million
25 number is above, then yes, you get there.

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2 Q. Okay.

3 A. You know, but as of the time of this
4 filing, that is what was put in this filing,
5 right, but, you know, I mean, numbers --
6 numbers change, facts and circumstances change.

7 Q. But as the CFO of Highland, the
8 debtor in bankruptcy, did you believe that this
9 number accurately reflected the total amount
10 due under the notes receivable?

11 A. That is what we had in our books and
12 records.

13 Q. Okay. And did you believe as the
14 CFO that the books and records accurately
15 reported the then value of the debtor's assets?

16 MS. DANDENEAU: Objection to form.

17 A. We didn't -- as part of this filing,
18 there was no fair value measurement or
19 anything. These were just accounting entries
20 for the promissory notes. There is no analysis
21 for impairment or fair market value adjustments
22 or anything of that nature. This is purely
23 taking numbers and putting them in our form.

24 Q. Did you do any impairment analysis
25 at any time while you were employed by

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2 Highland?

3 A. Yes, we did do impairment analysis
4 on -- on assets.

5 Q. Okay. Did you ever do an impairment
6 analysis on any of the promissory notes that
7 were given to Highland by any of the affiliates
8 or Mr. Dondero?

9 A. Not that I recall.

10 Q. Under what circumstances do you
11 prepare impairment analyses?

12 A. As -- as -- if you're preparing
13 financials in accordance with GAAP, generally
14 accepted accounting principles, if you're
15 preparing full GAAP financials, you should be
16 preparing -- you should be undergoing on a
17 periodic basis any fair market value
18 adjustments to assets.

19 As I was instructed at the time of
20 the petition date, we weren't producing GAAP
21 financials. So this wasn't something I was
22 worried about nor concerned about.

23 Q. Okay. Were NexPoint and HCMFA and
24 Highland's audited financial statements
25 prepared in accordance with GAAP?

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2 A. The audited financials -- yes,
3 audited financial statements are prepared in
4 accordance with GAAP.

5 Q. Do you recall whether any of
6 Highland or HCMFA or NexPoint ever made a fair
7 market value adjustment to any of the notes
8 issued by any of the affiliates or Mr. Dondero
9 to Highland?

10 A. I do not recall that happening, but
11 the -- it is because under -- under GAAP,
12 the -- the treatment of liabilities is
13 different than assets.

14 Q. Okay. So then let's just focus on
15 Highland's audited financial statements.

16 The last audited financial
17 statements were for the period ending December
18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had -- you had an obligation
21 to disclose anything to PricewaterhouseCoopers
22 concerning any subsequent events between the
23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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2 A. Correct.

3 Q. Okay. To the best of your
4 knowledge, as Highland's CFO, did Highland ever
5 make any fair market value adjustments to any
6 of the promissory notes that were carried on
7 its balance sheet and that were issued by any
8 of the affiliates or Mr. Dondero?

9 A. I think I answered that question
10 earlier. I don't recall doing that for any of
11 the -- those -- those notes. So it would have
12 included the audit for the -- for the 2018
13 period.

14 Q. Okay.

15 MR. MORRIS: Can we go to the next
16 page.

17 Q. Do you see this is a note a list of
18 notes receivable? Do you see that?

19 A. Yes, I do.

20 Q. And do you see that this ties into
21 the page that we were just looking?

22 A. I'm sorry, can we go back to the
23 prior page? I mean, it was at 150,331,222. It
24 was on the prior page. Next page. Yes, it
25 agrees.

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2 Q. Okay. So now let's look at that
3 schedule. So this was the face amount of all
4 of the promissory notes that Highland held at
5 the time this document was filed with the
6 bankruptcy court; right?

7 A. Yes.

8 Q. There is a footnote there that says,
9 doubtful or uncollectible accounts are
10 evaluated at year-end.

11 Do you see that?

12 A. I do.

13 Q. Okay. And is it fair to say that as
14 of the year-end 2018, the year before this,
15 that to the extent any of these notes were
16 outstanding at that time, they weren't deemed
17 to be doubtful or uncollectible?

18 A. Yeah. For the 2018 audit, there
19 weren't any -- there weren't any adjustments to
20 fair value.

21 Q. Okay. And during the bankruptcy, do
22 you recall that Highland subsequently reserved
23 for the Hunter Mountain Investment Trust note?

24 A. Yes.

25 Q. Why did Highland -- were you

1 WATERHOUSE - 10-19-21

2 involved in the decision to reserve the Hunter
3 Mountain Investment Trust note?

4 A. I was not.

5 Q. Do you know why Highland decided to
6 reserve for the Hunter Mountain Investment
7 Trust note?

8 A. I don't know yet decision was made.
9 I believe it was made by someone at DSI.

10 Q. Okay. I'm just asking if you know
11 why.

12 Did you ever ask anyone why they
13 reserved for that particular note?

14 A. I don't recall.

15 Q. Do you know whether the debtor
16 reserved for any other note on this list during
17 the bankruptcy?

18 A. Again, I don't recall. I wasn't
19 part of any process of -- again, like any fair
20 value adjustments or anything to that degree.
21 Like I said, a lot of that was done by DSI and
22 it was kind of out of our court.

23 Q. Okay. Do you know if any note
24 receivable on this list was ever deemed by the
25 debtor to be doubtful or uncollectible?

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2 A. I don't -- I don't have a
3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with
5 anybody at any time about whether any of the
6 notes receivable on this list should be deemed
7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were
9 told we didn't have to keep GAAP financials.
10 We weren't having -- you know, there is no
11 underlying audits being performed, so I mean,
12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation
15 with anybody about any of the notes receivable
16 and whether they should be deemed to be
17 doubtful or uncollectible? Did you have the
18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody
22 that you believed any of the notes receivable
23 on this list should be doubtful -- should be
24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall. I mean, it may have
3 happened, you know, again, when we initially
4 getting DSI up to speed and going through
5 financials, it may have happened, but I don't
6 recall specifically.

7 Q. While you were the CFO of Highland
8 during the time that the company was in
9 bankruptcy, did you have any reason to believe
10 that any of the notes receivable on this list
11 other than Hunter Mountain Investment Trust
12 should have been characterized as doubtful or
13 uncollectible?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Form.

16 A. I didn't know. I didn't form an
17 opinion. Bankruptcy was new to me. It still
18 is new to me, even after going through this.
19 So I really didn't know what to expect nor
20 really -- you know, I didn't know.

21 MR. MORRIS: I move to strike.

22 Q. During the period of Highland's
23 bankruptcy when you were serving as CFO, did
24 you have any reason to believe any of the notes
25 on this list were doubtful or uncollectible?

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2 MS. DEITSCH-PEREZ: This is like the
3 fifth time you've asked it. Object to the
4 form.

5 MR. MORRIS: I'm moving to strike,
6 if you haven't noticed, because he's not
7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering
9 the question, you just didn't like it, like
10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't -- we brought up a
14 myriad of issues at the start of the bankruptcy
15 case. I don't recall if this was one of them,
16 but, again, there are a lot of things we
17 couldn't change. Even, you know, I was told
18 status quo, blah, blah, blah, right, there is a
19 stay, you can't -- you know, I don't recall
20 specifically, but that doesn't mean it didn't
21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in
24 bankruptcy and you served as CFO, did you have
25 any reason to believe that any of the notes

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2 receivable on this list were doubtful or
3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,
9 yes, we -- at the beginning after filing and we
10 were getting DSI and others up to speed, you
11 know, we had a myriad of discussions of a lot
12 of things and this was likely one of them. I
13 don't -- but I don't recall specifically we
14 talked --

15 Q. I don't want to know -- I don't want
16 to know what was --

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him
19 finish his answer.

20 A. I spoke -- we had -- we were
21 bringing Fred Karesa and Brad Sharp (phonetic)
22 up to speed on all of these items, contracts,
23 and investments and going through -- we had
24 hours and hours and hours of discussion. And
25 then not only do I have to repeat this not

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2 once, twice, three, four times with -- you
3 know, I mean, we -- I don't -- I don't remember
4 the sum culmination of all these discussions.
5 They all kind of blend together.

6 MR. MORRIS: Okay. I move to strike
7 and I will try one more time.

8 Q. Did you ever tell anybody at DSI
9 that you believed any of the notes receivable
10 on this list were doubtful or uncollectible?

11 MS. DANDENEAU: Object to form.

12 A. Potentially.

13 Q. Potentially you told them or
14 potentially they were doubtful or
15 uncollectible?

16 A. Potentially I told them that we
17 needed to look at the value of these -- of
18 these assets.

19 Q. Okay. Did you -- okay. It is
20 potential that you told them and it is
21 potentially that you didn't; right?

22 MS. DANDENEAU: Objection to form.

23 A. I've gone through that. I don't
24 recall specifically.

25 Q. So you should just -- I don't want

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2 to tell what you to do. Do you have --

3 MS. DANDENEAU: Good.

4 Q. Other than -- other than telling
5 them that they should look at the values, do
6 you have any recollection whatsoever of ever
7 having told anybody at DSI that any of the
8 notes receivable on this page were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. I recall having general discussions
14 about everything on our balance sheet which
15 would have included these -- these notes
16 receivable.

17 Q. Okay.

18 A. I don't recall specifically where
19 those discussions delved into.

20 Q. Do you recall any discussion at all
21 on the topic of whether any of these notes on
22 this list were doubtful or uncollectible?

23 MR. AIGEN: Mr. Morris, how on earth
24 is that question different from the
25 question that you just asked for the last

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2 five times? I mean, really I thought you
3 were -- (overspeak.)

4 MR. MORRIS: Because he never
5 answered it.

6 MS. DEITSCH-PEREZ: Are you
7 listening to him?

8 MR. MORRIS: You know --

9 MS. DEITSCH-PEREZ: He basically
10 said that he had a conversation with DSI
11 that went over all of this stuff and that
12 conversation could have included the notes
13 but he doesn't recall specifically.

14 What more do you want him -- to ask
15 of him?

16 MR. MORRIS: I want him -- I would
17 love him to say -- I would like him to
18 testify to the truth, and that is he has no
19 recollection.

20 MS. DEITSCH-PEREZ: Well, the truth
21 as you would like to see it, but -- but he
22 is testifying truthfully. And I -- and, by
23 the way, I move to strike that comment --

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: -- because it

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2 suggests that he has not testified
3 truthfully.

4 MR. MORRIS: I will ask my question
5 again. And if at any time you want to
6 direct him not to answer, that is your
7 prerogative.

8 Q. Mr. Waterhouse, do you have any
9 recollection at all of ever telling anybody
10 from DSI that any of these notes were doubtful
11 or uncollectible?

12 MS. DANDENEAU: Object to form.

13 A. I don't remember specifically.

14 Q. Do you remember generally that
15 specific topic?

16 A. We generally talked about assets,
17 values. If -- we had discussions of that and
18 collectability in nature. I mean, of Highland,
19 the funds, the CLOs, the entire complex. We
20 had discussions like that, which is, you know,
21 as you look at a billion dollar consolidated
22 balance sheet.

23 So I generally remember -- this is
24 billions of dollars, including these assets --
25 having discussions of this -- of this type.

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2 Q. Do you believe that an affiliate
3 loan on this list was doubtful or
4 uncollectible? Would you have told that to
5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like -- again, if we --
9 if -- if we weren't preparing financial
10 statements in accordance with GAAP, and -- you
11 know, if DSI at that point -- they were --
12 again, I was new to bankruptcy.

13 The CRO is -- we are delegating
14 everything to the CRO. All the decisionmaking.
15 Remember -- remember when you and I went into
16 Delaware Court and we were saying DSI basically
17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and
19 basically we're running everything through DSI.
20 That was what this was like in the early part.

21 Everything was communicated through
22 DSI. So DSI says this. DSI says that. That
23 is what we're doing, and we're pointing out
24 things to them.

25 Now, they decide what direction this

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2 goes.

3 Q. Did you point out that any of
4 these --

5 A. I don't recall specifically.

6 Q. Okay. At any time that you served
7 as Highland's CFO, did you ever point out to
8 DSI that any of these loans were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. If you're asking me if I had a
14 conversation with DSI, if any of these loans
15 were doubtful or uncollectible, I don't recall
16 specifically.

17 Q. Do you recall that the debtor filed
18 on the docket monthly operating reports?

19 A. Yes.

20 Q. You prepared those personally,
21 didn't you?

22 MS. DEITSCH-PEREZ: Objection to
23 form.

24 A. I didn't personally prepare them,
25 the team did with DSI.

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2 Q. But you signed them; correct?

3 A. My signature is on the MORs.

4 Q. And you signed them as the preparer
5 of the document; correct?

6 A. Yes, I did this pursuant to DSI's
7 instructions.

8 Q. Okay. You wouldn't have signed the
9 document if you didn't believe it to be
10 accurate; correct?

11 A. If I had reason to believe it
12 wasn't, presumably I wouldn't have signed it.

13 Q. Okay. And do you have any reason to
14 believe right now that any monthly operating
15 report that has your signature on it was
16 inaccurate in any way?

17 MS. DEITSCH-PEREZ: Object to the
18 form.

19 A. My understanding of the monthly
20 operating reports is we were filing them in
21 accordance with the standards set by the Court.
22 It wasn't -- you know, again, I don't -- you
23 know, it wasn't GAAP. It wasn't these other
24 standards, so I testified I didn't have
25 experience in this. The CRO was running the

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2 show. I followed their advice.

3 Q. But you assured yourself that
4 everything in the report was accurate before
5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO
8 and their team and their experience and their
9 guidance for doing this for many, many, many
10 years to -- to -- to categorize and put things
11 in ways on the form.

12 You know, my team had -- had not
13 filled out these forms before and needed all of
14 this guidance. I'm not an expert in this. I
15 have oversight of it. I signed the form. DSI
16 told me to.

17 Q. And you and your team are the source
18 of the information that DSI used to create the
19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with
22 the -- with -- with the corporate accounting
23 team.

24 Q. Okay. And the corporate accounting
25 team was the corporate accounting team that was

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2 under your direction; correct?

3 A. Yes.

4 Q. So -- so your team was responsible
5 for maintaining Highland's books and records;
6 correct?

7 A. I'm sorry, my team was responsible?

8 Q. Correct.

9 A. Yes. They -- they -- they were
10 the -- the -- the general ledger of Highland,
11 that responsibility was with the corporate
12 accounting team.

13 Q. The corporate accounting group
14 reported to you; correct?

15 A. Yes.

16 MR. MORRIS: Can we put up 41,
17 please.

18 (Exhibit 41 marked.)

19 Q. All right. You will see that this
20 is a report that is dated January 31st, 2020,
21 but it is for the month ending December 2019.

22 Do you see that?

23 A. I do.

24 Q. And you signed this report in your
25 capacity as the chief financial officer of

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2 Highland; correct?

3 A. Yes.

4 Q. And you're the preparer -- you're
5 identified as the preparer of the report;
6 correct?

7 A. That is correct.

8 Q. Do you recall participating in the
9 preparation of monthly operating reports?

10 A. As I testified earlier, it was put
11 together, you know, with the team. The team
12 worked with DSI to put these monthly operating
13 reports together. We had no experience at this
14 time of the monthly operating reports or things
15 of this nature.

16 MR. MORRIS: Can you turn to the
17 next page, please.

18 Q. Do you see a line item under assets
19 due from affiliates?

20 A. Yes, I do.

21 Q. Okay. And to the best of your
22 knowledge and understanding, as the person who
23 is identified as the preparer of this report,
24 does that line item include the affiliate loans
25 that we've been talking about?

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2 A. Again, I would have to see, just
3 like we did with the financial statements of
4 Highland and NexPoint, I would have to see a
5 detailed build, but, you know, if you look at
6 the other line items, you know, the only other
7 place it could be would be in -- in other
8 assets.

9 Q. Okay. And as a matter of
10 arithmetic, is it fair to say that is the value
11 of the assets due from affiliates was more than
12 25 percent of the value of Highland's total
13 assets as of 12/31/2019?

14 MS. DANDENEAU: Objection to form.

15 A. I'm really not doing the mental math
16 right now, so I've been going at this depo for
17 hours, so I'm really not -- you know --

18 Q. All right. No problem.

19 A. -- these are millions of dollars.

20 Q. Let's look at the Footnote 1,
21 please. Do you see there is a reference to the
22 Hunter Mountain note?

23 A. Yes, I see that in Footnote 1.

24 Q. Okay. And that's the reserve that
25 was taken against that note?

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2 A. Yes, that is what this indicates.

3 Q. Okay. And were you aware that the
4 reserve was being taken on that it was?

5 A. I was -- I was aware, yeah, at some
6 point, yes.

7 Q. Okay. And are you aware of any
8 reserve being taken with respect to any other
9 note that was issued in favor of Highland?

10 A. Again, as I testified, we didn't go
11 through an analysis on -- on -- on the other
12 notes.

13 Q. Can we turn --

14 A. I believe -- I believe it says that
15 in Footnote 1, fair value has not been
16 determined with respect to any of the notes.

17 So this footnote -- footnotes, look,
18 there has been no determination.

19 Q. Okay. The determination was made in
20 the audited financial statements just six
21 months earlier; right? We saw that earlier?

22 A. That was as of 12/31/18. I mean,
23 things -- circumstances -- there's a bank --
24 circumstances change, things change -- things
25 change over time, you know, facts and

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2 circumstances change. Again, you have to do an
3 analysis.

4 Q. Okay. And you do recall that in
5 Highland's 2018 financial statement, all of the
6 notes issued by affiliates and Mr. Dondero that
7 were due at year-end had a fair value equal to
8 the carrying value; correct? We looked at
9 that?

10 A. Yes. That was in the -- in the
11 disclosure for the -- for the affiliate notes,
12 yes.

13 Q. And -- and you were obligated to
14 share with PwC any subsequent events between
15 the end of 2018 and the date that you signed
16 your management representation letter on June
17 3rd, 2019; correct?

18 MS. DEITSCH-PEREZ: Object to the
19 form.

20 A. Yes. I -- I -- I signed the
21 management, you know, my signature is in the
22 management representation letter -- I hope I'm
23 answering your question -- that is dated in
24 June with the representations made in that
25 management representation letter.

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2 Q. Okay. And there was nothing that
3 caused PricewaterhouseCoopers to include in
4 subsequent events any adjustment to the
5 conclusion that the fair value of the affiliate
6 notes and the notes issued by Mr. Dondero
7 equaled the carrying value; correct?

8 MS. DANDENEAU: Objection to the
9 form.

10 A. That is correct. That is what was
11 in the -- in the -- in the footnotes.

12 Q. Okay. So are you aware of anything
13 that occurred between June 3rd, 2019 and
14 December 31st, 2019 that would have caused the
15 fair value of the notes to differ from the
16 carrying value?

17 A. Yeah. Highland filed for
18 bankruptcy, things changed -- I mean, there was
19 a bankruptcy filed in October of -- of -- of
20 2019, right, the petition date that we've
21 described earlier.

22 I mean, I had a -- I guess looking
23 back naively, I thought we were going to get an
24 audit from PwC for year-ended 2019, and when we
25 had discussions with PwC, they were like, are

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2 you crazy, we're not auditing this. Values
3 change, all these things change, bankruptcy
4 changes the entire scenario. I mean -- and
5 they're like, we're not -- we're not touching
6 this.

7 And so, you know, I was like, okay,
8 sorry, I get it, okay, no an audit.

9 I mean, it is -- you know, and --
10 you know, and we weren't preparing GAAP
11 financial statements.

12 Again, I didn't know what we were
13 doing in relation to our financial statements,
14 but these were the discussions I was having at
15 the time. And yeah, I mean, filing bankruptcy
16 from what I got from outside auditors and
17 others involved changed things dramatically.

18 Q. Okay. Highland wasn't the obligor
19 under any of the notes that we're talking
20 about; correct?

21 A. No.

22 Q. So --

23 A. That's right.

24 Q. So can you identify any fact that
25 would cause the fair value to deviate from the

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2 carrying value during the seven-month period
3 between June 3rd and the end of the year, 2019?

4 MS. DANDENEAU: Objection to form.

5 A. No. I mean, I'm putting myself back
6 at that time, right. Hindsight is 2020, but we
7 didn't do an analysis, but we would have done a
8 fulsome analysis and looked at all of the facts
9 and circumstances at the time, but asset values
10 change. You know, there could have been a
11 market crash in hindsight in 2020, which --
12 which affected entities' abilities.

13 There could have been all of these
14 things, right, that -- that happen. It is --
15 it is easy to look back in hindsight, but when
16 you are looking at this in -- in realtime, the
17 analysis is different, and again, we didn't do
18 an analysis.

19 Q. Okay. You didn't do an analysis.

20 Do I have that right?

21 A. I don't -- I don't recall doing one
22 or maybe -- you know, I don't recall doing one.

23 MR. MORRIS: Okay. I'm going to
24 take a break. I may be done, so the time
25 now is -- is 4:30 your time. Let's just

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2 take a short break until 4:40 your time.

3 MS. DANDENEAU: Okay.

4 VIDEOGRAPHER: We're going off the
5 record, 4:31 p.m.

6 (Recess taken 4:31 p.m. to 4:43 p.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 4:43 p.m.

9 MR. MORRIS: I have no further
10 questions.

11 MR. RUKAVINA: Okay.

12 Mr. Waterhouse, I will go next.

13 EXAMINATION

14 BY MR. RUKAVINA:

15 Q. Sir, my name is Davor Rukavina. I'm
16 the lawyer for --

17 MR. MORRIS: Hey, Davor, just before
18 you begin, I just want to put on the record
19 Highland's objection to documents that were
20 produced to me 10 minutes before the
21 deposition began.

22 MR. RUKAVINA: What the basis of
23 your objection?

24 MR. MORRIS: That they were due
25 quite some time ago, and the fact that you

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2 had -- I just think it's appropriate to --
3 to dump documents on somebody 10 minutes
4 before the deposition. I just think
5 that's --

6 MR. RUKAVINA: Well, these are
7 documents Highland produced. I'm not aware
8 of any rule I have to give you advance
9 documents when I know for the record that
10 other than the exhibits that you sent to us
11 last week, most of the exhibits you used
12 today you did not provide to me prior to
13 this deposition.

14 MR. MORRIS: No, but the documents
15 were produced by me in -- in litigation,
16 right?

17 MR. RUKAVINA: I'm going to use
18 primarily, John, the documents that you
19 produced to me today, but you may.

20 MR. MORRIS: Primarily. I've got --
21 I've got my objection. You have got your
22 response. Proceed.

23 Q. Mr. Waterhouse, again, I represent
24 the advisors, HCMFA and NexPoint Advisors.

25 Do you understand that?

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2 A. Yes.

3 Q. You and I have never met or talked
4 before today, have we?

5 A. No, I have -- I have heard your
6 voice on calls before.

7 Q. Okay.

8 MR. RUKAVINA: Madam Court Reporter,
9 I will use a few exhibits today. My
10 associate, Mr. Nguyen, will find some way
11 to get them to you. I don't know how to do
12 that, but it looks like you guys do.

13 I am going to use numbers as well.
14 But to differentiate them from Mr. Morris
15 we're going to mark mine with the prefix A
16 for advisors.

17 Do you understand?

18 COURT REPORTER: Yes.

19 MR. RUKAVINA: Okay. Perfect.

20 Q. Okay. So, Mr. Waterhouse, let's
21 start with those two HCMFA notes that you were
22 asked about, one for 5 million and one for
23 2.4 million.

24 Do you recall those notes?

25 A. Yes.

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2 Q. Were you ever the CFO of HCMFA?

3 A. I don't recall.

4 Q. So to the best of your recollection,
5 you were still an officer of HCMFA in 2019,
6 just that your title was treasurer?

7 MR. MORRIS: Object to the form of
8 the question. There is no leading here.
9 He works for your client.

10 MS. DANDENEAU: That is not -- that
11 is not true.

12 MR. MORRIS: He's the treasurer --
13 he is the treasurer of your client. I
14 don't -- I'm going to object every time you
15 try to lead, so...

16 MR. RUKAVINA: Totally fine to
17 object.

18 MR. MORRIS: Okay.

19 Q. Please answer my question,
20 Mr. Waterhouse.

21 A. I'm sorry, could you repeat? There
22 was...

23 Q. Yes. You were -- you testified
24 earlier that in 2019 you were an officer of
25 HCMFA; correct?

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2 A. Yes, I testified that I was the
3 treasurer and I didn't know if that incumbency
4 certificate, you know, was one that appointed
5 me as a treasurer, but yes.

6 Q. I'm just trying to confirm that
7 sitting here today, to the best of your
8 recollection, at that time you were -- your
9 title was treasurer. It was not chief
10 financial officer.

11 A. I don't recall that being my title.

12 Q. Okay. And in May of 2019, however,
13 I think you testified you were the chief
14 financial officer of the debtor; correct?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes, I was -- yes.

18 Q. Okay. As such, in May of 2019, did
19 you have the authority, to your understanding,
20 to unilaterally loan \$5 million or \$2.4 million
21 to anyone on behalf of the debtor?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Sorry, can you repeat that?

25 Q. Yes. So in your capacity as the

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2 chief financial officer of the debtor, Highland
3 Capital Management, L.P., in May of 2019, did
4 you believe that you unilaterally, just Frank
5 Waterhouse, had the authority to loan on behalf
6 of the debtor to anyone \$5 million and
7 \$2.4 million?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. No.

11 Q. Is it because loans of that amount
12 would have had to be approved by someone else?

13 A. Yes.

14 Q. Who in '20 -- in May of 2019, if
15 Highland wanted to loan 5 million or
16 \$2.4 million to someone, what would have been
17 the internal approval procedure?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. If -- if we had loans of that nature
21 that needed to be made due to their size, we
22 would have gotten approval from the -- the
23 president of Highland.

24 Q. And who that was individual?

25 A. It was James Dondero.

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2 Q. Okay. Now, I'm going to ask you a
3 similar question but for a different entity.

4 In May of 2019, as the treasurer of
5 HCMFA, did you believe that you unilaterally
6 had the ability to cause HCMFA to become the
7 borrower of a \$5 million loan and a
8 \$2.4 million loan?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. No.

12 Q. What would -- what would the
13 approval have taken place -- strike that.

14 What would the approval process have
15 been like in May of 2019 at HCMFA for HCMFA to
16 take out a \$7.4 million loan?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. The process would have been similar
20 to what we just discussed on -- for Highland to
21 make a loan to others. So, again, you know,
22 we -- we would have -- either myself or someone
23 on the team would have discussed this with
24 the -- the president and owner of -- of HCMFA.

25 Q. And who was that individual?

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2 A. That was James -- Jim Dondero.

3 Q. So do I understand that in May of
4 2019, on behalf of both the lender, Highland,
5 and the borrower, HCMFA, Mr. Dondero would have
6 had to approve \$7.4 million in loans?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Yes.

10 Q. You mentioned when Mr. Morris was
11 asking you the NAV error, N-A-V error, with
12 respect to TerreStar, without writing us a
13 novel, unless you feel like you have to, can
14 you summarize what that NAV error was? What
15 happened?

16 A. There was a -- in the Highland
17 Global Allocation Fund, it owned at the time an
18 equity interest in a company called TerreStar.
19 And TerreStar is -- at the time was a private
20 company, and it may still be today. Again, I'm
21 putting myself back then as a private company.

22 We had -- sorry, I don't mean we --
23 the fund and the advisor used Houlihan Lokey
24 to -- to value that investment. And during
25 that time there was some trades that were

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2 executed at market levels that were much lower
3 than the Houlihan Lokey model.

4 And based on information and
5 discussions with the portfolio managers and,
6 you know, principals that were very familiar
7 with TerreStar, it was determined that those
8 trades were non-orderly and they were not
9 considered in the valuation as consulted with
10 Houlihan Lokey and PricewaterhouseCoopers at
11 the time.

12 Subsequent to a -- I can't remember
13 the exact circumstances of why the SEC got
14 involved. I think it was due to this -- this
15 investment became a material position in the
16 fund. It triggered an SEC, kind of, inquiry.
17 And as part of that inquiry, they questioned
18 the valuation methodology. "They" meaning the
19 SEC.

20 And at the culmination of that
21 process -- this is all summarized -- the value
22 that was -- that ultimately had to be used in
23 the fund's NAV was different than -- materially
24 different than what the original valuation at
25 Houlihan Lokey provided.

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2 And given that there was this fund
3 was, as we discussed -- I don't know if we
4 discussed it, but it was an open-ended fund
5 that was going -- that was converting to a
6 close-end fund.

7 Due to the fact that it was an
8 open-ended fund, you had to recalculate NAV and
9 see what the impact was on people -- on
10 investors coming in and out of the fund and if
11 there is a detrimental impact and to calculate
12 what that -- what that impact was and if there
13 was any amounts owed to the fund pursuant to
14 the error.

15 Q. Were you personally involved
16 internally at either Highland or HCMFA with
17 these investigations and discussions with the
18 SEC?

19 A. I was.

20 Q. Which other key people or senior
21 people at Highland were involved, to your
22 recollection?

23 A. Myself, Thomas Surgent, David Klos,
24 Lauren Thedford, Jason Post.

25 Q. Mr. Dondero, was he --

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2 A. I believe Cliff Stoops. I'm trying
3 to think. And maybe that is -- that is -- that
4 is -- that is all kind I can recall at the
5 moment.

6 Q. Do you recall whether it was
7 determined that the fund suffered losses as a
8 result of this error?

9 A. The -- the fund -- the -- the --
10 because the open-ended nature of the fund,
11 there were losses that were attributable to
12 investors. Meaning they -- they would have
13 redeemed and got a less money or -- or they
14 subscribed in and maybe because they didn't get
15 enough shares and then they later sold and then
16 they were harmed in that fashion.

17 And there is -- there is -- there
18 were very -- there were very detailed
19 calculations and, you know, all these different
20 scenarios that we had to -- I'm sorry, I keep
21 saying "we" -- that the individuals involved
22 had to calculate and quantify.

23 Q. Well, do you recall whether HCMFA
24 admitted certain fault and liability for this
25 error?

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2 A. I don't recall specifically.

3 Q. Do you recall whether HCMFA caused
4 any funds to be paid to the investors and the
5 fund the subject of the NAV error?

6 A. Yes.

7 Q. Do you recall the approximate amount
8 of funds, moneys paid to the investors and the
9 fund?

10 A. It was -- it was approximately
11 \$7 million.

12 Q. If I was to suggest 7.8 million,
13 would that ring more true or are you sticking
14 with your original answer?

15 A. It was -- it was approximately 7 --
16 7 to \$8 million. Again, I don't remember the
17 exact number, but it was in that ballpark.

18 Q. So regardless of whether HCMFA
19 accepted fault or liability, it caused some
20 \$7 million or more to be paid out to affected
21 investors in the fund?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. And I want to make sure I'm
25 understanding your question because there is a

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2 lot of different entities that are going on to
3 my head.

4 I think what you are saying is based
5 on this error, shareholders were harmed by this
6 approximately \$7.8 million -- by approximately
7 \$7.8 million. Is that what you are asking?

8 Q. Yes, sir.

9 A. Yes, that was -- again, I don't have
10 the exact numbers. If I take -- it was -- it
11 was in that ballpark, and there is a detail
12 calculation and write-up that could, that --
13 that exists someplace.

14 Q. Now, at that time, at the time that
15 the NAV error occurred, was there a contract in
16 place between HCMFA and the debtor pursuant to
17 which the debtor was providing services to
18 HCMFA?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Was that contract generally called a
23 shared services agreement?

24 A. It was generally called that, but
25 there were -- there were -- I mean, it -- it --

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2 it depends on who you talk to, but yes,
3 generally, there were -- there are multiple
4 agreements.

5 Q. Pursuant to one or more of those
6 agreements, was the debtor providing certain
7 services to HCMFA?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes.

11 Q. And can you at a very high level
12 summarize in 2018 and 2019 what those services
13 were?

14 A. Yes, there was a -- yes.

15 Q. Okay. Please -- please go -- go
16 through a short summary.

17 A. There was a -- a cost reimbursement
18 agreement between Highland Capital Management
19 Fund Advisors and Highland Capital Management,
20 L.P. That agreement was for what we referred
21 to as front office services, so investment
22 management, things of that nature.

23 There was I think what most people
24 refer to as the shared services agreement that
25 was -- that agreement was between Highland

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2 Capital Management Fund Advisors and Highland
3 Capital Management for back office services.

4 Q. And can you summarize what you mean
5 by back office services?

6 A. Those services were for accounting,
7 finance, tax, valuation, HR, IT, you know,
8 legal compliance, things of -- things of those
9 nature -- or things of that nature, excuse me.

10 Q. So in the spring of 2019, do you
11 recall whether HCMFA took the position that it
12 was actually Highland that caused the NAV error
13 to occur pursuant to the valuation services
14 that Highland was providing?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I do not recall.

18 Q. Did you ever have any discussions
19 with anyone, Jim Dondero or anyone in the first
20 half of 2019 as to whether Highland, the
21 debtor, that is, had any liability to HCMFA
22 related to the NAV error?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I do not recall.

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2 Q. And then you mentioned that the fund
3 was being closed and some compensation related
4 to that. Can you -- can you elaborate? What
5 were you referring to?

6 A. Right. So the advisor, pursuant to
7 board approval, put a proposal in front of the
8 shareholders of the Highland Global Allocation
9 Fund to convert it from an open-ended fund to a
10 closed-end fund.

11 So an open-ended fund, when
12 shareholders subscribe to the fund or redeem
13 into the fund, they do it at NAV.

14 When it is -- when you have a
15 closed-end fund, closed-end funds are -- are
16 publicly-traded, like on the New York Stock
17 Exchange, exchanges like that, and -- and
18 shareholders or investors, they're not --
19 they're -- they're not subscribing and
20 redeeming with the fund. They are like shares
21 of Apple.

22 Those shares of the Highland Global
23 Allocation Fund trade on an exchange, and that
24 is how you, you know, that is how, you know,
25 you become an equity owner in the fund or you

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2 sell your shares and you are no longer an
3 equity owner.

4 As part of that proposal, the
5 advisor told shareholders if you -- if you vote
6 for this proposal to -- to convert it from an
7 open-ended fund to a closed-end fund, we will
8 pay you some amounts of money. I forgot -- a
9 certain number of points. I think it was
10 like -- it was like two to three points or
11 something -- something like that.

12 Q. Okay. You mentioned when Mr. Morris
13 was asking you, going back to those two
14 promissory notes, you will recall the 5 million
15 and 2.4 million, you mentioned something to the
16 effect that Mr. Dondero told -- told you to pay
17 some moneys out of Highland. Do you remember
18 that discussion with Mr. Morris?

19 A. I do.

20 Q. So, to the best of your
21 recollection, did you have a discussion with
22 Mr. Dondero about making some payments in May
23 of 2019 out of Highland?

24 A. I recall, as I testified earlier,
25 that I had a conversation with Mr. Dondero

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2 for -- for these amounts attributable to -- it
3 was either the error -- you know, the error,
4 and in that conversation he said, go get the
5 money from Highland. I believe that is what I
6 testified earlier, and that -- that is my
7 recollection.

8 Q. Do you recall if that was an
9 in-person meeting or some other mode for the
10 meeting?

11 A. I -- I -- I recall that being
12 in-person.

13 Q. Do you recall if anyone else was
14 present, or was it just you and Mr. Dondero?

15 A. I recall just he and I.

16 Q. And the moneys that he told you to
17 find from -- or get from Highland, was that in
18 the amount of \$5 million and \$2.4 million?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I believe so, but I would have to go
22 back and look and see when those moneys were
23 actually paid into the -- into the fund and,
24 you know, when those transfers were done. If
25 they were all done around that same time, then

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2 yes, I would say it was -- it was all related
3 to that.

4 Q. Did Mr. Dondero tell you that those
5 funds would be a loan from Highland to HCMFA?

6 A. I don't recall.

7 MR. MORRIS: Objection to the form
8 of the question.

9 Q. Now, and forgive me, I'm probably
10 the only non-American born here, but I speak
11 reasonably well in English. I don't recall,
12 does that mean you don't remember or does that
13 mean it didn't happen?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it means I don't -- I don't
17 remember.

18 Q. Did Mr. Dondero tell you to have
19 those two promissory notes prepared?

20 A. I don't recall.

21 Q. When you -- again, when you say, I
22 don't recall today, that means that sitting
23 here today, you just don't remember one way or
24 the other. Is that accurate?

25 A. Yes.

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2 Q. Is it possible that you, having
3 heard what Mr. Dondero said and seeing funds
4 being transferred, assumed that that would be a
5 loan without him actually telling you that
6 would be a loan?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Sorry, I want to make sure -- did I
10 ask the amounts that were transferred that I --
11 that -- that I assumed that that was a loan?

12 Q. Well, let me -- let me take -- let
13 me try again.

14 So you have established already that
15 there were quite a number of promissory notes
16 back and forth -- I'm sorry, quite a number of
17 promissory notes with affiliated companies and
18 individuals owing Highland money; right?

19 A. Yes.

20 Q. And you have established that there
21 were many transactions and transfers going back
22 and forth over the years; right?

23 MS. DANDENEAU: Objection to form.

24 A. In -- yes, in my capacity as CFO and
25 my employment, yes, that is -- yes.

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2 Q. And that's part of the reason why
3 you just can't remember some of the details
4 today because this -- this happened years ago,
5 and there were a number of transactions. Is
6 that accurate?

7 MS. DANDENEAU: Objection to the
8 form.

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I mean, I deal with thousands of --
12 of -- of -- of transactions, you know, whether
13 it has -- the processing of transactions, you
14 know, if it has got, you know, more -- more
15 zeros, you know, behind it than others.

16 When you look at thousands of
17 transactions over the years for funds and
18 advisors and -- and, you know, financial
19 statements, I mean, it is -- it is very hard
20 going back in -- in -- in my -- you know,
21 14-ish year career at -- at Highland to
22 remember a lot of those details, especially
23 when I don't have any records or books or
24 anything like that, and -- and going back many
25 years.

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2 Q. And that is fine. That -- that --
3 that is why I asked the question.

4 Is it possible in May of 2019 when
5 Mr. Dondero told you to transfer the funds from
6 Highland, you just assumed on your own that
7 those would be loans without him actually
8 telling you that those would be loans?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I don't know.

12 Q. I'm sorry, you --

13 A. I said I don't know.

14 Q. Okay. Well, as the -- as the CFO
15 for Highland, if you saw \$7.4 million going
16 out, you would feel some responsibility to
17 account for that, wouldn't you?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. Yes.

21 Q. Is it fair to say that those would
22 be in the range large enough to rise up to your
23 level?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. If -- I don't know if I understand
3 your question. Those amounts would arise to my
4 level where I would be involved or...

5 Q. You would want to know what a
6 transfer for that amount, \$7.4 million, was all
7 about, as the CFO of Highland, wouldn't you?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, I make it -- I mean, I -- I
11 review all sorts of payments, I mean, even
12 smaller dollar payments on a periodic basis,
13 you know, to -- to -- to understand and to make
14 sure that we are paying things in a -- you
15 know, in -- in -- in an informed way. And, you
16 know -- and we're -- and we're paying things
17 pursuant to vendor contracts and things like
18 that.

19 Q. So as part of that, is it possible
20 that seeing \$7.4 million go out you would have
21 promissory notes made in order to keep a paper
22 trail, assuming that those were loans, when
23 perhaps they were never intended to be loans by
24 Mr. Dondero?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. I don't know. As I testified
4 earlier, I had conversations with Mr. Dondero
5 about -- about the -- the -- the moneys that
6 were needed for the NAV error. And I recall
7 him saying go get it from Highland -- or get it
8 from Highland.

9 Q. Well, why did you sign those
10 promissory notes and why didn't you have him
11 sign them?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. I don't know.

15 Q. You mentioned earlier that you
16 typically don't sign promissory notes. Am I
17 remembering your testimony correctly?

18 I mean, promissory notes on behalf
19 of the entities. Not yourself, obviously.

20 A. Yes, that is what I said earlier.

21 Q. Do you recall any other promissory
22 notes in the million-plus range that you had
23 ever signed before on behalf of any entity?

24 A. There is -- there has been a lot of
25 transactions over the years. I don't -- I

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2 don't -- I don't recall generally. I don't --
3 I don't recall.

4 Q. So -- but to the best of your
5 recollection, it was on your initiative,
6 following your discussion with Mr. Dondero,
7 that you had someone draft those two promissory
8 notes; is that correct?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes, we would have -- the team, as I
12 stated earlier, we don't draft promissory
13 notes. "The team" meaning the accounting and
14 finance team.

15 So the team would have worked with
16 the legal group at Highland to draft any notes.

17 Q. Do you believe or do you have any
18 recollection as to whether you would have done
19 that pursuant to an email or telephone call or
20 in-person meeting?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Are you asking if I would have -- if
24 those notes would have been drafted pursuant to
25 an email or phone call?

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2 Q. Strike that.

3 Do you recall whether you sent an
4 email to anyone asking them to draft those two
5 promissory notes?

6 A. I don't recall because, again,
7 once -- I would have instructed -- likely
8 instructed the team to -- to work with the
9 legal group to draft these documents.

10 I -- I -- I -- yeah, I didn't -- I
11 mean, that is more an operational-type
12 procedure. So, you know, a manager or a
13 controller or working with legal. You know,
14 they -- they can certainly handle that task to
15 get that -- you know, to request that from
16 legal.

17 Q. And who on your team do you think
18 you would have asked to do that?

19 MR. MORRIS: Objection --

20 Q. Who would have been the logical
21 person or people, if you don't remember their
22 name today?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. It -- it -- there is only two

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2 managers of the group. That would have been
3 Dave Klos or Kristin Hendrix.

4 Dave was the -- one of his duties
5 was managing the valuation team, and so he was
6 intimately involved with this process. So, you
7 know...

8 Q. Okay.

9 A. I don't recall specifically but, I
10 mean, my general -- you know, I -- I -- I
11 likely would have talked to Dave first about it
12 versus someone like Kristin who hadn't been
13 intimately involved.

14 Q. And -- and do you have a view as to
15 whether it is most likely that you would have
16 done that by email or in-person or how would
17 you believe you would have communicated that to
18 Mr. Klos?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I likely would have done that in
22 person. Again, if things of this nature
23 that -- again, you have to put ourselves back
24 to, we have been working on this very stressful
25 project for many, many months. And once the

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2 go-ahead was to -- you know, we see the light
3 at the end of the tunnel with wrapping this up
4 and making shareholders whole -- sorry to say
5 "we" -- you know, the -- so the folks that are
6 involved in it.

7 I like to talk to people
8 face-to-face and -- and -- and go to -- and go
9 to their desk, because that shows if I'm going
10 to their desk that -- that is something that I
11 want done, you know.

12 Q. And do you remember, Mr. Waterhouse,
13 getting those two promissory notes in paper
14 format or by email before they were executed?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall.

18 Q. For whatever was the ordinary course
19 back then in May 2019, would you expect to have
20 received them only on paper or would you have
21 expected to have received them in Word document
22 or PDF document by email?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I -- I didn't sign -- I signed very

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2 few documents via email. I can't say that it
3 never happened, but people either stopped by my
4 office and physically walked in documents for
5 signature that we discussed face-to-face.

6 Or documents were -- if -- if --
7 if -- if -- let's say I wasn't there or I
8 wasn't available, documents were dropped off.
9 I had -- I had some in- and outboxes in front
10 of my -- my office there at the Crescent.

11 Documents would be dropped off for
12 signature. There would be a cover sheet that
13 would be -- have been applied to those
14 documents detailing, you know, who dropped it
15 off, the purpose, why, what time.

16 And then, you know, as I stated, I
17 don't draft documents and I always go to the
18 legal group and the compliance group to make
19 sure that they're in the loop. And there is
20 a -- a box or section that says, Has legal
21 reviewed or approved, or something to that
22 nature.

23 Again, I don't -- I don't have
24 access to that cover sheet anymore, but it
25 was -- it was something to that effect.

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2 And my assistant, you know, if she
3 was there, she would review that -- you know,
4 whatever was being dropped off. And if that
5 has legal, you know, reviewed or -- reviewed or
6 approved it, if that wasn't -- if that stuff
7 hadn't been done, it was like she would just
8 tell them like, go -- go -- go to the legal
9 group, because --

10 Q. Let me -- let me pause --

11 MS. DANDENEAU: Let him finish.

12 MR. MORRIS: Thank you. Go ahead.

13 A. I take -- go to the legal group
14 because that -- that was my -- you know, I
15 didn't -- I didn't review anything that -- that
16 they weren't -- you know, or there wasn't some
17 representation made to me that they had
18 reviewed, approved in some capacity.

19 Again, my -- my -- my goal, as CFO,
20 is to provide transparency and make sure that
21 groups like compliance and other things -- and
22 the other group in legal are -- are in -- you
23 know, their -- they're made aware of
24 transactions of -- you know, that are crossing
25 my desk.

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2 Because I'm not in every
3 conversation. They're not in every
4 conversation -- meaning legal compliance -- and
5 I just want to make sure that -- that everyone
6 is in sync to, you know, to -- to the extent
7 possible.

8 Q. So if we summarize, you don't
9 specifically remember signing these two notes,
10 but most likely it would have been that they
11 would have presented -- been presented to you
12 physically on paper?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. They would -- they would have been
16 presented physically on paper most likely or
17 someone would have left it. But, I mean,
18 again, I don't -- I don't recall.

19 Q. I understand. Understand.
20 When you signed -- when you signed
21 documents, when you personally signed
22 documents, did you typically use a ink pen or
23 did you use a stamp?

24 A. No, I -- I -- I use a -- an -- an
25 ink pen.

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2 Q. Do you know -- was there a file at
3 Highland kept anywhere with ink-signed
4 originals of a promissory notes in general or
5 these two promissory notes specifically?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Sorry, I just want to make sure I
9 understand your question. Are you saying is
10 there a file somewhere that has ink-signed
11 originals of these two promissory notes?

12 Q. Yes.

13 A. I would -- I would assume they're
14 some place. I mean --

15 Q. Well, was there a -- was there a
16 place where Highland generally kept originals
17 of promissory notes owed to it?

18 A. I wouldn't -- no.

19 MR. RUKAVINA: Mr. Nguyen, would you
20 please pull up my A7, alpha 7.

21 Q. These are the two promissory notes,
22 Mr. Waterhouse.

23 (Exhibit A7 marked.)

24 Q. And please -- Mr. Waterhouse, please
25 command my associate to scroll down as you need

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2 to, but I want you to take a very close look at
3 your two signatures here and tell me whether
4 you believe, in fact, that you ink signed them
5 or whether you --

6 MS. DANDENEAU: Mr. Rukavina,
7 Mr. Waterhouse has the copies.

8 MR. RUKAVINA: Perfect. Then you
9 can take this down, Mr. Nguyen.

10 A. These -- these -- these signatures
11 are identical, now that I stare at them, and I
12 mean, they are so close -- I mean, they're
13 identical that, I mean, even with my chicken
14 scratch signature, I don't know if I can -- you
15 know, I do this 100 times, could I do that
16 as -- as precisely as I see between the two
17 notes.

18 Q. Well, that is why I ask.
19 Mr. Waterhouse, now that you have examined
20 them, does it seem like it is more likely that
21 you actually electronically signed these?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Is -- I don't -- I don't recall
25 specifically. As I said before, my assistant

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2 did have a -- an electronic signature, and that
3 was used from time to time. It wasn't as
4 common practice back in 2019. It definitely
5 was more common practice when we had to work
6 from home and remotely for COVID because it
7 that made it almost impossible to, right,
8 provide wet signatures since we're all working
9 from home remotely.

10 Q. Well, going just for these two
11 promissory notes, Mr. Waterhouse, in light of
12 your inability to remember any details, are you
13 sure you actually signed either or both of
14 those notes?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall specifically
17 signing -- actually physically signing these
18 notes. As I said before, I don't recall doing
19 that. This -- this looks like my signature,
20 but yet these two signatures are identical.

21 Q. So you don't recall physically
22 signing them, and I take it you don't recall
23 electronically signing them either?

24 A. I don't recall. You know, Highland
25 has all my emails. If that occurred, you know,

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2 you know, I don't have any of these records is
3 what I'm saying. I don't have any of those
4 records.

5 Q. That is why I'm asking you these
6 questions in great detail because I don't have
7 those emails. I'm trying to -- I'm hoping that
8 you will give me some names or some details so
9 I can go look for more emails, but again, you
10 don't remember any -- any individual, other
11 than Mr. Dondero that we've discussed, you
12 don't remember any individual with whom you
13 discussed these promissory notes prior to their
14 execution?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall discussing it with
18 anybody else.

19 Q. Okay.

20 A. I mean, prior --

21 Q. I understand.

22 A. You know, there was no one else --
23 there was no one else in that meeting that I
24 recall with Mr. Dondero.

25 Q. Now, when you established that by

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2 May of 2019 --

3 A. And -- and from what I recall, and
4 the reason why I was by myself is -- is, you
5 know, I don't -- I don't want to speculate, I'm
6 sorry.

7 Q. Okay. We have established that by
8 May of 2019, in your view, the liabilities of
9 HCMFA exceeded its assets; correct?

10 A. Yeah. I mean, again, I don't have
11 financial statements in front of me, but I
12 think, if I recall, we'd have to go through the
13 testimony with Mr. Morris, I believe that was
14 the case.

15 Q. In fact, you will recall that in
16 April of 2019, Mr. Dondero signed a document
17 that extended the demand feature of two prior
18 notes to May 31, 2019. Do you recall that?

19 MS. DEITSCH-PEREZ: I think you
20 might -- maybe have the court reporter read
21 that back. You might have misspoke.

22 (Record read.)

23 MR. RUKAVINA: And I did misspeak.

24 Q. I meant to say to May 31, 2021. Do
25 you recall that, sir?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Yes.

5 MR. RUKAVINA: And, Mr. Nguyen, just
6 so that the record is clear, will you please
7 pull up my Exhibit Alpha 10, A10.

8 (Exhibit A10 marked.)

9 Q. You don't have this one in front of
10 you, Mr. Waterhouse? This is the one that
11 Mr. Morris used earlier. Do you see that
12 document, sir?

13 A. Yes, I do.

14 Q. And this is what you were testifying
15 about before when Mr. Morris was asking you.
16 Do you remember that?

17 A. Yes.

18 Q. So here is my question for you,
19 Mr. Waterhouse: As the chief financial officer
20 of Highland, was it prudent for Highland less
21 than three weeks later to be lending
22 \$7.2 million to an insolvent entity that
23 couldn't even then pay its debts back to
24 Highland?

25 MS. DANDENEAU: Objection to form.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Sorry, I just want to make sure --
5 are you asking me, did you say, was it prudent
6 for Highland to loan \$7.4 million to HCMFA a
7 few weeks after this document was executed?

8 Q. Yes, and at a time when HCMFA's
9 liabilities exceeded its assets.

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't -- it is odd. I don't know.

13 MR. RUKAVINA: You can take this
14 exhibit down, Mr. Nguyen.

15 Q. Do you recall asking anyone,
16 Mr. Dondero or -- or anyone outside as to
17 whether Highland ought to be lending
18 \$7.4 million to HCMF regarding HCMF's
19 creditworthiness?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I don't recall.

23 Q. Did you receive personally any of
24 that \$7.4 million?

25 A. No.

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2 Q. Did you even --

3 MR. MORRIS: I didn't hear that
4 question, sir.

5 MR. RUKAVINA: The one that he
6 answered, John, or my new one?

7 MR. MORRIS: No, no, your question,
8 Davor.

9 MR. RUKAVINA: I had asked him
10 whether he received any of the
11 \$7.4 million. He said no.

12 MR. MORRIS: Yeah. I thought there
13 was a question after that. Maybe I was
14 mistaken. I apologize.

15 MR. RUKAVINA: I had started a new
16 question, so here, let me start the new
17 question again.

18 Q. Did you personally receive any
19 direct benefit from those two notes for
20 \$7.4 million?

21 A. No.

22 Q. Did you ever personally consider
23 yourself obligated to repay either or both of
24 those notes?

25 A. No.

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2 MR. RUKAVINA: Pull up those notes
3 again, Mr. Nguyen.

4 Q. You can have them in front of you,
5 Exhibit 7, Mr. Waterhouse, whatever is easier
6 for you. If you go to your signature page, my
7 question to you is, why did you not include
8 your title as treasurer by your name, Frank
9 Waterhouse?

10 MS. DANDENEAU: Objection to form.

11 A. I didn't -- I didn't draft this
12 document.

13 Q. So you relied on whoever drafted it
14 to draft it correctly?

15 A. Yes.

16 Q. Okay. But back then when you signed
17 this, did it ever cross your mind that you were
18 the maker on these notes?

19 A. No.

20 Q. Back then when you signed this
21 document, did it ever cross your mind that you
22 could be a co-obligor on these notes?

23 A. No. I didn't receive \$7.4 million,
24 I mean...

25 Q. But can you say that HCMFA received

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2 \$7.4 million?

3 A. I would have to go back and look and
4 check in, you know, the -- the financial
5 records and the bank statements.

6 MR. RUKAVINA: You can take this
7 exhibit down, Mr. Nguyen.

8 Q. Mr. Waterhouse, I'm not trying to be
9 a smart-ass, but if the law says that because
10 of the way that you signed this promissory
11 note, if that is what the law says, that that
12 made you personally -- personally liable, then
13 you would agree with me that that was never
14 your intent?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. That was never -- I wouldn't sign a
18 note and not get consideration in return.

19 Q. So putting all other issues aside,
20 if the law -- if the law says that you were
21 liable for those notes because of how you
22 signed them, then would you agree with me that
23 these notes are a mistake?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 MS. DANDENEAU: Objection to the
3 form.

4 A. Yes.

5 Q. So do you agree with me that it's
6 odd -- I think that is the word you used --
7 that Highland would be loaning \$7.4 million a
8 few weeks after that extension to an entity
9 whose liabilities exceeded its assets, and you
10 would agree with me that it was never your
11 intention to be in any way liable for these two
12 promissory notes; correct?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. Sorry, you -- you asked a lot there.

16 MR. RUKAVINA: I will strike it and
17 I will move on.

18 Let's go to -- pull up Exhibit 9,
19 please Mr. Nguyen -- Alpha 9, I'm sorry, Alpha
20 9, A9.

21 (Exhibit A9 marked.)

22 Q. Sir, take a moment to look at this,
23 but this is an email, and you will see attached
24 July 31, 2020 affiliate notes.

25 Do you see that attachment?

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2 A. Yes.

3 Q. Okay. And do you see an entry for
4 Highland Capital Management Fund Advisors?

5 MR. MORRIS: I'm sorry, hold on.
6 Where are you looking?

7 MR. RUKAVINA: Last page, John.

8 MR. MORRIS: Is it the page on the
9 screen?

10 MR. RUKAVINA: Oh, I'm sorry.
11 Mr. Nguyen just did it. Yes, the last page
12 there.

13 MR. MORRIS: Thank you.

14 Q. Do you see an entry there for HCMFA?

15 A. Yes.

16 Q. About \$10.5 million.

17 Do you see that?

18 A. I do.

19 Q. And, now, do you have any
20 explanation for why if HCMFA owed \$7.4 million,
21 plus the 5.3 million that had been extended,
22 why that amount was only 10.5 million?

23 A. I don't know. Okay.

24 MR. RUKAVINA: Close this one and
25 pull up, Mr. Nguyen, the schedules,

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2 schedule of assets. What exhibit is this
3 of ours, Mr. Nguyen?

4 MR. NGUYEN: This is All.

5 MR. RUKAVINA: Oh, this will be All.
6 (Exhibit All marked.)

7 Q. You don't have this in front of you,
8 Mr. Waterhouse?

9 A. Okay.

10 Q. This is what Mr. Morris used
11 earlier. Do you remember looking at this with
12 Mr. Morris?

13 A. Yes.

14 MR. RUKAVINA: You might have to
15 zoom in a little. Okay.

16 Q. Now, I see Affiliate Note A, B, and
17 C.

18 Do you have any recollection as to
19 why the names of the affiliates are omitted?

20 A. I don't. I testified earlier that,
21 you know, the team worked with DSI in providing
22 these. I -- I don't -- I don't know.

23 Q. Can we deduce -- is it logical to
24 deduce that Affiliate Note A would be NexPoint
25 given its size of \$24.5 million?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. I mean, it -- it is a -- it is -- it
5 is approximate.

6 Q. Well, can we -- can we deduce -- or,
7 I'm sorry, strike that.

8 Can you, sitting here today,
9 logically conclude that Affiliate Note B or C
10 represents HCMFA?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. I don't know. I don't know. I
14 can't.

15 Q. Okay. As of the petition date, we
16 have established that HCMFA, under promissory
17 notes, owed \$7.4 million and \$5.3 million to
18 the debtor; correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that
23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. It would be \$12.7 million. Is that
3 generally correct?

4 A. Sorry, the amounts were 7.4, 5.3.

5 Q. Yes.

6 A. Okay. Yeah, that -- that -- I can
7 do that math, yes.

8 Q. Do you have any explanation or any
9 understanding of why there is no similar entry
10 listed here on the schedule of assets filed
11 with the bankruptcy court?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. We have to look at
15 the supporting schedules, like I talked about
16 other -- presumably there is -- there is a
17 build to the schedule that would provide the
18 detail.

19 Q. Well, that was going to be my next
20 question. You anticipated it.

21 MR. RUKAVINA: You can -- you can
22 take this down, Mr. Nguyen.

23 Q. Do you believe that whenever you and
24 your team provided the underlying data to the
25 financial advisor that the actual names of the

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2 affiliates for Affiliate Note A, B, and C would
3 have been listed there?

4 A. Are you asking we provided the names
5 to the financial advisor? I don't -- I don't
6 understand who the financial advisor is.

7 Q. I'm sorry, DSI.

8 Let me ask the question this way,
9 Mr. Waterhouse.

10 Whenever you provided information
11 about the affiliate notes to DSI, do you
12 believe that you would have included the actual
13 names of the affiliates, you or your team, or
14 that you would have done the Affiliate Note A,
15 Note B, Note C?

16 MR. MORRIS: Objection to the form
17 of the question.

18 MS. DANDENEAU: Objection to the
19 form.

20 A. We -- like I testified earlier, when
21 we were -- we gave everything to -- to DSI. We
22 were giving all of our records, all of our
23 files, everything to DSI. We weren't redacting
24 information or saying, hey, here is a note,
25 here is Affiliate Note A or B.

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2 I mean, it was -- our job and our
3 focus -- and I testified in court back in 2019;
4 right -- was -- was to be transparent and, you
5 know, get DSI up to speed on -- on the matters
6 at Highland. So I can't see us redacting at
7 that point.

8 MR. RUKAVINA: Mr. Nguyen, will you
9 please pull up Mr. Morris' Exhibit 36.
10 Just the very first page, the very top
11 email. You might zoom in a little bit.

12 Q. Now, you recall being asked about
13 this by Mr. Morris?

14 A. Yes, I do.

15 Q. And you wrote: The HCMFA note is a
16 demand note.

17 You wrote that; right?

18 A. Yes.

19 Q. And, in fact, weren't there by that
20 point in time several notes?

21 A. Yes, there were. Again, I don't --
22 I don't remember everything specifically. I
23 mean --

24 Q. I understand. I understand.

25 So this is an example where -- where

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2 you might have made a mistake by referring to a
3 singular instead of a plural; right?

4 A. Yes.

5 Q. Okay. And you -- you wrote -- a
6 couple of sentences later, you wrote: There
7 was an agreement between HCMLP and HCMFA the
8 earliest they could demand is May 2021.

9 You wrote that; right?

10 A. Yes.

11 Q. But I think you -- you agreed with
12 Mr. Morris that that can't possibly apply to
13 the May 2019 notes, can it?

14 MR. MORRIS: Objection to the form
15 of the question. That is not what he
16 testified to.

17 Q. Let me ask -- let me ask a different
18 question.

19 Sitting here today -- or if you can
20 answer me from your memory on October 6,
21 2020 -- did the April acknowledgment that
22 extended the maturity date apply to the
23 May 2019 notes also?

24 A. I don't recall specifically.

25 Q. Well, you recall that the notes that

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2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on
5 your experience, that had they intended to have
6 a different or a set maturity date, you would
7 have instructed that that set maturity date be
8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Sorry, just want to make sure I
12 understand. You are saying that -- that the
13 \$5 million note, the \$2.4 million note, if
14 those were supposed to be a term note, that I
15 would have made sure that those were a term
16 note?

17 Q. I'm saying -- I'm saying,
18 Mr. Waterhouse, that on May the 2nd and May the
19 3rd, 2019, if you intended that those two
20 promissory notes could not be called until May
21 2021, would you have included such language in
22 those two promissory notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I guess -- I'm sorry, I don't recall

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2 putting language in those May notes. I don't
3 remember what language you are referring to.

4 Q. Well, let's read this again.

5 There was an agreement between HCMLP
6 and HCMFA the earliest they could demand is May
7 2021.

8 Do you recall that agreement?

9 A. Yes, that was the agreement we
10 looked at earlier; correct?

11 Q. Okay. Yes.

12 Do you -- do you understand now that
13 that agreement that we looked at earlier also
14 applied to the May 2019 notes that you signed?

15 A. I don't -- I don't know.

16 Q. But as of October 6, 2020, you're
17 writing that there is one demand note and
18 you're categorizing that demand note as not
19 being demandable on May 2021; correct?

20 A. Yes.

21 Q. And you know now that you made at
22 least one mistake in this email; correct?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. Yes.

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2 MR. RUKAVINA: You can pull this
3 down, Mr. Nguyen.

4 Q. So, Mr. Waterhouse, you don't
5 remember Mr. Dondero telling you to make these
6 loans or not. HCMLP was loaning \$7.4 million
7 to someone that their assets were less than
8 their liabilities.

9 We don't see on the July list of
10 notes, where there is \$12.7 million of notes,
11 we don't see that on the bankruptcy schedules,
12 and we have this Exhibit 36 where you are
13 confused.

14 Are you prepared to tell me, sir,
15 today that you might have made a mistake in
16 executing those two promissory notes?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. I -- I don't know.

20 Q. And if it turns out that you're
21 personally liable for those promissory notes,
22 it would certainly be a mistake, wouldn't it?

23 MS. DANDENEAU: Objection to the
24 form.

25 MR. MORRIS: Join.

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he
4 never told you to make these loans, would you
5 disagree with his testimony?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Like I testified earlier with my
9 conversation with Mr. Dondero, all I recall is
10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that
12 he, in consultation with other senior personnel
13 at Highland, decided that Highland needed to
14 pay HCMFA \$7.4 million as compensation for the
15 NAV error and not a loan, would you have any
16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. If that was -- if that was his
20 intent, yes, it would -- I would --

21 Q. Do you have any reason to disagree
22 with him?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. If that was his intent, I don't

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2 know. I don't know how I disagree with that.

3 Q. And just to confirm, you don't
4 remember ever asking Mr. Dondero whether you
5 should have two promissory notes prepared?

6 A. No.

7 Q. And you don't remember discussing
8 with Mr. Dondero what the terms of those two
9 promissory notes should be?

10 A. I don't recall -- I testified all I
11 recall is he said, get the money from Highland.
12 I don't -- the -- the terms of the note, I
13 don't recall ever having a discussion around
14 the terms of the note, but since I don't draft
15 the notes, that -- there could have been a
16 conversation with other people later.

17 Q. Do you have any memory of whether
18 after the notes were drafted, but before you
19 signed them, that you communicated with
20 Mr. Dondero in any way to just confirm or -- or
21 get his blessing or ratification to signing
22 those notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Again, the only thing you remember,
3 sitting here today, was Mr. Dondero said, get
4 the money from Highland, and that is it, that
5 is all you remember?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. I testified to that several times.
9 This was over two years ago. A lot has
10 happened. That is all I recall.

11 Q. And help me here. I'm not very
12 technologically astute. When you -- and I -- I
13 recognize that you do it rarely, but when you
14 sign a document electronically, do you believe
15 that there is an electronic record of you
16 having authorized or signed a document
17 electronically?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. I -- I don't know the tech answer to
21 that, but, you know, since I don't have -- I
22 don't ever attach my signature block
23 electronically, my assistant would have done
24 that, and if that is done over email like we
25 did several times -- you know, multiple,

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2 multiple times over COVID, she would attach my
3 signature block and then email it out to
4 whatever party.

5 Q. What was your assistant's name in
6 May 2019?

7 A. It was Naomi Chisum.

8 Q. Is she the only one? I'm sorry, was
9 she your only assistant that would have maybe
10 facilitated logistically something like you
11 just described?

12 A. You know, she was out on maternity
13 leave at some point. I don't -- I don't recall
14 those dates where she was out for maternity
15 leave. There was -- there were folks backing
16 her up. I don't recall specifically who
17 those -- who those, you know, administrative
18 assistants were, and I don't recall
19 specifically if she was out during this time on
20 maternity leave.

21 I do know that that she was out for
22 a period of time, or who knows, or she could
23 have been on vacation that day or, you know, I
24 don't know.

25 Q. Switching gears now, the two

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2 complaints that have been filed that is against
3 HCMFA and NexPoint, did you see any drafts of
4 those complaints before they were filed?

5 MR. MORRIS: Objection to the form
6 of the question, and to the extent that you
7 had any communications with counsel or you
8 were shown drafts of the complaints by
9 counsel while you were employed by
10 Highland, I direct you not to answer.

11 A. I -- I reviewed documents yesterday
12 with counsel here. I believe that is the first
13 time I have ever seen those.

14 Q. Okay. Did you ever discuss with
15 Mr. Seery these two lawsuits before or after
16 they were filed?

17 A. I don't recall.

18 Q. Were you ever interviewed by legal
19 counsel, to your knowledge, about these
20 promissory notes before the complaints were
21 filed? Without going into what was said, were
22 you ever interviewed by legal counsel?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Obviously with COVID, it changed,
3 but -- but before COVID, did you used to meet
4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID -- so
6 we're talking kind of late March, early April,
7 right, there was about -- I don't remember the
8 specific date when the board for Highland was
9 appointed. I believe it was around February of
10 2020, so maybe there was a month-and-a-half,
11 two-month window where we were meeting
12 in-person or, you know, like we were actually
13 in the office, excuse me, we were in the
14 office.

15 And, you know, when they were first
16 appointed, the board members and Mr. Seery
17 were -- were definitely down here more
18 in-person.

19 Q. Did you ever see Mr. Seery taking
20 written notes of -- of his meetings with you or
21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video
24 conference with Mr. Seery, seeing him take
25 notes, written notes?

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2 A. The Zoom calls we had, I don't
3 recall having seen video or, you know, or if it
4 was on Zoom, I just remember it being -- well,
5 no, you know what, there were some -- you know,
6 I take that back.

7 So there were -- there were some
8 times that I did remember seeing Mr. Seery
9 on -- on some of the Zoom calls.

10 Q. Well, let me --

11 A. I don't -- sorry, I'm thinking. I'm
12 thinking -- I'm going back. I'm trying to
13 process this.

14 Q. I can make it much quicker,
15 Mr. Waterhouse. I have heard -- I have heard
16 that Mr. Seery is a copious note taker.

17 Do you have any knowledge about
18 that?

19 A. No.

20 Q. Okay. Switching gears yet again,
21 and this will be last theme. Do you need a
22 restroom break, or are you good to go for
23 another half an hour?

24 MS. DEITSCH-PEREZ: I need a
25 restroom break.

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2 MR. RUKAVINA: Can we make it five
3 minutes?

4 THE WITNESS: Five minutes would be
5 great.

6 VIDEOGRAPHER: We're going off the
7 record at 5:53 p.m.

8 (Recess taken 5:53 p.m. to 5:59 p.m.)

9 VIDEOGRAPHER: We are back on the
10 record at 5:59 p.m.

11 Q. Mr. Waterhouse, I had asked you
12 earlier about contracts between HCMFA and the
13 debtor, and now I'm going to talk about
14 contracts between the debtor and NexPoint
15 Advisors. Okay?

16 A. Okay.

17 Q. Now, were there contracts similar to
18 the ones with HCMFA that NexPoint had in the
19 nature of employee reimbursement and shared
20 services?

21 A. Yes, they -- NexPoint Advisors and
22 Highland Capital Management Fund Advisors had
23 cost reimbursement and shared services
24 agreements with Highland Capital Management,
25 L.P.

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2 Q. And was that shared services
3 agreement, to the best of your understanding,
4 in place as of December 31, 2020?

5 A. It was -- it was terminated at some
6 point, and I remember the contracts had
7 different termination dates, but I think the --
8 the date of termination was January 31st of
9 2021, after the termination was put in.

10 So yeah, it would be in place at the
11 end of the year of December -- it would be in
12 place at December 31st, 2020.

13 Q. And pursuant to that agreement as of
14 December 31st, 2020, was the debtor providing
15 what you would describe as back office services
16 to NexPoint?

17 A. Yes.

18 Q. Would those have included accounting
19 services?

20 A. Yes.

21 Q. And as part of those accounting
22 services, would the debtor have assisted
23 NexPoint with paying its bills?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes.

3 Q. So let's break that up. You were a
4 treasurer of NexPoint as well in December of
5 2020?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes.

9 Q. Okay. And in December of 2020, did
10 NexPoint have its own bank accounts?

11 A. Yes.

12 Q. And did it use those bank accounts
13 to pay various of its obligations?

14 A. Yes.

15 Q. Did employees of the debtor have the
16 ability to cause transfers to be made from
17 those bank accounts on behalf of NexPoint?

18 A. Yes.

19 Q. And is that one of services that the
20 debtor provided NexPoint, basically ensuring
21 that accounts payable and other obligations
22 would be paid?

23 A. Yes.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. You answered yes?

3 A. Yes.

4 Q. And the payments, though, whose
5 funds would they be made from?

6 A. From the bank account of NexPoint
7 Advisors. If they were NexPoint advisor
8 obligations, it would be made from NexPoint
9 Advisors' bank account.

10 Q. So let's pull up Exhibit Alpha 1.
11 You should have that -- it is my Tab 1 or my
12 Exhibit 1.

13 (Exhibit A1 marked.)

14 Q. So this is a -- this is a series of
15 emails, Mr. Waterhouse. Let's look at the
16 first page here, November 25, 2020, between
17 Kristin Hendrix and yourself.

18 Do you see that, sir?

19 A. I do.

20 Q. And do you see where Ms. Hendrix
21 writes: NPA.

22 Do you know what NPA stood for?

23 A. Yes.

24 Q. And what does it stand for?

25 A. NexPoint Advisors.

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2 Q. And was that how you-all internally
3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her
6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what --

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is -- what is Ms. Hendrix
14 here on November 25 asking of you?

15 A. She is asking me -- so she -- these
16 are -- these are payments -- typically we would
17 do an accounts payable run every week at the
18 end of every Friday. But looking at this date,
19 it is Wednesday, November 25th, which means, to
20 me, it is likely Thanksgiving weekend.

21 So this is the day before
22 Thanksgiving, so this is the last kind of --
23 kind of day before the holidays and vacation
24 and things of that nature. So it is
25 effectively the Friday of that week.

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2 So she is -- she is putting in all
3 the payments for the week because we batch
4 payments weekly. And these are the payments
5 that go out that week, and she is informing me
6 of the payments and -- you know, again, at the
7 bottom of the email, she is asking for my okay
8 to -- to release these payments in the wire
9 system.

10 Q. So these would be accounts payable
11 of NexPoint?

12 A. I mean, it would be accounts payable
13 for all of these entities listed on this email.

14 Q. And who was Ms. Hendrix employed by
15 in November and December of 2020?

16 A. Highland Capital Management.

17 Q. Okay. So -- so part of the services
18 that NexPoint had contracted with was for
19 Highland to ensure that NexPoint timely paid
20 its accounts payable; is that accurate?

21 MR. MORRIS: Objection to the form
22 of the question. You have got to be
23 kidding me.

24 Q. Is that accurate?

25 A. Yes.

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2 Q. And did NexPoint rely on employees
3 of the debtor to ensure that NexPoint's
4 accounts payable were timely paid?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes.

8 MR. RUKAVINA: Let's flip to the
9 next page, Mr. Nguyen, if you will please
10 scroll to the next page.

11 Q. So this is an email similar to the
12 prior one, November 30th.

13 Do you see where it says, NPA HCMFA,
14 USD \$325,000 one-day loan?

15 Do you see that, sir?

16 A. I do.

17 Q. Do you have any memory of what that
18 was?

19 A. I don't recall what that -- what
20 that payment was for.

21 Q. Did it sometimes occur that one
22 advisor would, on very short-terms, make loans
23 to another advisor?

24 A. Yes. This -- this -- this occurred
25 from -- from -- from time to time. It actually

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2 looking at -- I'm -- I'm looking at the date of
3 this email. It is November 30th. It is the
4 last day of the month.

5 HCMFA has obligations it needs to
6 pay to its broker-dealer, which is HCFD. And
7 it likely was short funds to make those
8 obligations under that -- under its agreement,
9 and so it provided a one-day loan because on
10 the next business day on 12/1 -- or the next
11 business day in December, it would receive
12 management fees from the underlying funds that
13 it managed and it would be able to pay back
14 that loan to NexPoint Advisors.

15 Q. So -- so here Ms. Hendrix was
16 seeking your approval to transfer \$325,000 from
17 NexPoint to HCMFA for a one-day loan; is that
18 correct?

19 A. That is correct.

20 Q. Let's flip to the next page, sir.

21 MR. RUKAVINA: And, Mr. Nguyen, if
22 you will please scroll down.

23 Q. Now we have as an entry for
24 \$325,000, 11/30 loan payment.

25 Do you see that, sir?

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2 A. Yes.

3 Q. And that is probably the loan that
4 was approved on the prior page?

5 A. Yes, most likely.

6 Q. So is it also true, sir, that in
7 addition to accounts payable debtor employees
8 would be assisting NexPoint with respect to
9 paying back its debt?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I mean, yes, for loans of this
13 nature, yes.

14 Q. Well, what about long term loans?
15 Was it reasonable for NexPoint to expect debtor
16 employees to ensure that NexPoint timely paid
17 its obligations under long-term notes?

18 MR. MORRIS: Objection to the form
19 of the question.

20 MS. DANDENEAU: Objection to form.

21 A. I mean, that is one of the things
22 that the Highland personnel did provide to the
23 advisors. Yes, we would -- we would -- over
24 the years, yes, we -- we -- we -- we did do
25 that generally. Again, I don't remember

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2 specifically but, yes, generally we -- you
3 know, we did do that.

4 Q. So do you recall -- and we can pull
5 it up, if need be -- that under the NexPoint
6 note that Mr. Morris asked you about earlier,
7 the one for more than \$30 million, that
8 NexPoint was obligated to make an annual
9 payment of principal and interest?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yes, it was -- yes, it -- it was an
13 amortizing note. It was -- you know, from what
14 we reviewed earlier, it was payable by
15 December 31st of each year. So -- but are --
16 are you asking me --

17 Q. I'm just asking you, sir, if you
18 recall the note.

19 A. Yes, the \$30 million note, yes, we
20 reviewed it earlier, yes.

21 Q. And do you recall Mr. Morris had you
22 go through the fact that NexPoint had made
23 payments in years prior to 2020 on that note?

24 A. I do.

25 Q. And do you believe that employees of

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2 the debtor would have played any role in
3 NexPoint having made those prior payments?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. Yes.

7 Q. And what role in years prior to 2020
8 would employees of the debtor have had with
9 respect to NexPoint making that annual payment?

10 A. We -- we -- we would have -- I keep
11 saying "we." The team would have calculated
12 any amounts due under that loan and other
13 loans, as -- as standard course.

14 We would -- since we provided
15 treasury services to the advisors, we would
16 inform the -- the -- the -- we informed
17 Mr. Dondero of any cash obligations that are
18 forthcoming, whether we do cash projections.

19 If, you know, any of these payments
20 would have -- or, you know, the sum total of
21 all of these payments, including any note
22 payments, if there were any cash shortfalls, we
23 would have informed Mr. Dondero of any cash
24 shortfalls. We could adequately plan, you
25 know, in instances like that.

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2 Or, sorry, we -- I say "we" -- I
3 keep saying "we" -- I keep wearing my -- again,
4 my -- my treasurer hat.

5 But, yes, it is to -- it is to
6 inform Mr. Dondero of the obligations of the
7 advisors in terms of cash and obligations that
8 are -- are upcoming and that -- and that are --
9 are scheduled to be paid.

10 Q. And would those obligations that are
11 upcoming and scheduled to be paid prior to 2020
12 have incurred the annual payment on that
13 NexPoint \$30 million note?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Davor, I think
16 you misspoke. You might want to just
17 repeat the question.

18 Q. Okay. Let me repeat the question,
19 sir.

20 Prior to 2020, those services that
21 you just described, would that -- on behalf of
22 the debtor, would that have included NexPoint's
23 payments on the \$30 million note?

24 A. Yes.

25 Q. So someone at the debtor in treasury

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2 or accounting would have sent some schedule or
3 a reminder that a payment would be coming due
4 in the future. Is that generally the practice?

5 A. Yes, we would -- you know, again, I
6 didn't -- I didn't micromanage the teams, but
7 we had a -- a corporate accounting calendar
8 that we use as kind of a tickler file to keep
9 track of payments.

10 I actually, you know, don't know how
11 actively they're using that in -- in prior to
12 2020, but it was actively used at some point.

13 We did look at NexPoint cash
14 periodically and cash for the other advisors as
15 well and payments. You know, we -- payments
16 like this would have appeared in our cash
17 projections, in the advisor's cash projections.

18 And, again, as like I said earlier,
19 they would have appeared there, so there would
20 be time to plan for making any of these
21 payments.

22 Q. And based on your experience, would
23 it have been reasonable for NexPoint to rely on
24 the debtors' employees to inform NexPoint of an
25 upcoming payment due on the \$30 million

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2 promissory note?

3 MR. MORRIS: Objection to form of
4 the question.

5 MS. DANDENEAU: Objection to form.

6 A. Yes. Yes, they did. I mean, but I
7 mean, but I don't think these -- these notes
8 were any secret to anybody.

9 Q. I understand, and I'm not suggesting
10 otherwise.

11 MR. RUKAVINA: Please pull up Alpha
12 2, Mr. Nguyen.

13 (Exhibit A2 marked.)

14 Q. Now, this document is similar to the
15 ones we've seen before as of December 31, 2020,
16 and I don't see under NTA anything there for
17 paying the promissory note to Highland.

18 Do you see anything like that?

19 A. I do not.

20 MR. RUKAVINA: You can pull that --
21 that exhibit down, Mr. Nguyen.

22 Q. You are aware, of course, by now
23 that, in fact, NexPoint failed to make the
24 payment due December 31, 2020, are you not?

25 A. I am aware, and yes, I do understand

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2 it.

3 Q. Were you aware that Highland
4 accelerated that \$30 million promissory note?

5 A. I am aware.

6 Q. Were you aware of that acceleration
7 at the time that it occurred?

8 A. I don't remember specifically.

9 Q. Do you recall whether anyone asked
10 you -- prior to the acceleration, anyone asked
11 you at Highland, what Highland should do with
12 respect to the missed payment?

13 A. Did anyone ask me what Highland
14 should do about the missed payment?

15 Q. Yes, before acceleration.

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. I mean, what -- what I recall is
19 there was the -- sorry, are you asking me --

20 MS. DANDENEAU: Why don't you just
21 repeat the question, Mr. Rukavina.

22 Q. Let me try again, Mr. Waterhouse,
23 let me try again.

24 I am saying you're the CFO of
25 someone, in this case, Highland, and the

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2 borrower failed to make the required payment.

3 Are you with me so far?

4 A. I am.

5 Q. Did anyone then ask you, what should
6 we do with respect to our rights against the
7 borrower that missed the payment?

8 A. Not that I recall.

9 Q. Did you play a role in the decision
10 to accelerate that \$30 million promissory note?

11 A. I did not.

12 Q. Do you recall whether Mr. Seery ever
13 asked you before the acceleration as to whether
14 he should accelerate the note?

15 A. I don't recall.

16 Q. And you don't recall when you
17 learned of the acceleration itself?

18 MR. MORRIS: Objection to the form
19 of that question.

20 A. It was -- it was sometime in
21 early -- in early 2021. I don't remember
22 specifically.

23 Q. But do you recall whether it was
24 after the acceleration had already been
25 transmitted?

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2 MS. DANDENEAU: Objection to the
3 form of the question.

4 A. I don't recall.

5 Q. Do you recall in early to mid
6 January of 2021, after the default, discussing
7 the default with Mr. Dondero?

8 A. I do recall discussing with
9 Mr. Dondero after December 31, 2020?

10 Q. Yes, the fact of the default.

11 A. I don't recall.

12 MR. RUKAVINA: Let's pull up my
13 Exhibit 6, Alpha 6.

14 (Exhibit A6 marked.)

15 MR. RUKAVINA: And, Mr. Nguyen, if
16 you will please scroll down.

17 Q. This email chain begins with you
18 writing to Ms. Hendrix on January the 12th:
19 NexPoint note to HCMLP.

20 Do you see that, sir?

21 A. I do.

22 Q. Were you discussing this same
23 \$30 million note we're talking about right now
24 with Ms. Hendrix?

25 A. Yes.

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2 Q. Okay. Do you recall what prompted
3 you to send that email to her?

4 A. Yes, I had -- I had a conversation
5 with Jim.

6 Q. Okay. And what -- what did you
7 discuss with Jim that led to this email chain?

8 A. He -- he called me and he said he
9 wanted to make payment on the NexPoint note,
10 and I didn't -- I didn't know the -- the amount
11 offhand, so I reached out to Kristin and got
12 the details and relayed that to him.

13 Q. And you see you sent that email to
14 her at 11:15 a.m. Does that help you remember
15 when you had this discussion with Mr. Dondero?
16 In other words, was it that morning or the day
17 before, or can you -- can you --

18 A. No, it was -- it was that morning.

19 Q. And do you recall how you had that
20 conversation with him?

21 MR. MORRIS: Objection to the form
22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he -- he called me. I was at
25 home. We were working from home here in

1 WATERHOUSE - 10-19-21
2 December of 2020. He called me from home. He
3 said he was in court. He wanted to -- he asked
4 about, you know, making payment on the note and
5 the amount, and so I didn't have those numbers
6 in front of me, so I said I would get back to
7 him. I wanted all the details, so here is
8 this -- so I reached out to Kristin.

9 Q. And then she gave you that
10 \$1,406,000 figure?

11 MR. RUKAVINA: Mr. Nguyen, if you
12 will scroll up, please.

13 A. Yes. Yeah, she -- the \$1,406,112.

14 Q. And do you recall whether you
15 conveyed that amount to Mr. Dondero?

16 A. Yes. I -- I called him back and
17 gave him -- gave him this amount.

18 Q. Are you aware of whether NexPoint,
19 in fact, then made that 1 million 406 and
20 change payment?

21 A. Yes, they did.

22 Q. Did you discuss with Mr. Dondero at
23 that time, either the first conference or the
24 second conference that day -- strike that.

25 When you conveyed the number to

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2 Mr. Dondero, was -- was it also on January
3 12th?

4 A. Sorry, when I conveyed the
5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that -- it was --

8 Q. So you had --

9 A. It was that point.

10 Q. Well, to the best of your
11 recollection, you had a conference with
12 Mr. Dondero by the telephone in the morning,
13 and then another conference with him by
14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember -- yeah, it
16 was either that morning or it could have been,
17 you know, early afternoon, but again, I
18 remember calling him back, relaying this
19 information to him, and he said, okay, pay --
20 you know, make -- make this payment.

21 Q. And during either of those two
22 calls, did you tell Mr. Dondero anything to the
23 effect that making those -- I'm sorry, making
24 that payment would not de-accelerate the
25 promissory note?

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2 A. No.

3 Q. Did you tell him anything to the
4 effect that making that payment would not cure
5 the default?

6 A. No.

7 Q. Did you discuss that in any way with
8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have
11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. He -- he -- he didn't go into
15 specifics.

16 Q. Did he say anything to you to the
17 effect that if NexPoint makes that payment,
18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one
23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't
25 recall, you mean you don't remember right now

1 WATERHOUSE - 10-19-21

2 either way; correct?

3 A. Yeah, I don't remember. I don't
4 remember us discussing that.

5 Q. Now -- and we're almost done, I
6 promise. I'm just going to -- I don't know how
7 to ask this question, so I'm just going to try
8 to do my best.

9 Prior to the default on December 31,
10 2020, did Mr. Seery ever tell you any words to
11 the effect that you or someone at Highland
12 should ensure that NexPoint doesn't make its
13 payment?

14 A. No.

15 Q. Did you have any hint or any belief
16 that anyone at NexPoint -- I'm sorry, strike
17 that.

18 Did you have any reason to believe
19 that anyone with Highland was actively trying
20 to get NexPoint to make that default by not
21 paying on December 31?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Are you asking, did any Highland
25 employees actively work to make -- to

1 WATERHOUSE - 10-19-21

2 somehow --

3 Q. Yes. Let me take a step back. Let
4 me take a step back.

5 So you are aware now that as a
6 result of that default, what was still some
7 25-year note was accelerated and became
8 immediately due. You are aware of that now;
9 right?

10 A. Yes.

11 Q. And can you see how someone at
12 Highland might actually have been pleased with
13 that development?

14 MR. MORRIS: Objection to the form.

15 Q. Not that they were --- not that they
16 were pleased, but you can see how someone at
17 Highland might have been pleased with that
18 development?

19 MR. MORRIS: Objection to the form
20 of the question.

21 MS. DANDENEAU: Object to form.

22 A. I don't know how they would have
23 reacted to that.

24 Q. Okay. But you're not -- you're not
25 aware of any instructions or any actions being

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2 given or taken at Highland by Mr. Seery, the
3 independent board, DSI, that -- that would have
4 basically led Highland to ensure that NexPoint
5 would fail to make that payment?

6 A. I'm not aware.

7 Q. In other words, there wasn't a trick
8 or a settlement; right?

9 MS. DEITSCH-PEREZ: Objection to
10 form.

11 MS. DANDENEAU: Object to form.

12 MR. MORRIS: Object to form.

13 A. I'm not aware.

14 Look, I'm not aware. I'm not in
15 every conversation. I mean, and I'm just --
16 again, I'm sitting at home. It is the end of
17 the year. Again, I'm not aware.

18 Q. That is a perfectly legitimate
19 answer. I don't know why -- why you think
20 otherwise.

21 Okay. Just give me one second to
22 compose my thoughts.

23 MS. DEITSCH-PEREZ: While you're
24 taking your one second, why don't we take
25 three minutes. I will be right back.

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2 VIDEOGRAPHER: Do we want to go off
3 the record?

4 MR. RUKAVINA: Yes.

5 VIDEOGRAPHER: All right. We're
6 going off the record at 6:27 p.m.

7 (Recess taken 6:27 p.m. to 6:30 p.m.)

8 VIDEOGRAPHER: We are back on the
9 record at 6:30 p.m.

10 MR. HORN: Is Deb back?

11 MS. DANDENEAU: Are you asking about
12 me? I'm here.

13 MR. HORN: Oh, okay. I don't see
14 you, sorry.

15 Q. Actually, yeah, Mr. Waterhouse, so
16 when you had --

17 MS. DANDENEAU: Are you asking about
18 Deb Dandeneau or Deborah? I mean, there
19 are a lot -- as we talked about, a lot of
20 Debs. I'm here.

21 MS. DEITSCH-PEREZ: I'm here.

22 MR. HORN: Yes, I was asking about
23 DDP.

24 MS. DEITSCH-PEREZ: Oh, DDP is here.

25 MR. HORN: Okay. Here we go. I'm

1 WATERHOUSE - 10-19-21

2 going back on mute.

3 MS. DANDENEAU: Get the right
4 nomenclature.

5 Q. Mr. Waterhouse, on January 12th,
6 2021, when you had those talks with Mr. Dondero
7 about the \$1.4 million payment, did you have a
8 communication or a conversation with Mr. Seery
9 about that payment after January 12th, 2021?

10 A. I don't recall.

11 Q. Well, in response to Mr. Dondero
12 reaching out to you, do you recall on that day,
13 January 12th, talking to Mr. Seery or anyone at
14 Highland other than the email chain we just saw
15 about Mr. Dondero's call with you?

16 A. Did I talk to -- I spoke with
17 Kristin -- I don't know if I spoke to her. I
18 likely spoke to Kristin Hendrix because we had
19 to get the wire on NexPoint's behalf to make
20 the payment to Highland.

21 Q. So it is true, then, that -- that
22 employees of the debtor did actually cause that
23 payment to be made when it was made after
24 January 12th?

25 A. Yes, I mean, we -- we -- as I

1 WATERHOUSE - 10-19-21
2 testified earlier, we provided that accounting
3 finance treasury function as -- under the
4 shared services agreement. And so once I
5 got the -- I talked to Jim, got the approval to
6 make this payment, we have to then make the
7 payment, or the team does, and so the payment
8 was made.

9 Q. Okay. But -- okay. And -- and
10 sitting here right now, after Jim called you,
11 you don't remember talking to anyone other than
12 the -- the couple of people you mentioned,
13 talking to anyone about something to the effect
14 that, hey, Jim wants to make this payment now?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't -- I don't recall.

18 Q. And does that include legal counsel?
19 Without going into any detail, on
20 January 12th or before that payment was made,
21 did you consult with legal counsel about
22 anything having to do with the \$1.4 million
23 payment?

24 A. I don't recall.

25 Q. Okay. Thank you, sir, for your

1 WATERHOUSE - 10-19-21

2 time.

3 MR. RUKAVINA: Pass the witness.

4 MR. MORRIS: I just have a few
5 questions, if I may.

6 MS. DEITSCH-PEREZ: Don't you go at
7 the end?

8 MR. MORRIS: Oh, I apologize. He is
9 your witness. I'm surprised you want to
10 ask him questions, but go right ahead.

11 MS. DEITSCH-PEREZ: Just have a
12 couple of things.

13 MR. RUKAVINA: And I will just
14 object to that, that he's our witness.
15 That's not --

16 MR. MORRIS: I'm not talking to you.
17 I'm not talking to you.

18 MS. DANDENEAU: Also, Mr. Morris, it
19 is -- it is --

20 MS. DEITSCH-PEREZ: He is not my
21 witness. He's been subpoenaed by you.
22 Okay?

23 That is no offense, Mr. Waterhouse,
24 I'm -- I'm not -- okay. Anyway.

25 EXAMINATION

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2 BY MS. DEITSCH-PEREZ:

3 Q. Good evening. I'm very sorry to be
4 going last and I know you have had a long and
5 taxing day, so I thank you for indulging me.

6 The kinds of services that you
7 describe that the -- that Highland provided for
8 NexPoint, did Highland also provide similar
9 services to that to HCRE and HCMS?

10 A. Yes.

11 MR. MORRIS: Objection to the form
12 of the question.

13 Q. What kind of services did Highland
14 provide to HCRE and HCMS?

15 MR. MORRIS: Objection to the form
16 of the question.

17 MS. DEITSCH-PEREZ: What is your
18 objection, John?

19 MR. MORRIS: It is vague and
20 ambiguous. Unlike the advisors and
21 NexPoint, they actually had shared services
22 agreements.

23 MS. DEITSCH-PEREZ: I got -- I
24 understand your objection. That is fine.

25 Q. Let's take them one at a time.

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2 What kinds of services did Highland
3 provide to HCRE?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. HCMS, Highland employees provided
7 accounting services, treasury management
8 services, potentially legal services. I
9 don't -- but I wouldn't have been directly
10 involved in that. But as far as the teams that
11 I manage, it was accounting, treasury, things
12 of that nature.

13 Q. Okay. And that was for HCM, LLP --

14 A. And -- and, sorry, it would also be
15 any asset valuation if needed as well.

16 Q. Okay. We went back and forth on
17 each other and I apologize, so just to clarify.

18 You were talking about the services
19 that Highland Capital Management provided to
20 HCMS; is that right?

21 A. HCMS. So, again, yes. And
22 accounting, treasury, valuation, and also tax
23 services too.

24 Q. Okay.

25 A. Tax services. Look, I'm expanding

1 WATERHOUSE - 10-19-21

2 this, their HR services as well.

3 Q. Okay. And did that include bill
4 paying?

5 MR. MORRIS: Objection to the form
6 of the question.

7 Q. Did the services that HCM provided
8 to HCMS include bill paying?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes.

12 Q. And did the services that HCMLP
13 provided to HCMS include scheduling upcoming
14 bills?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. And did HCMLP regularly pay -- cause
19 to be paid the payments on loans HCMS had from
20 HCMLP?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Yes.

24 Q. Typically -- if there is a
25 typically, how far in advance of due dates did

1 WATERHOUSE - 10-19-21

2 HCMLP cause HCMS to pay its bills?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I mean, it -- it -- it depend -- it
6 depended on the nature of the payment and the
7 vendor, but, you know, if there were -- if
8 there were larger scheduled payments, you know,
9 I would like to give at least 30 days notice.

10 And that is -- that is kind of my
11 rule of thumb so no one is surprised.

12 Q. Okay. And was it generally HCMLP's
13 practice to timely pay HCMS' bills?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it -- it -- that depended on
17 the nature of the payment.

18 Q. Okay. And can you explain what you
19 mean by that?

20 A. Yeah, I mean if -- if it was -- I
21 mean -- if there was some professional fees
22 that weren't -- you know, they were due but
23 they weren't urgent, those fees may not be paid
24 as timely as others that have a due date or --
25 or things like that.

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2 Q. Okay. Are loan payments the kinds
3 of thing that HCMLP would pay on time because
4 of potential consequences of not paying on
5 time?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes. As I testified earlier, we
9 would want to give, you know, notice on -- on
10 -- on larger payments and -- and things of that
11 nature so we didn't miss due dates.

12 Q. Okay. And over the course of time,
13 did HCMLP generally pay HCMS' loan payments in
14 a timely fashion?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I can't remember specifically, but
18 generally, yes.

19 Q. Okay. Now, did HCMLP provide
20 similar services to HCRE that you have
21 described it provided to HCMS?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, but I don't think it -- it
25 provided -- I don't think it provided HR

1 WATERHOUSE - 10-19-21

2 services.

3 Q. Can you describe the accounting and
4 treasury services that HCMLP provided for HCRE?

5 A. Yeah, it -- it would provide
6 bookkeeping services on a -- on a periodic
7 basis. It would make payments, you know, as
8 needed.

9 Q. Okay. So did it provide --

10 A. And -- and I believe it -- it -- it
11 provided tax services as well.

12 Q. Okay. And so did it provide the
13 same kind of bill -- did HCMLP provide the same
14 kind of bill-paying services for HCRE that it
15 provided for HCMS and NexPoint?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Yes.

19 Q. And over the course of time, did
20 HCMLP generally cause to be made the loan
21 payments that HCRE owed to HCMLP?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes.

25 Q. Did HCMLP make loan payment -- the

1 WATERHOUSE - 10-19-21

2 loan payment that was due from HCMS to HCMLP in
3 December of 2020?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I don't believe that payment --
7 payment was made.

8 Q. Okay. And when HCMLP caused HCMS in
9 the past to make loan payments, whose money did
10 it use to make those payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. It was the -- the money in HCMS's
14 operating account would be made to that --
15 those moneys would be used to make payment to
16 Highland Capital Management.

17 Q. Okay. And Highland -- is it correct
18 that Highland Capital Management personnel had
19 the access to HCMS's accounts to be able to
20 cause such payments to be made?

21 A. Yes, Highland personnel had access
22 to those accounts.

23 Q. Okay. And so now for HCRE, whose
24 money was used when HCMLP caused HCRE
25 payments -- loan payments to Highland to be

1 WATERHOUSE - 10-19-21

2 made?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. It was -- it was cash in HCRE's bank
6 account that would be used to make payments to
7 Highland Capital Management.

8 Q. Okay. And so did Highland Capital
9 Management have access to HCRE's funds in order
10 to be able to make such payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Personnel at Highland Capital
14 Management had access to HCRE's bank account to
15 effectuate the payments.

16 Q. Okay. And was the payment due from
17 HCRE to HCMLP due in December of 2020 made?

18 A. It --

19 Q. In December of 2020.

20 A. It was not.

21 Q. Okay. And was there money in HCRE's
22 account that would have enabled the payment to
23 be made had HCM personnel attempted to make the
24 payment?

25 MR. MORRIS: Objection to the form

1 WATERHOUSE - 10-19-21

2 of the question.

3 A. I -- I don't recall.

4 Q. Do you have any reason to believe
5 that either HCRE or HCMS simply didn't have the
6 funds on hand to make the December 2020
7 payments?

8 A. I don't know.

9 Q. I guess I'm asking, do you have any
10 reason to believe that they didn't have the
11 funds?

12 A. We managed cash for so many
13 different entities and funds, and I don't
14 recall, you know, where the cash position was
15 for HCRE and HCMS at 12/31/2020.

16 Q. Okay.

17 A. I just don't recall, and I don't --
18 and I don't remember what the loan payment
19 obligations were from HCRE to Highland, and
20 from HCMS to Highland. I don't recall. I
21 don't recall, I mean...

22 Q. Let me come at it a different way.
23 Were the -- were the payments that would
24 otherwise have been due in December of 2020
25 made in January of 2021 for HCMS and HCRE?

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2 A. I believe the HCRE payment was made
3 in January of 2021. I don't recall any
4 payments being made from HCMS to Highland.

5 Q. If it -- how is it the HCRE payment
6 came to be made? Why did you make it -- why
7 did HCM make the payment in January of 2021?

8 A. Jim -- Jim called me and instructed
9 me to -- to make the payment on behalf of HCRE,
10 Jim Dondero -- Jim Dondero.

11 Q. Did he seem upset that -- that the
12 payment had not been made?

13 A. Yeah. On the note that was, you
14 know, that was the term note, yes, he -- he was
15 displeased that the -- that the payment had not
16 been made by year-end.

17 Q. Okay. And did you make the -- cause
18 the payment to be made as -- as requested?

19 A. Yes.

20 Q. And did anyone else from HCM
21 participate with you in causing the payment to
22 be made to -- on the HCRE loan?

23 A. Yes. It would have been Kristin
24 Hendrix. I -- again, I don't -- as I testified
25 earlier, I'm not an officer of HCRE. I don't

1 WATERHOUSE - 10-19-21

2 believe I'm an authorized signer. So I
3 can't -- other personnel have to make payment
4 from HCRE to -- to -- to -- to Highland.

5 Q. Okay. And in the conversation
6 that -- that you had with Mr. Dondero when he
7 requested the payment to be made, did you say
8 to him words to the effect, Jim, this loan is
9 going to stay in default, what are you making
10 the payment for, anything like that?

11 A. No.

12 Q. In fact, did you have the impression
13 from him that he thought that the loan would
14 be -- the default would be cured by making the
15 payment?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Did I get the impression from Jim
19 Dondero that the loan would be cured if the
20 payment from HCRE --

21 Q. Yeah, if that is what he thought.

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. I didn't get any impression from him
25 on that at the time.

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2 Q. Do you know whether there was an
3 HCMS term loan that had a payment due in
4 December of 2020?

5 A. I don't recall.

6 Q. Okay. And so the reason you don't
7 recall whether or not there was a payment in
8 January of 2021 is because you just don't
9 remember whether there was such a loan at all?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't remember. There is -- there
13 is so many notes, and I mean, demands, and I
14 don't -- I don't remember. It's a lot to keep
15 track in your head.

16 Q. I understand, and -- and I hear your
17 frustration when you have explained that the
18 debtor has your documents and you don't, and so
19 I fully appreciate it, and this is no knock on
20 you. It's a knock on somebody else on this
21 call.

22 MR. MORRIS: I move to strike. That
23 was pretty obnoxious, but go ahead.

24 Q. Okay. But so, Mr. Waterhouse, if --
25 if a payment on the HCMS loan was made in

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2 January of 2021, do you think it was part of
3 the same conversation where Jim Dondero said,
4 hey, why didn't that get paid, please make
5 that -- get that payment done?

6 MR. MORRIS: I object to the form of
7 the question.

8 A. Yes. Likely it would have been -- I
9 mean, again, I don't recall a payment being
10 made, but, you know, again, I don't remember
11 everything.

12 Q. Okay. Did -- at the time you were
13 communicating with Kristin Hendrix about the
14 payment being made, whichever payments were
15 made in January, did she say anything to you
16 about the payments not curing the loan
17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to
20 take you back to very early in the deposition
21 when Mr. Morris was asking you about the --
22 the -- the -- the agreement with respect to
23 the -- the forgiveness element of the loans, so
24 that is just to orient you.

25 Do you remember that there was a

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2 time that you and Mr. Dondero were
3 communicating about potential means of
4 resolving the Highland bankruptcy by what was
5 colloquially referred to as a pot plan?

6 A. Yes.

7 Q. Okay. And can you tell me generally
8 when that was?

9 A. Like mid -- mid 2020, sometime in
10 2020, mid 2020.

11 Q. Okay. And did the process of trying
12 to figure out what the numbers should be
13 involve looking at what one should pay for the
14 Highland assets?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. Okay. And did there come a time
19 when you were proposing some potential numbers
20 and Mr. Dondero said something to you like,
21 well, why are you including payment for the
22 related party notes, those, you know, were
23 likely to be forgiven as part of my deferred
24 executive compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we did have that conversation.

4 Q. Okay. Was that conversation in
5 connection with trying to figure out the right
6 numbers for a pot plan?

7 A. Yeah. I mean, it was -- it was -- I
8 mean, Jim -- Jim would ask for, you know,
9 most -- most recent asset values, you know, for
10 Highland, and -- and myself and the team
11 provided those to him, so it was in that
12 context.

13 Q. Okay. And does that refresh your
14 recollection that these communications were in
15 2020 rather than 2021?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. The -- the -- the executive
19 compensation discussions were definitely in
20 2020.

21 Q. Okay. Now, did you ever make
22 proposals that took into account Jim's comment
23 that the notes were likely to end up forgiven
24 as part of his compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we -- the team and myself put
4 together, you know, asset summaries of Highland
5 at various times for all the assets of
6 Highland, and not including the notes.

7 Q. Okay. And were those presentations
8 communicated to -- to Mr. Seery?

9 A. No. Well, look, I didn't tell -- I
10 didn't tell Mr. Seery. I don't know what
11 Mr. Dondero did with the information.

12 Q. Okay.

13 A. I did not have conversations with
14 Mr. Seery.

15 Q. Okay. Do you know who saw the
16 presentations that you put together that didn't
17 include the value of the related party notes?

18 A. We're talking presentations -- these
19 are -- these are Excel spreadsheets?

20 Q. Uh-huh.

21 A. I don't know who -- these were given
22 to -- to Jim Dondero. I don't know what was
23 done with them after that.

24 Q. Okay. You also mentioned earlier
25 that sometime during your tenure at Highland

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2 you knew of the practice of giving forgivable
3 loans to executives.

4 MR. MORRIS: Objection to the form
5 of the question.

6 Q. Can you -- can you tell me what you
7 recall about that practice?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, so there were -- there were --
11 during my tenure at Highland, there were loans
12 or -- given to employees that were later
13 forgiven at a future date and time.

14 Q. Okay. And when the loans were
15 given, did the notes, to your recollection, say
16 anything about the potential forgiveness term?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. When you say "did the notes," did
20 the promissory notes detail the forgiveness?

21 Q. Yes.

22 A. Not that I recall.

23 Q. And until such time as whatever was
24 to trigger the forgiveness occurred, were the
25 notes bona fide notes as far as you were

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2 concerned?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. Yes, similar to -- yes.

6 Q. Okay. You were going to say similar
7 to what?

8 A. Mr. Morris earlier today showed
9 notes of the financial statements about various
10 affiliate loans. I -- I -- I do recall these
11 notes because I -- at that time personally
12 worked on the -- the financial statements of
13 Highland. That was, you know, in my role as a
14 corporate accountant.

15 And there were -- those loans
16 were -- to the partners were detailed in the
17 notes to the financial statements, similar to
18 what we went through earlier today in the prior
19 testimony about what we saw with Highland
20 and -- and -- and the -- and HCMFA.

21 Q. Is it fair to say that on Highland's
22 balance sheet there were any number of assets
23 that the value of which could be affected by
24 subsequent events?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes. I mean, yes, that -- there
4 are. And that is -- yes.

5 Q. Okay. And is it typical accounting
6 practice that until there is some certainty
7 about those potential future events, that asset
8 value listed on -- on the books doesn't take
9 into account those potential future events?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yeah, if those -- yes. If -- if
13 those future events, you know, at the time of
14 issuance are not known or knowable, like I
15 discussed earlier with, like, market practice,
16 asset dislocation, or, you know, I mean, things
17 like that, you -- I mean, it -- it could affect
18 its fair value --

19 Q. Okay.

20 A. -- in the future.

21 Q. And am I correct you wouldn't feel
22 compelled to footnote in every possible change
23 in -- in an asset when those possibilities are
24 still remote?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. The accounting standard is you have
4 to estimate to the best -- you know, to -- to
5 the best of your ability, the fair value of an
6 asset as of the balance sheet date under --
7 under GAAP.

8 Q. Did -- strike that.

9 Okay. Give me a minute. I'm
10 close -- I'm close to done. Let me just go off
11 and look at my notes for a second. So take two
12 minutes.

13 VIDEOGRAPHER: We're going off the
14 record at 7:02 p.m.

15 (Recess taken 7:02 p.m. to 7:03 p.m.)

16 VIDEOGRAPHER: We are back on the
17 record at 7:03 p.m.

18 Q. Mr. Waterhouse, is it generally your
19 understanding that people you work with now
20 have been asking the debtor for full and
21 unfettered access to their own former files?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, I am -- I am generally aware.

25 Q. Okay. And do you think you could

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2 have been better prepared for this deposition
3 if the debtor had complied with those requests?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I -- I -- I most certainly -- yes.
7 I mean, again, these are multiple years,
8 multiple years ago, lots and lots of
9 transactions.

10 You know, we asked about NAV errors
11 and, you know, things like that and these
12 are -- it would make this process a lot more --
13 a lot easier and if we had -- if we had access
14 to that.

15 Q. Okay. And has the debtor -- is the
16 debtor suing you right now?

17 A. Yes.

18 Q. And is the debtor trying to renege
19 on deals that it had previously made with you?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. Sorry, I need to -- it is my
23 understanding that the litigation trust is
24 suing me. And not being a lawyer, I don't
25 know -- is that the debtor?

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2 Is that -- I don't know the
3 relationship. So, again, I'm not the lawyers.
4 I've said many times. But my understanding is
5 the litigation trust is suing me. I could be
6 wrong there. I don't know.

7 Q. Okay. I understand.

8 Someone with some connection to the
9 Highland debtor has brought a claim against
10 you; is that fair?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Yes.

14 Q. Okay. And is there also some motion
15 practice in the bankruptcy where the debtor or
16 someone associated with the debtor is
17 attempting to undo something that was
18 previously resolved with you?

19 A. Yes.

20 Q. And so in one action somebody is
21 associated with the debtors trying to --
22 threatening you with trying to take money from
23 you, and then in the other -- and trying to --
24 and in the other they are threatening not to
25 pay you things that had previously been agreed;

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2 is that correct?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I want to be -- yes, I -- there
6 is -- I'm being sued, again, on -- on something
7 that was agreed to with Mr. Seery and myself.
8 I don't -- I don't -- I don't own that claim.

9 Q. Okay.

10 A. To be transparent, I don't own that
11 claim. So it is not my personal property.

12 Q. Okay.

13 A. And -- and being the nonlawyer, I
14 don't know how I can get sued for something
15 that I don't owe or, like, I don't own
16 anything. I'm not the lawyer. But, I mean, if
17 that is -- if I'm understanding the facts
18 correctly.

19 Q. Okay. And the lawsuit that was
20 filed that names you, that was just filed
21 this -- this past week; is that right?

22 MS. DANDENEAU: Ms. Deitsch-Perez, I
23 do want to interrupt at this point because
24 just as I told Mr. Morris, that this is a
25 deposition about the noticed litigation.

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2 I really don't want to go -- go
3 afield --

4 MS. DEITSCH-PEREZ: Yeah.

5 MS. DANDENEAU: -- and open up a
6 whole new line of inquiry about the lawsuit
7 or the -- the motion and the bankruptcy
8 court. We will be here all night.

9 MS. DEITSCH-PEREZ: And I
10 understand.

11 Q. My -- my point is: Do you feel
12 like -- like there is some effort by these
13 parties related to the debtor to intimidate
14 you -- not that you -- I'm not saying you are
15 or you aren't.

16 But do you feel like there is some
17 effort to intimidate you and maybe an effort to
18 deter you from being as prepared as you might
19 be in this deposition?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I was -- I was surprised by the
23 lawsuit, by me being named, because, again, I
24 don't own the asset and things like that.
25 Yeah, I just -- I want to move forward with my

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2 life at Skyview.

3 MS. DEITSCH-PEREZ: Thank you.

4 THE WITNESS: Thank you.

5 FURTHER EXAMINATION

6 BY MR. MORRIS:

7 Q. If I may, I just have a few
8 questions.

9 Mr. Waterhouse, we saw a number of
10 documents that Mr. Rukavina put up on the
11 screen where Ms. Hendrix would send you a
12 schedule of payments that were due on behalf of
13 certain Highland affiliates.

14 Do you remember that?

15 A. Yes.

16 Q. And in each instance she asked for
17 your approval to make the payments; is that
18 right?

19 A. Yes, she did.

20 Q. And was that the -- was that the
21 practice in the second half of 2020 whereby
22 Ms. Hendrix would prepare a list of payments
23 that were due on behalf of Highland associates
24 and ask for approval?

25 A. Yes.

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2 Q. And I think you said that there was
3 a -- a --

4 A. It was -- I think I testified to
5 this earlier when we talked about procedures
6 and policy, you know, again, I want to be
7 informed of -- of -- of -- of -- of any
8 payments that are going out. I want to be made
9 aware of these payments, and that was just a
10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting
16 group would prepare a calendar that would set
17 forth all of the payments that were anticipated
18 in the -- in the three weeks ahead; is that
19 right?

20 A. I -- like I testified earlier, we
21 had a corporate calendar that was set up, you
22 know, to -- to provide reminders or, you know,
23 of anything of any nature, whether it is
24 payments or -- or financial statements or, you
25 know, whatever it is, you know, to meet

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2 deadlines.

3 I don't know how, as I testified
4 earlier, how much they were using that
5 calendar.

6 Q. Okay. But -- but you did get notice
7 and a request to approve the payments that were
8 coming due on behalf of Highland's affiliates.
9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you
12 know, as we saw with these emails, generally, I
13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the
15 payment -- do you know why there was no payment
16 made by NexPoint at the end of 2020?

17 A. Yes. There was -- there was -- we
18 talked about these agreements between the
19 advisors and Highland, the shared services and
20 the cost reimbursement agreement.

21 And in late 2020, there were
22 overpayments, large overpayments that had been
23 made over the years on these agreements, and it
24 was my understanding that the advisors were --
25 were talking with -- like Jim Seery and others

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2 to offset any obligations that the advisors
3 owed to Highland as offset to the overpayments
4 on these agreements.

5 Q. Okay. Did you participate in any of
6 those conversations?

7 A. I did not.

8 Q. Okay. Do you know -- do you recall
9 that the -- at the end of November, the debtor
10 did notice to the advisors of their intent to
11 terminate the shared services agreements?

12 A. Like I testified earlier, there
13 was -- the agreements weren't identical, from
14 what I recall, and there is one that had a
15 longer notice period, which I think had a
16 60-day notice period. I don't recall which one
17 that was, so not all of them were -- notice
18 hadn't been given as of November 30th, for all
19 of the agreements.

20 Q. Upon the receipt of the -- the
21 termination notices that you recall, do you
22 know if the advisors decided at that point not
23 to make any further payments of any kind to
24 Highland?

25 MR. RUKAVINA: Objection, form.

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2 A. No. The advisors -- the advisors
3 had stopped making payments prior to that
4 notice.

5 Q. Okay. And how do you know that the
6 advisors stopped making -- making payments
7 prior to the notice?

8 A. I had -- I had a conversation
9 with -- with Jim Dondero.

10 Q. And did Mr. Dondero tell you that
11 the advisors would no longer make payments to
12 Highland?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes, he -- he -- again, he said
16 they -- they -- the advisors have overpaid on
17 these agreements, to not make any future
18 payments, and that there needs to be offsets,
19 and they're working on getting offsets to these
20 overpayment.

21 Q. Do you know if anybody ever
22 instructed Highland's employees to make the
23 payment that was due by NexPoint at the end of
24 the year?

25 A. Did anyone instruct Highland's

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2 employees to make that payment?

3 Q. Correct.

4 A. Anyone -- not that I'm aware.

5 Q. Were any of Highland's employees
6 authorized to make the payments on behalf of
7 its affiliates -- withdrawn.

8 Was any of Highland's employees
9 authorized to effectuate the payment on behalf
10 of NexPoint that was due at the end of the year
11 without getting approval from either you or
12 Mr. Dondero?

13 A. They had the -- they had the ability
14 to make the payment, but they didn't -- you
15 know, that -- that payment needed to be
16 approved.

17 Q. Okay. And it needed to be approved
18 by you or Mr. Dondero; is that right?

19 A. I mean, I'm not going to make the
20 unilateral decision.

21 Q. Is that a decision that you
22 understood had to be made by Mr. Dondero?

23 A. Yes. Sitting back in December of
24 2020, the -- that -- there was this off --
25 offset negotiation that -- that was happening,

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2 so I mean, until those negotiations were
3 resolved, you know, there wasn't any
4 payments -- there weren't any payments.

5 Q. And -- and there were no payments
6 until the negotiations were resolved because
7 that was the directive that you received from
8 Mr. Dondero; correct?

9 A. I don't think he said -- I mean, I
10 think -- yeah, I mean -- I'm trying to recall
11 the conversation. It was -- you know, there
12 is -- there is these negotiations. There's --
13 there needs to be these offsets. They're
14 talking with the debtor. So, you know, until
15 this is resolved, right, I mean, depending on
16 how, whatever that resolution was, were we to
17 take any action.

18 Q. Okay. How about with respect to
19 HCMS, did HCMS have a term payment due at the
20 end of the year?

21 A. Again, I don't -- I don't recall.

22 Q. Okay. You discussed briefly two
23 payments that were made in January of 2021, one
24 on behalf of NexPoint, and one on behalf of
25 HCMS. Do I have that right?

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2 A. No. The two payments I recall were
3 NexPoint and HCRE.

4 Q. Okay. And those two payments --
5 thank you for the correction. And those two
6 payments were made because Mr. Dondero
7 authorized those payments to be made; correct?

8 A. Yes.

9 Q. And they hadn't been made before
10 that because Mr. Dondero had not authorized
11 them to be made?

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. Yes, because of these negotiations.

15 Q. Okay. Just a couple of more
16 questions.

17 Did anybody, to the best of your
18 knowledge, on behalf of HCMFA, ever tell the
19 SEC that HCMLP was responsible for the mistakes
20 that were made on the TerreStar valuation?

21 A. Did anyone from Highland on HCMFA's
22 behalf tell the SEC that Highland -- that
23 Highland was responsible for there -- I just
24 want to make sure --

25 Q. It was a little bit different, so

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2 let me try again.

3 A. These are very long questions, John.

4 I'm not trying to be --

5 Q. That is good. Do you know whether
6 anybody -- do you know whether anybody on
7 behalf of HCMS -- HCMFA ever told the SEC that
8 Highland was the responsible party for the
9 TerreStar valuation error?

10 A. Not that I'm aware.

11 Q. Okay. Did anybody on behalf of
12 the -- on behalf of HCMFA ever tell the retail
13 board that Highland was responsible for the
14 TerreStar valuation error?

15 A. Not that I'm aware.

16 Q. Do you know if HCMFA made an
17 insurance claim with respect to the damages
18 that were incurred in relation to the TerreStar
19 valuation error?

20 A. Yes.

21 Q. And do you know why they made that
22 insurance claim?

23 A. Because there was an error. I
24 mean --

25 Q. Was the insured's claim made -- was

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2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the
5 petition date -- withdrawn.

6 You were asked a couple of questions
7 where -- where you said that Mr. Dondero told
8 you that he was ascribing zero value to the
9 notes as part of a pot plan because he believed
10 that the notes were part of executive
11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that
17 before the time that Mr. Dondero told you that
18 in the conversation about the pot plan?

19 A. Had I heard that prior to my
20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context
24 of his formulation of the settlement proposal;
25 is that right?

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2 A. I mean, generally, yes. You know,
3 we were asked to provide asset values, right,
4 and he was having settlement discussions.
5 Again, I don't know who those went to
6 ultimately. I don't recall.

7 MR. MORRIS: I have no further
8 questions. Thank you very much for your
9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay
11 on about your email when --

12 MR. RUKAVINA: Hold on, I'm not
13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor
15 still has questions. Sorry. I was going
16 to say both John and Davor, could you stay
17 on afterwards just to talk about the
18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now
22 testifying about a discussion you had with
23 Mr. Dondero where he said something like no
24 more payments.

25 Do you remember that testimony?

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2 A. Yes.

3 Q. Okay. And was that late November or
4 early December of 2020?

5 A. It was, I would say, first or second
6 week of November.

7 Q. Okay. Do you recall whether --
8 whenever you had that discussion, whether
9 Mr. Dondero had already been fired by the
10 debtor?

11 A. Yes, I -- I believe he was not an
12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this
14 with Mr. Dondero and he said no more payments,
15 you were discussing the two shared services
16 agreements and employee reimbursement
17 agreements we testified -- you testified about
18 before; is that correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. That is correct.

22 Q. And had your office or you -- and we
23 will talk at a future deposition about the
24 administrative claim.

25 But had -- by that time that you

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2 talked to Mr. Dondero, had your office or you
3 done any estimate of what the alleged
4 overpayments were?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes, we had -- there was a -- there
8 was a detailed analysis that was put together
9 by David Klos at the time.

10 Q. And do you recall just generally
11 what the total amount for both advisors of the
12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I -- I remember it was an
18 eight-figure number. I don't remember
19 specifically.

20 Q. Okay. And did you convey that
21 number to Mr. Dondero when you had that
22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

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2 Q. Is it fair to say he was upset?

3 A. Yes.

4 Q. Did Mr. Dondero ever expressly tell
5 you to not have NexPoint make the required
6 December 31, 2020, payment?

7 A. Yes, I recall him saying don't make
8 the payment because it was being negotiated, as
9 I discussed with Mr. Morris, this offset
10 concept. So there were obligations due by the
11 advisors to Highland, they should be offset
12 that -- you know, those obligations should be
13 offset by this -- by this overpayment.

14 Q. And when did he tell you that?

15 A. I would say -- I would say around --
16 probably December -- December-ish.

17 Q. Early December, late December?

18 A. I don't recall with as much
19 specificity as -- as -- as -- as stopping the
20 shared services payments, because we had
21 actually made one shared services payment in
22 November. So that is why I need to remember
23 that one more clearly. I don't remember where
24 exactly in December that conversation occurred.

25 Q. Did Mr. Dondero expressly use the

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2 word "NexPoint" when he was saying don't make
3 these payments?

4 MR. MORRIS: Objection to the form
5 of the question, asked and answered.

6 A. Yeah, we were -- we were discussing
7 advisor obligations. So it was -- you know, it
8 was just obligations from the advisors.

9 And -- and he specifically talked
10 about the NexPoint payment as well.

11 Q. Okay. And it is your testimony that
12 he expressly told you not to make that NexPoint
13 December 31 payment?

14 MR. MORRIS: Objection, asked and
15 answered twice.

16 A. Yes, he -- he did, during that
17 conversation.

18 Q. And did you ever follow up with him
19 after that about whether NexPoint should or
20 shouldn't make that payment?

21 A. I did not.

22 Q. Did you ever, on or about
23 December 31, 2020, remind him and say, hey,
24 this payment is due, what shall I -- what
25 should I do?

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2 A. I did not.

3 Q. So sitting here today, you -- you
4 remember distinctly that Dondero in December of
5 2020 expressly told you not to have NexPoint
6 make that payment?

7 MR. MORRIS: Objection, asked and
8 answered three times.

9 A. Yes.

10 Q. Can you say categorically it wasn't
11 just some general discussion where he told you
12 not to make payments?

13 MR. MORRIS: Objection, asked and
14 answer four times.

15 MR. HORN: Four times now. Go for
16 five.

17 A. Yes.

18 Q. Did you tell Mr. Seery that?

19 A. I don't believe I did. I don't
20 recall.

21 Q. And was this an in-person discussion
22 or telephone or email? Do you remember?

23 A. This was a phone -- a phone
24 conversation.

25 Q. Okay. Would you have a record of --

1 WATERHOUSE - 10-19-21

2 on your cell phone of when that conversation
3 might have taken place?

4 I'm sorry, strike that.

5 Was that by cell phone?

6 A. I believe -- yes, because we -- I
7 was at home. I mean, I don't have a landline.
8 All I have is my cell phone.

9 Q. Do you know whether your cell phone
10 still has records of conversations from
11 December 2020 on it?

12 A. My call log doesn't go back that
13 far.

14 Q. Okay. Thank you.

15 MR. RUKAVINA: I will pass the
16 witness.

17 MS. DEITSCH-PEREZ: Just a couple
18 quick questions.

19 FURTHER EXAMINATION

20 BY MS. DEITSCH-PEREZ:

21 Q. With respect to HCRE and HCMS, am I
22 correct there was -- there was no direction not
23 to pay those loan payments?

24 MR. MORRIS: Objection to the form
25 of the question.

1 WATERHOUSE - 10-19-21

2 A. Yes, I don't recall having
3 conversations about, you know, those -- those
4 entities.

5 Q. And, in fact, what was the tone that
6 Mr. Dondero had when he talked to you about the
7 fact that HCRE and HCMS payments hadn't been
8 made when he found out that they hadn't been
9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was -- it was -- it was -- it
14 was very negative. I mean, I think he cursed
15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that
17 consistent with the fact that he was surprised
18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

1 WATERHOUSE - 10-19-21

2 Thank you, Mr. Waterhouse. We appreciate
3 your time. I am logging off the discussion
4 and I will talk to y'all tomorrow.

5 MR. MORRIS: Super.

6 VIDEOGRAPHER: If there are no
7 further questions, this ends the
8 deposition -- excuse me. This ends the
9 deposition, and we are going off the record
10 at 7:30 p.m.

11 (Deposition concluded at 7:30 p.m.)

12

13

14 _____
FRANK WATERHOUSE

15

16 Subscribed and sworn to before me

17 this day of 2021.

18

19 -----

20

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 C E R T I F I C A T E

3

4 I, SUSAN S. KLINGER, a certified shorthand
5 reporter within and for the State of Texas, do
6 hereby certify:

7 That FRANK WATERHOUSE, the witness whose
8 deposition is hereinbefore set forth, was duly
9 sworn by me and that such deposition is a true
10 record of the testimony given by such witness.

11 I further certify that I am not related to
12 any of the parties to this action by blood or
13 marriage; and that I am in no way interested in
14 the outcome of this matter.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this 19th of October, 2021.

17



18

19 Susan S. Klinger, RMR-CRR, CSR

20 Texas CSR# 6531

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 NAME OF CASE: In re: Highland Capital

3 DATE OF DEPOSITION: October 19, 2021

4 NAME OF WITNESS: Frank Waterhouse

5 Reason Codes:

6 1. To clarify the record.

7 2. To conform to the facts.

8 3. To correct transcription errors.

9 Page____ Line____ Reason_____

10 From_____ to_____

11 Page____ Line____ Reason_____

12 From_____ to_____

13 Page____ Line____ Reason_____

14 From_____ to_____

15 Page____ Line____ Reason_____

16 From_____ to_____

17 Page____ Line____ Reason_____

18 From_____ to_____

19 Page____ Line____ Reason_____

20 From_____ to_____

21 Page____ Line____ Reason_____

22 From_____ to_____

23 Page____ Line____ Reason_____

24 From_____ to_____

25

EXHIBIT 80

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*Counsel for Defendant Highland Capital
 Management Services, Inc.*

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03006-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC., JAMES DONDERO, NANCY	§	
DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.’S MOTION
 TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW, Highland Capital Management Services, Inc. (“HCMS”), one of the Defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as Plaintiff (the “Debtor”), and files this, its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”). HCMS respectfully shows as follows:

I. RELIEF REQUESTED

1. On October 29, 2021, NexPoint Advisors, L.P. (“NexPoint”) filed its *Motion to Extend Expert Disclosure and Discovery Deadlines* with several exhibits attached (the “NexPoint Motion”) in Case No. 19-34054-sgj11, Adversary Proceeding No. 21-03005-sgj, collectively attached hereto as “Exhibit A.”¹ HCRE and HCMS incorporate the context of the NexPoint Motion as if fully set forth herein.

2. As described in the NexPoint Motion, in the NexPoint, HCMS and HCRE Notes cases there is a similar issue regarding whether the Debtor, Highland Capital Management, as the servicer for NexPoint, HCMS and HCRE, failed to make term loan payments at the end of 2020, enabling the Debtor to contend that the term loans were accelerated. As described in the Rukavina Declaration annexed to the NexPoint Motion, unexpected testimony just last week gave rise to the need to investigate whether expert testimony on the duties of a servicer like Highland Capital Management would be useful.

3. As a result of the timing, it was not possible to retain an expert who could provide a report by the existing deadline, today. HCRE and HCMS therefore seek an extension of time to potentially obtain an expert report from Mr. Steven Pully. HCRE and HCMS would act expeditiously to minimize any impact on the schedule.

4. For generally the same reasons set forth in the NexPoint Motion, HCMS requests this Court grant it the same relief requested by NexPoint.

¹ *Motion to Extend Expert Disclosure and Discovery Deadlines*, Case 21-03005-sgj [Doc 86]; *Declaration of Davor Rukavina*, Case 21-03005-sgj [Doc 86-1]; *Exhibit A*, Case 21-03005-sgj [Doc 86-2]; *Exhibit B*, Case 21-03005-sgj [Doc 86-3]; *Exhibit C*, Case 21-03005-sgj [Doc 86-4].

II. PRAYER

WHEREFORE, PREMISES CONSIDERED, HCMS respectfully requests this Court enter an order (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting HCMS such other and further relief as may be proper.

RESPECTUFLLY SUBMITTED this 29th day of October, 2021.

STINSON LLP

/s/ Deborah Deitsch-Perez
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**ATTORNEYS FOR DEFENDANT
HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC.**

CERTIFICATE OF CONFERENCE

Counsel for NexPoint requested counsel for the Debtor to agree to the extension and within minutes, the Debtor declined. For that reason, counsel for HCRE and HCMS concluded further conferencing would be futile.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

Case 21-03006-sj Doc 91-1 Filed 10/29/21 Entered 10/29/21 21:54:01 Page 1 of 446

Exhibit A

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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND
 EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”), respectfully stating as follows:

I. RELIEF REQUESTED

1. By this Motion, NexPoint requests that the Court extend the deadline, in its *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [docket no. 70] (the “Scheduling Order”), for the designation of experts and service of expert reports, through December 13, 2021, with a corresponding extension of expert discovery. Specifically, NexPoint finds it appropriate and advisable to designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement (defined below) with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment. This request is necessitated by recent deposition testimony of key individuals on October 19 and 21, 2021, prior to which NexPoint did not know or reasonably believe that expert testimony on the duties of care would be advisable.

II. PROCEDURAL BACKGROUND

2. The Debtor initiated this Adversary Proceeding with the filing of its original complaint against NexPoint on January 22, 2021.

3. By this Adversary Proceeding, the Debtor seeks to collect on a promissory note issued by NexPoint to the Debtor on May 31, 2017 in the original principal amount of \$30,746,812.33 (the “Note”). The Note is a 30-year note and provides for an annual payment of principal and interest. After prior payments, the Debtor asserts that \$23,071,195.03 remains due and owing on the Note.

4. NexPoint has asserted various defenses and affirmative defenses to the Debtor’s allegations and causes of action. This Motion concerns one such affirmative defense only, to the effect that the Debtor, through its employees, caused the alleged underlying default.

5. On July 28, 2021, the District Court entered an order adopting this Court's report and recommendation and ordering that the reference for this Adversary Proceeding will be withdrawn once this Court certifies this Adversary Proceeding as being trial ready. As part of the same, the District Court necessarily agreed and ordered that NexPoint has a right to a trial by jury of this Adversary Proceeding.

III. FACTS

6. This Motion is supported by the Declaration of Davor Rukavina, attached hereto as incorporated herein (the "Declaration").

7. The Debtor alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated, and the Debtor demanded full and immediate payment.

8. One of NexPoint's affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the "Shared Services Agreement") between the Debtor and NexPoint dated January 1, 2018. The Agreement was in place as of December 31, 2020, although the Debtor terminated it later, in 2021. Under the Agreement, the Debtor provided various services to NexPoint, including so-called "back office" services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Shared Services Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint's funds. Indeed, Waterhouse (defined below) testified that it was "reasonable for NexPoint to rely on the debtors' employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note." *See Declaration at Exhibit C, 337:22-338:8.*

9. NexPoint asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor's negligence, the Note would remain in place. NexPoint has always asserted this as an affirmative defense. *See* Docket No. 6. NexPoint's defense, however, was based on its belief that the Debtor and its employees, including Waterhouse, did nothing to facilitate or ensure the payment, as opposed to a conscious decision not to make the payment.

10. On October 19, 2021, the Debtor deposed Frank Waterhouse ("Waterhouse"), as did NexPoint, in connection with this Adversary Proceeding. Waterhouse was the Debtor's chief financial officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020. To be clear, Waterhouse was the Debtor's employee, although he provided services to NexPoint as well pursuant to the Shared Services Agreement. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note.

11. This changed the potential facts as NexPoint understood them to be from ones where the Debtor simply failed utterly to facilitate the payment, as it has always done, to one where the Debtor intentionally, allegedly upon the instructions of Dondero, decided not to facilitate the payment. Assuming the Dondero instruction to be true, this raises the question of whether the Debtor thereafter had any affirmative duty with respect to the alleged instruction.

12. NexPoint did not know that Waterhouse would provide this testimony. NexPoint understood that Dondero instructed Waterhouse to make no further payments on the Shared Services Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars

on the Shared Services Agreement. But NexPoint did not understand that Waterhouse would testify that Dondero instructed him also not to pay the Note.

13. If Dondero told Waterhouse in early December, 2020 not to pay on the Note, then the question becomes whether Waterhouse or the Debtor thereafter “put their heads in the sand” in violation of any affirmative duty or obligation they may have had regarding the matter, such as: to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint and the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision. After all, the Debtor was responsible to facilitate the payment, the Debtor had various duties under the Shared Services Agreement, and it was in the Debtor’s interest that NexPoint would default, thus creating a conflict of interest.

14. Accordingly, on October 19, 2021, when NexPoint deposed James Seery, NexPoint asked Mr. Seery about section 6.01 of the Shared Services Agreement, labeled “standard of care,” which provides that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims.” Mr. Seery testified that he did not believe that this provision of the Shared Services Agreement obligated the Debtor or Waterhouse to do anything further after Dondero allegedly instructed Waterhouse not to pay on the Note.

15. At that time, NexPoint determined that it was appropriate, and would assist the finder of fact, to retain an expert on the “standard of care” provided for in the Shared Services Agreement. This is especially important because this will be a jury trial in the District Court. NexPoint did not believe that it would need to retain such an expert, and it had no reasonable grounds to suspect that it would need such an expert, prior to these depositions.

16. NexPoint moved as promptly as it could thereafter. NexPoint decided to retain an expert on October 22, 2021 and began searching for one on that day. NexPoint located a potential expert, Steven J. Pully, on October 26, 2021, and after conflicts were cleared and terms agreed to, Mr. Pully agreed to serve as NexPoint's expert on October 28, 2021. NexPoint files this motion just one day later, and less than two weeks after Waterhouse's deposition triggered the issue.

17. It goes without saying that neither Pully nor any reasonable expert can possibly review the issues, formulate an opinion, and prepare a report one day after they are retained. Among other things, Pully needs to review all underlying documents and deposition transcripts, some of which have yet to be returned by the court reporters. Accordingly, NexPoint believes that approximately six (6) weeks will be sufficient for Pully to prepare a report. NexPoint submits that the Debtor should have a period of time to then designate a potential rebuttal expert, and a period of time for expert discovery. Such a procedure would be fair for all involved and would constitute a minimal delay to what has already been a rapidly advanced case.

IV. ARGUMENT AND AUTHORITIES

18. It is appropriate for an expert to consider the issue of Waterhouse's and the Debtor's duties under the Shared Services Agreement—*i.e.*, “duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims,”—as issues such as “prudent person” and “like capacity and familiar with like aims” are appropriate for expert analysis and will assist the finder of fact, especially a jury.

19. Rule 16(b) provides that a deadline in a scheduling order may be modified “for good cause,” although there is some uncertainty as to whether this standard applies only after a deadline has passed (which is not the case here). *See* Fed. R. Civ. P. 16(b)(4); *Marathon Fin. Ins.*

Inc. RRG v. Ford Motor Co., 591 F.3d 458, 470 (5th Cir. 2009) (“Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order's deadline to amend has expired”).

20. When the issue concerns an “untimely submission of expert reports,” the Fifth Circuit has specified the following for factors as guiding the decision: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). Again, this test applies to a deadline which has already expired. Logically, therefore, a lesser standard should apply when a party seeks relief prior to the expiration of a deadline, as NexPoint does here.

21. Applying these or any factors:

- (i) this Adversary Proceeding is only some nine (9) months old and the parties have moved very quickly, with all discovery almost over;
- (ii) if this Motion is granted, all discovery in this Adversary Proceeding will have been completed by the end of 2021, still less than one (1) year after filing;
- (iii) the reason for the need to extend the deadline is the most logical reason that most frequently appears—that discovery has necessitated some previously unexpected action—which is one of the purposes of discovery;
- (iv) NexPoint’s failure to previously designate an expert was due solely to not having the benefit of Waterhouse’s and Seery’s recent deposition testimony, and is not the result of any delay or lack of diligence, as evidenced by the fact that NexPoint did already and timely designate two other experts on other issues (*i.e.* NexPoint did not sit on its responsibility to consider retaining experts);
- (v) the matter is important because the duties of care as specified in the Shared Services Agreement are terms of art necessitating an expert analysis, especially before a jury, and the matter goes to the heart of NexPoint’s affirmative defense, and is necessitated by Waterhouse’s testimony and not any prior action or inaction of NexPoint;
- (vi) there is no prejudice to the Debtor, which will have sufficient time to retain a rebuttal expert and take expert discovery (*i.e.* no witnesses or documents have been lost); and

- (vii) a continuance is easily available to avoid any prejudice to the Debtor—indeed, there is no need for a continuance even as the Adversary Proceeding has yet to be certified as trial ready and it is likely that the District Court will not schedule the Adversary Proceeding for trial for some time.

22. NexPoint submits that this Motion cannot come as a surprise to the Debtor. NexPoint has asserted its affirmative defense since the beginning. The only difference now is that, instead of a wholesale disregard of any duty to facilitate the Note payment, the issue has evolved to whether the Debtor or Waterhouse had any affirmative duty to act after the alleged instruction from Dondero. As it can be presumed that Waterhouse previously informed the Debtor or its counsel of this alleged instruction (as he apparently informed other employees at the Debtor), the Debtor likely knew what Waterhouse’s testimony would be well before NexPoint learned of that testimony. It is reasonable to conclude that the Debtor knew or should have known that the “standard of care” under the Shared Services Agreement would then become a material issue.

23. Accordingly, “good cause” to amend the Scheduling Order exists, if that higher standard even applies, and approving such amendment will not prejudice the Debtor and will instead serve the interests of justice.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, NexPoint respectfully requests that the Court enter an order: (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting NexPoint such other and further relief as may be proper.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on October 28, 2021, he conferred with counsel for the Debtor, John Morris, and the Debtor opposes the relief requested herein.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served on the following recipients via the Court's CM/ECF system:

Zachery Z. Annable on behalf of Plaintiff Highland Capital Management, L.P.
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Paige Holden Montgomery on behalf of Creditor Committee Official Committee of Unsecured Creditors
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/s/ Davor Rukavina

Davor Rukavina

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§ § § § § §	
Defendants.	§	

DECLARATION OF DAVOR RUKAVINA

STATE OF TEXAS

COUNTY OF DALLAS

I, Davor Rukavina, hereby state and testify to the following as being true and correct and under penalty of perjury pursuant to the laws of the United States of America:

1. My name is Davor Rukavina. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to execute this Declaration.

2. I am an attorney duly licensed to practice law in the State of Texas. I am a shareholder at Munsch Hardt Kopf & Harr, P.C. I am the lead attorney for NexPoint Advisors, L.P. ("NexPoint"), one of the defendants in this Adversary Proceeding.

3. At issue in this Adversary Proceeding is a 30-year promissory note executed by NexPoint in the original principal amount of \$30,746,812.33 (the "Note"), although the Note had been paid down significantly by the time of the filing of this Adversary Proceeding.

4. Highland Capital Management, L.P. (the “Debtor”) alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated and the Debtor demanded full and immediate payment.

5. The parties agreed by written stipulation that they would disclose experts and produce expert reports on or before October 29, 2021, and the Court’s scheduling order so requires. NexPoint requests an extension of this deadline. The following is the reason why.

6. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Agreement”) between the Debtor and NexPoint dated January 1, 2018, a copy of which is attached hereto as Exhibit “A.” The Agreement was in place as of December 31, 2020, although the Debtor terminated it later in 2021. NexPoint alleges that, under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. NexPoint therefore asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor’s negligence, the Note would remain in place.

7. The foregoing has always been an affirmative defense of NexPoint in this Adversary Proceeding, including in its amended answer filed on September 1, 2021, a copy of which is attached hereto as Exhibit “B.”

8. On October 19, 2021, the Debtor deposed Frank Waterhouse (“Waterhouse”), as did I, in connection with this Adversary Proceeding. Waterhouse was the Debtor’s chief financial

officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020.

9. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero (“Dondero”), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note. A copy of this deposition transcript is attached as Exhibit “C.”

10. This testimony was not expected by me or by NexPoint. I had understood that Dondero instructed Waterhouse to make no further payments on the Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars on the Agreement and because that was what Dondero and Waterhouse had been discussing. I had not understood that Waterhouse would testify that Dondero instructed him to also not pay the Note specifically.

11. Prior to that deposition, I had never spoken to Waterhouse. Waterhouse presently serves as an officer of NexPoint; however, and unlike every other case I have been involved with, I have not been permitted to discuss with Waterhouse litigation matters. This is because Waterhouse is in litigation with the Debtor on other matters and has separate and independent counsel, Debra Dandeneau and Frances Smith, who would not permit me to speak directly to Waterhouse, which I understood to be a logical and appropriate instruction to protect their client. I did discuss with Ms. Dandeneau what Waterhouse may know about the litigation between the Debtor and my clients, but that primarily focused on defenses that another client of mine, Highland Capital Management Fund Advisors, L.P., has. And I did discuss with Ms. Dandeneau that Dondero told Waterhouse to not make payments, but I understood that to be limited to the Agreement and to not include the Note, since the topic under discussion (as it was told to me)

between Dondero and Waterhouse was the Agreement and overpayments on the Agreement, and not the Note.

12. In sum, prior to October 19, 2021, I did not know that Waterhouse would testify that Dondero told him to not pay on the Note, and I had no reasonable reason to suspect the same. My surprise is evident from the transcript of that deposition, where I asked Waterhouse multiple times whether he was sure that Dondero told him this—so much so that opposing counsel objected multiple times as “asked and answered,” and even objected as having been asked and answered “four time.” Exhibit “C” at 390-392.

13. Assuming that Waterhouse’s testimony on this issue will be accepted by a trier of fact, the question is whether, from NexPoint’s perspective, Waterhouse had no further duties to review, confirm, investigate, or to discuss the issue with Dondero. In that respect, section 6.01 of the Agreement, labeled “standard of care,” states that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

14. I deposed Jim Seery on October 21, 2021, and asked him various questions about this provision of the Agreement. Mr. Seery testified to the effect that he did not believe that the Agreement obligated the Debtor or Waterhouse to do anything further after Dondero told Waterhouse to not pay the Note (again, assuming that this was true). I do not have a copy of Mr. Seer’s deposition yet.

15. With Mr. Seery testifying that he did not believe that the Agreement required the Debtor or Waterhouse to do anything further if Dondero in fact gave the instruction Waterhouse testified that he did, NexPoint concluded that it needed to retain an expert to review whether the “standard of care” specified in the Agreement compelled the Debtor or Waterhouse to do anything

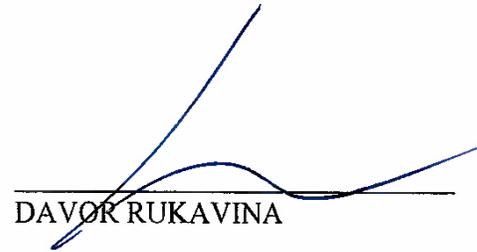
further after Dondero gave the alleged instruction, such as checking with him to see if they understood him correctly, advising him of the potential serious consequences of a default, trying to dissuade him, or at least asking him once again prior to December 31, 2020 whether the payment should be made.

16. On October 22, 2021, I began searching for a potential expert. On October 26, 2021, I contacted Steven J. Pully about the potential engagement. After clearing conflicts and coming to an agreement, Mr. Pully agreed to the engagement on October 28, 2021. The engagement letter has yet to be finalized and executed, but I have every confidence that it will and the urgency of the matter necessitates this Declaration at this time. I have been extremely diligent in searching for an finding an expert once NexPoint determined that the retention of an expert was appropriate, which did not occur until the Seery deposition on October 21, 2021.

17. Even though NexPoint has retained Mr. Pully as of October 28, 2021, it is not possible for Mr. Pully to formulate an opinion and prepare a report by October 29, 2021. Among other things, various deposition transcripts of important witnesses have yet to be received and reviewed by Mr. Pully, and Mr. Pully has yet to review the underlying documents. Assuming no undue delays with respect to deposition transcripts, Mr. Pully should be able to prepare a report by December 13, 2021.

18. NexPoint therefore seeks an extension of the expert designation and report deadline through December 13, 2021, in order that justice may be done and not for delay or any improper purpose, NexPoint not having designated an expert before due solely to the lack of knowledge that Waterhouse would testify as he did on October 19, 2021 and that Mr. Seery would testify as to his view that the Agreement did not require Waterhouse to do anything thereafter.

I hereby swear under oath and penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



DAVOR RUKAVINA

AMENDED AND RESTATED SHARED SERVICES AGREEMENT

This Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated effective as of January 1, 2018, is entered into by and between NexPoint Advisors, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

RECITALS

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Parties entered into that certain Shared Services Agreement, dated effective as of January 1, 2013 (the "Original Agreement");

WHEREAS, the Parties desire to amend and restate the Original Agreement and the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company, in each case, on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company; and

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee"), if any, is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree, and the Original Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

Exhibit A

“Affiliate” shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term “control” means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

“Applicable Asset Criteria and Concentrations” means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

“Applicable Law” shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

“Client or Account” shall mean any fund, client or account advised by the Management Company, as applicable.

“Covered Person” shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

“Governmental Authority” shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission, corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

“Indebtedness” shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers’ acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) all capital lease obligations; (e) all indebtedness guaranteed by such Person or any of its subsidiaries; and (f) all indebtedness guaranteed by such Person or any of its subsidiaries.

“Operating Guidelines” means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a Client or Account.

“Portfolio” means the portfolio of securities and other assets, including without limitation, financial instruments, equity investments, collateral loan obligations, debt securities, preferred return notes and other similar obligations held directly or indirectly by, or on behalf of, Clients and Accounts from time to time;

“Securities Act” shall mean the Securities Act of 1933, as amended.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) “or” is not exclusive (unless preceded by “either”) and “include” and “including” are not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) “writing”, “written” and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) “hereof”, “herein”, “hereunder” and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and if applicable, to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.01 and subject to Section 2.04 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, investment research, trade desk services,

including trade execution and settlement, finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, expense reimbursement, vendor management, and information technology (including, without limitation, general support and maintenance (OMS, development, support), telecom (cellphones, telephones and broadband) and WSO);

(b) *Legal/Compliance/Risk Analysis.* Assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis;

(c) *Tax.* Assistance and advice with respect to tax audit support, tax planning and tax preparation and filing.

(d) *Management of Clients and Accounts.* Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any Client or Account from time to time.

(e) *Valuation.* Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(f) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a Client or Account managed by the Management Company, transactions involving the Management Company or a Client or Account managed by the Management Company, and any other rights and obligations of the Management Company or a Client or Account managed by the Management Company;

(g) *Marketing.* Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified Clients or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(h) *Reporting.* Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any Client or Account, including reports relating to (i) credit facility reporting and purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(i) *Administrative Services.* The provision of office space, information technology services and equipment, infrastructure, rent and parking and other related services requested or utilized by the Management Company from time to time;

(j) *Shared Employees.* To the extent applicable, the provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing; and

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any Client or Account or similar securitization, (c) the substantive investment management decisions with respect to any Client or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee, if any, shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. To the extent applicable, the Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees, if any, shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any Client or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

Shared Employees, if any, with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a Client or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company

and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive a flat fee of \$168,000 per month (the "Staff and Services Fee"), payable monthly in advance on the first business day of each month.

Section 3.02 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.03 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms

of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance: Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records: Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its

rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Client or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such information as is routinely disclosed to the trustee, custodian or collateral administrator of any Client or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such Client or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the Clients or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Clients or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom.

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless it is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a “Disabling Conduct”) on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement. The exculpations set forth in this Section 6.02 shall exculpate any Covered Person regardless of such Covered Person’s sole, comparative, joint, concurrent, or subsequent negligence.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, causes of action (including, but not limited to, strict liability, negligence, statutory violation, regulatory violation, breach of contract, and all other torts and claims arising under common law), demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated (“Claims”), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or

arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons. Any Covered Person shall be indemnified under the terms of this Section 6.03 regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder shall be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the Clients or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has

substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, Client or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

- (a) If to the Management Company:

NexPoint Advisors, L.P.
200 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed as of the date hereof by its duly authorized representative.

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its
General Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

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

By: Strand Advisors, Inc., its General
Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
MUNSCH HARDT KOPF & HARR, P.C.
500 N. Akard Street, Suite 3800
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Facsimile: (214) 978-4375

Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

Exhibit B

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 note expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF
(Against NexPoint)
(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF
(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

1 WATERHOUSE - 10-19-21
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 IN RE:

6 HIGHLAND CAPITAL Chapter 11
7 MANAGEMENT, L.P., CASE NO.
8 19-34054-SGI11

9 Debtor.

10 HIGHLAND CAPITAL MANAGEMENT, L.P.,

11 Plaintiff,

12 vs. Adversary Proceeding No.
13 21-03000-SGI

14 HIGHLAND CAPITAL MANAGEMENT
15 FUND ADVISORS, L.P.; NEXPOINT
16 ADVISORS, L.P.; HIGHLAND
17 INCOME FUND; NEXPOINT
18 STRATEGIC OPPORTUNITIES FUND;
19 NEXPOINT CAPITAL, INC.; and
20 CLO HOLDCO, LTD.,

21 Defendants.

22 REMOTE VIDEOTAPED DEPOSITION OF

23 FRANK WATERHOUSE

24 October 19, 2021

25 Reported by: Susan S. Klinger, RMR-CRR, CSR

Job No: 201195

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WATERHOUSE - 10-19-21

October 19, 2021
9:30 a.m.

Remote Deposition of FRANK WATERHOUSE,
held before Susan S. Klinger, a Registered
Merit Reporter and Certified Realtime Reporter
of the State of Texas.

1 WATERHOUSE - 10-19-21

2 A P P E A R A N C E S:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital
5 Management:

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7 Hayley Winograd, Esq.

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13 Michelle Hartmann, Esq.

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15 1900 North Pearl Street

16 Dallas, Texas 75201

17 Attorneys for NexPoint Advisors, LP and
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21 An Nguyen, Esq.

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24 Dallas, Texas 75201-6659

25

1 WATERHOUSE - 10-19-21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,
3 and HCMS:

4 Deborah Deitsch-Perez, Esq.

5 Michael Aigen, Esq.

6 STINSON

7 3102 Oak Lawn Avenue

8 Dallas, Texas 75219

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10 Attorneys for Dugaboy Investment Trust:

11 Warren Horn, Esq.

12 HELLER, DRAPER & HORN

13 650 Poydras Street

14 New Orleans, Louisiana 70130

15

16 Attorneys for Marc Kirschner as the trustee for
17 the litigation SunTrust:

18 Deborah Newman, Esq.

19 QUINN EMANUEL URQUHART & SULLIVAN

20 51 Madison Avenue

21 New York, New York 10010

22

23 Also Present:

24 Ms. La Asia Canty

25

1 WATERHOUSE - 10-19-21

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1 WATERHOUSE - 10-19-21

2 P R O C E E D I N G S

3 VIDEOGRAPHER: Good morning,
4 Counselors. My name is Scott Hatch. I'm a
5 certified legal videographer in association
6 with TSG Reporting, Inc.

7 Due to the severity of COVID-19 and
8 following the practice of social
9 distancing, I will not be in the same room
10 with the witness. Instead, I will record
11 this videotaped deposition remotely. The
12 reporter, Susan Klinger, also will not be
13 in the same room and will swear the witness
14 remotely.

15 Do all parties stipulate to the
16 validity of this video recording and remote
17 swearing, and that it will be admissible in
18 the courtroom as if it had been taken
19 following Rule 30 of the Federal Rules of
20 Civil Procedures and the state's rules
21 where this case is pending?

22 MR. HORN: Yes.

23 MS. DANDENEAU: Yes.

24 MR. MORRIS: Yes. John Morris. I
25 would just try to do a negative notice

1 WATERHOUSE - 10-19-21
2 here, as we did yesterday. If anybody has
3 a problem with what was just stated, can
4 you state your objection now?

5 Okay. No response, so everybody
6 accepts the stipulation and the instruction
7 that was just given.

8 VIDEOGRAPHER: Thank you. This is
9 the start of media labeled Number 1 of the
10 video recorded deposition of Frank
11 Waterhouse In Re: Highland Capital
12 Management, L.P., in the United States
13 Bankruptcy Court for the Northern District
14 of Texas, Dallas Division, Case Number
15 21-03000-SGI.

16 This deposition is being held via
17 video conference with participants
18 appearing remotely due to COVID-19
19 restrictions on Tuesday, October 19th, 2021
20 at approximately 9:32 a.m. My name is
21 Scott Hatch, legal video specialist with
22 TSG Reporting, Inc. headquartered at 228
23 East 45th Street, New York, New York. The
24 court reporter is Susan Klinger in
25 association with TSG Reporting.

1 WATERHOUSE - 10-19-21

2 Counsel, please introduce
3 yourselves.

4 MR. MORRIS: John Morris, Pachulski
5 Stang Ziehl & Jones for the reorganized
6 Highland Capital Management, L.P., the
7 plaintiff in these actions.

8 MS. DANDENEAU: Deborah Dandeneau
9 from Baker McKenzie. My partner, Michelle
10 Hartmann, is also in the room with me,
11 representing Frank Waterhouse individually.

12 MS. DEITSCH-PEREZ: Deborah
13 Deitsch-Perez from Stinson, LLP,
14 representing Jim Dondero, Nancy Dondero,
15 HCRA, and HCMS.

16 MR. HORN: Warren Horn with Heller,
17 Draper & Horn in New Orleans representing
18 Dugaboy Investment Trust.

19 MR. RUKAVINA: Davor Rukavina with
20 Munsch Hardt Kopf & Harr in Dallas
21 representing NexPoint Advisors, LP and
22 Highland Capital Management Fund Advisors,
23 L.P.

24 MR. AIGEN: Michael Aigen from
25 Stinson, and I represent the same parties

1 WATERHOUSE - 10-19-21

2 as Deborah Deitsch-Perez.

3 MS. NEWMAN: This is Deborah Newman
4 from Quinn Emanuel. We represent the
5 litigation -- Marc Kirschner as the trustee
6 for the litigation SunTrust.

7 MR. MORRIS: I think that is
8 everybody.

9 VIDEOGRAPHER: Thank you. Will the
10 court reporter please swear in the witness.

11 FRANK WATERHOUSE,
12 having been first duly sworn, testified as
13 follows:

14 EXAMINATION

15 BY MR. MORRIS:

16 Q. Please state your name for the
17 record.

18 A. My name is Frank Waterhouse.

19 Q. Good morning, Mr. Waterhouse. I'm
20 John Morris, as you know, from Pachulski Stang
21 Ziehl & Jones. You understand that my firm and
22 I represent Highland Capital Management, L.P. ;
23 is that right?

24 A. Yes.

25 Q. Okay. And do you understand that

1 WATERHOUSE - 10-19-21

2 we're here today for your deposition in your
3 individual capacity?

4 A. Yes.

5 Q. Did you review and -- did you
6 receive and review a subpoena that Highland
7 Capital Management, L.P., served upon you?

8 A. Yes.

9 Q. You have been deposed before; right?

10 A. Yes.

11 Q. How many times have you been
12 deposed?

13 A. About three or four times.

14 Q. Okay. And I defended you in one
15 deposition; isn't that right?

16 A. That is correct.

17 Q. So the general ground rules for this
18 deposition are largely the same as the
19 depositions you have given before. And that is
20 I will ask you a series of questions, and it is
21 important that you allow me to finish my
22 question before you begin your answer; is that
23 fair?

24 A. Yes.

25 Q. And it is important that I allow you

1 WATERHOUSE - 10-19-21

2 to finish your answers before I begin a
3 question, but if I fail to do that, will you
4 let me know?

5 A. I can certainly do that.

6 Q. Okay. Do you understand that this
7 deposition is being videotaped?

8 A. Yes.

9 Q. You understand that I may seek to
10 use portions of the videotape in a court of
11 law?

12 A. I did not know that, until you just
13 said that.

14 Q. Okay. And you are aware of that now
15 before the deposition begins substantively; is
16 that right?

17 A. Yes.

18 Q. So unlike I think the other
19 depositions that you have given, this one is
20 being given remotely. So that presents some
21 unique challenges, at least as compared to a
22 deposition that is taken in-person.

23 From time to time we're going to put
24 documents up on the screen, Mr. Waterhouse.

25 And it is important that I give you the

1 WATERHOUSE - 10-19-21

2 opportunity to review any portion of the
3 document that you think you need in order to
4 fully and completely answer the question.

5 So I would ask you to let me know if
6 there is a portion of a document that you need
7 to see in order to fully and completely answer
8 the question. Can you do that for me?

9 A. Yes.

10 MS. DANDENEAU: Mr. Morris, I would
11 just note that we do have hard copies of
12 the documents that you sent, so if you can
13 just refer to the exhibit number as
14 reflected in the documents that you sent,
15 Mr. Waterhouse will be able to look at the
16 hard copies of those documents.

17 MR. MORRIS: I appreciate that,
18 and -- and I will encourage him to do so.
19 There will be other documents that we did
20 not send to you that we'll be using today
21 though.

22 Q. Okay. With that as background, if
23 there is anything that I ask you, sir, that you
24 don't understand, will you let me know?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Are you currently employed?

3 A. Yes.

4 Q. By whom?

5 A. The Skyview Group.

6 Q. When did you become employed by the
7 Skyview Group?

8 A. I believe March 1st of 2021.

9 Q. Do you have a title at Skyview?

10 A. Yes.

11 Q. What is your title?

12 A. My title is chief financial officer.

13 Q. Do you report to anybody in your
14 role as CFO?

15 A. I don't, no.

16 Q. No. Is there a president or a CEO
17 of Skyview?

18 A. Yes.

19 Q. Who is that?

20 A. That is Scott Ellington.

21 Q. But you don't report to
22 Mr. Ellington; is that right?

23 A. I don't think so.

24 Q. Does Skyview Group --

25 MS. DANDENEAU: Excuse me, we --

1 WATERHOUSE - 10-19-21

2 A. I -- I -- I might. I just -- I
3 don't recall.

4 Q. Okay. Does Skyview Group provide
5 any services to any entity directly or
6 indirectly owned or controlled by Jim Dondero?

7 A. Yes.

8 Q. Can you name -- is that pursuant to
9 written contracts?

10 A. Yes.

11 Q. And do you know how many contracts
12 exist?

13 A. Approximately six or so.

14 Q. And is the Skyview Group made up of
15 individuals who were formerly employees of
16 Highland Capital Management, L.P.?

17 A. No.

18 Q. Do you know how many -- how many --
19 how many employees does Skyview have?

20 A. Approximately 35.

21 Q. And can you tell me how many of
22 those 35 are former officers, directors, or
23 employees of Highland Capital Management, L.P.?

24 A. I don't know the exact number.

25 Q. Is it more than 20?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Is it more than 30?

4 A. I don't know.

5 Q. Can you tell me what portion of
6 Skyview -- Skyview's revenue is derived from
7 entities that are directly or indirectly owned
8 or controlled by Jim Dondero?

9 MS. DANDENEAU: Mr. Morris, I mean,
10 you called Mr. Waterhouse here individually
11 for purposes of his testimony in connection
12 with the noticed litigation. I have given
13 you some leeway to ask him some background
14 information about Skyview Group, but this
15 is not a substitute for a deposition in
16 connection with any other pending disputes
17 that exist. And -- and we agreed to accept
18 the subpoena on the basis of he -- this is
19 testimony that he is giving in connection
20 with the noticed litigation.

21 I really think that you are now
22 going a little bit far afield from the
23 purpose of this deposition.

24 MR. MORRIS: Okay. It is -- I'm not
25 intending to use these -- the answers to

1 WATERHOUSE - 10-19-21

2 these questions for any purpose other than
3 this litigation. I think you understand
4 fully why I'm asking the questions, and I
5 just have a couple more, if you will bear
6 with me.

7 MS. DANDENEAU: Okay.

8 MS. DEITSCH-PEREZ: Can we have an
9 agreement that an objection by one is an
10 objection for any other party here?

11 MR. MORRIS: Sure. I would -- I
12 would encourage that, sure.

13 MS. DEITSCH-PEREZ: Thank you.

14 MR. MORRIS: It can't be sustained
15 or overruled more than one time, so...

16 Q. Mr. Waterhouse, can you answer my
17 question, please.

18 MS. DANDENEAU: Do you want to
19 repeat it, Mr. Morris, for his benefit?

20 MR. MORRIS: Sure.

21 Q. Can you -- can you tell me the
22 approximate portion of Skyview's revenue that
23 is derived from entities that are directly or
24 indirectly owned or controlled by Mr. Dondero?

25 A. I don't know the exact number.

1 WATERHOUSE - 10-19-21

2 Q. Is it more than 75 percent?

3 A. Yes.

4 Q. Is it more than 90 percent?

5 A. I don't know.

6 Q. Okay. Can I refer to Highland

7 Capital Management, L.P., as Highland?

8 A. Yes.

9 Q. All right. And you previously
10 served as Highland's CFO; correct?

11 A. Yes.

12 Q. When did you join Highland?

13 A. I don't recall the exact date.

14 Q. Can you tell me what year?

15 A. 2006.

16 Q. When did you -- in what year did you
17 become Highland's CFO?

18 A. I don't recall the exact date.

19 Q. I'm not asking you for the exact
20 date. I'm asking you if you recall the year in
21 which you were appointed CFO.

22 A. I don't recall the exact year.

23 Q. Can you tell me which years it is
24 possible that you were appointed to CFO of
25 Highland?

1 WATERHOUSE - 10-19-21

2 A. 2011 or 2012.

3 Q. Did you serve as Highland's CFO on a
4 continuous basis from in or around 2011 or 2012
5 until early 2021?

6 A. Yes.

7 Q. During that entire time you reported
8 directly to Jim Dondero; correct?

9 A. I -- I don't know.

10 Q. Is there anybody else you reported
11 to -- withdrawn.

12 Did you report to Mr. Dondero for
13 some portion of the time that you served as
14 CFO?

15 A. Yes.

16 Q. Is there a portion of time that you
17 don't recall who you reported to?

18 A. Yes.

19 Q. What portion of time do you have in
20 your mind when you can't recall who you
21 reported to?

22 A. From the 2011 to -- for
23 approximately a year or two.

24 Q. Okay. So is it fair to say that you
25 reported to Mr. Dondero in your capacity as CFO

1 WATERHOUSE - 10-19-21

2 from at least 2014 until the time you left
3 Highland?

4 MS. DANDENEAU: Objection to form.

5 A. I don't want to speculate the exact
6 or what year that changed or -- so I would like
7 to stick with my testimony.

8 Q. Can you recall when you began
9 reporting to Mr. Dondero?

10 A. I don't recall.

11 Q. Can you -- can you give me an
12 estimate of what year you think you might have
13 began reporting to Mr. Dondero?

14 A. I will go back to my prior
15 testimony.

16 Q. Okay. There is no -- you have no
17 ability to tell me when you began reporting to
18 Mr. Dondero.

19 Do I have that right?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall.

22 Q. Okay. Do you recall who you might
23 have reported to before you began reporting to
24 Mr. Dondero?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Who might you have reported to in
3 your capacity as CFO before you started
4 reporting to Mr. Dondero?

5 A. That would have been Patrick Boyce.

6 Q. Are you aware that Highland filed
7 for bankruptcy on October 19th, 2019?

8 A. Yes.

9 Q. And we refer to that as the petition
10 date?

11 A. Yes.

12 Q. Okay. Do you hold any professional
13 licenses, sir?

14 A. Yes.

15 Q. Can you tell me what professional
16 licenses you hold?

17 A. I'm a certified public accountant.

18 Q. Okay. Anything else?

19 A. No.

20 Q. Do you have any other professional
21 licenses or certificates?

22 A. When you say "professional license,"
23 that is not education?

24 Q. Tell me -- sure. Anything other
25 than a driver's license.

1 WATERHOUSE - 10-19-21

2 Do you have any other license or
3 certificate or certification?

4 A. Are you asking, like, where I went
5 to school and the --

6 Q. I am not. I am not. I didn't say
7 education. I didn't ask about degrees.

8 Do you know what a license is?

9 A. Well, yeah, I mean, a license is
10 something you get after you receive a certain
11 level of proficiency.

12 Q. Do you have any licenses or
13 certifications other than your CPA?

14 MS. DANDENEAU: Objection, form.

15 I assume you mean professional
16 licenses, Mr. Morris; correct?

17 Q. Can you answer my question, sir?

18 A. Mr. Morris, I'm thinking. I
19 don't -- I don't think I have any others.

20 Q. Are you familiar with an entity
21 called Highland Capital Management Fund
22 Advisors?

23 A. Yes.

24 Q. Were you ever -- can we refer to
25 that entity as HCMFA?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Were you ever employed by HCMFA?

4 A. Not that I recall.

5 Q. Were you ever -- did you ever hold
6 the title of an officer or director of HCMFA?

7 A. Yes.

8 Q. What title did you hold?

9 A. Treasurer.

10 Q. When did you become the treasurer of
11 HCMFA?

12 A. I don't recall.

13 Q. Can you tell me the year?

14 A. I don't -- I don't know the year.

15 Q. Can you approximate the year in
16 which you became the treasurer of HCMFA?

17 A. I don't know.

18 Q. Can you tell me if it was before or
19 after 2016?

20 A. I don't recall.

21 Q. Are you still the -- do you know if
22 you're still the treasurer of HCMFA today?

23 A. Today, I am the acting treasurer for
24 HCMFA.

25 Q. Is there a distinction between

1 WATERHOUSE - 10-19-21

2 treasurer and acting treasurer?

3 A. I said "acting treasurer" as I am an
4 employee of Skyview, as you previously
5 stated -- or asked.

6 Q. But you are the treasurer of HCMFA
7 today; correct?

8 A. I am -- I am the acting treasurer
9 for HCMFA.

10 Q. How did you become the treasurer of
11 HCMFA?

12 A. Are you asking how I became the
13 treasurer of HCMFA today?

14 Q. How did you become appointed to
15 serve as the treasurer of HCMFA?

16 A. Well, in -- in -- in what time
17 capacity?

18 Q. The first time that you were
19 appointed.

20 A. First time. I believe I was asked
21 to serve as treasurer for HCMFA the first time.

22 Q. By who? Who asked you to do that?

23 A. I don't recall.

24 Q. Is there anything that would refresh
25 your recollection as to who appointed you as

1 WATERHOUSE - 10-19-21

2 the treasurer of CF- -- HCMFA for the first
3 time?

4 A. I don't -- I mean, there would be
5 some documents, some legal documents. I don't
6 know where those are.

7 Q. How many times have you been
8 appointed the treasurer of HCMFA?

9 A. I don't know.

10 Q. Was it more than once?

11 A. I don't know.

12 Q. Can you tell me any period of time
13 since 2016 that you did not hold the title of
14 treasurer of HCMFA?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall.

17 Q. What are your duties and
18 responsibilities as the treasurer of HCMFA?

19 A. My duties are to do the best job
20 that I can as the -- as an accountant and
21 finance guy.

22 Q. What specific duties and
23 responsibilities do you have as the treasurer
24 of HCMFA?

25 A. My duties are to do the best job

1 WATERHOUSE - 10-19-21

2 that I can as the accounting and finance person
3 for HCMFA.

4 Q. As the accounting and finance person
5 for HCMFA, do you have any particular areas of
6 responsibility?

7 A. Yeah, it is to manage the accounting
8 and finance function for HCMFA.

9 Q. Would that include -- do you have
10 responsibility for overseeing HCMFA's annual
11 audit?

12 A. Can I please elaborate on my prior
13 question?

14 Q. Of course. You -- you are giving
15 answers. I'm asking questions.

16 A. Okay. Yes, so the -- it -- like I
17 said, it is to manage the accounting finance
18 aspect, but I am, as we discussed, the
19 treasurer. That is -- being treasurer is what
20 gives me that -- that management function.

21 Q. Does anybody report to you in your
22 capacity as treasurer of HCMFA?

23 A. I don't believe so.

24 Q. Does HCMFA have a chief financial
25 officer?

1 WATERHOUSE - 10-19-21

2 A. I don't -- I don't know.

3 Q. You don't know?

4 You're the treasurer of HCMFA but
5 you don't know if HCMFA has a chief financial
6 officer.

7 Do I have that right?

8 A. That's right.

9 Q. Okay. Have you heard of a company
10 called NexPoint Advisors?

11 A. Yes.

12 Q. We will refer to that as NexPoint.
13 Okay?

14 A. Okay.

15 Q. Were you ever employed by NexPoint?

16 A. I don't recall.

17 Q. Did you ever hold any title with
18 respect to the entity known as NexPoint?

19 A. Yes.

20 Q. What titles have you held in
21 relation to NexPoint?

22 A. Treasurer. I think it was only
23 treasurer.

24 Q. Can you tell me the approximate year
25 you became the treasurer of NexPoint?

1 WATERHOUSE - 10-19-21

2 A. I don't know.

3 Q. Are you still the treasurer of
4 NexPoint today?

5 A. I am the acting treasurer for
6 NexPoint.

7 Q. When did your title change from
8 treasurer to acting treasurer?

9 A. I don't know.

10 Q. Did your duties and responsibilities
11 change at all when your title was changed from
12 treasurer to acting treasurer?

13 A. I don't -- I don't believe so.

14 Q. Why did --

15 A. I still manage the finance and
16 accounting function for NexPoint.

17 Q. Why did your title change from
18 treasurer to acting treasurer?

19 A. I don't -- I'm using the term
20 "acting treasurer" as I'm a Skyview employee.
21 I don't -- I don't know -- again, I am a -- as
22 I am the Skyview employee.

23 Q. Okay.

24 A. And we -- we provide officer
25 services.

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2 Q. And you serve as an officer of
3 HCMFA; correct?

4 A. I think we went over that with my
5 testimony. Yes, I'm the acting treasurer for
6 HCMFA.

7 Q. And you are an officer of NexPoint;
8 correct?

9 A. I think -- I am the acting treasurer
10 for NexPoint Advisors.

11 Q. And -- and who appointed you acting
12 treasurer of NexPoint Advisors?

13 A. I don't recall specifically.

14 Q. Do you have any recollection of who
15 might have appointed you the treasurer of
16 NexPoint?

17 A. I mean, it -- it -- I don't recall
18 exactly who it was.

19 Q. Who were the possibilities?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 Q. You can answer.

23 A. Someone in the legal group for
24 NexPoint. The other officers as well.

25 Q. Have you heard of a company called

1 WATERHOUSE - 10-19-21

2 Highland Capital Management Services, Inc.?

3 A. Yes.

4 Q. We will refer to that as HCMS.

5 Okay?

6 A. HCMS. Okay.

7 Q. Were you ever employed by HCMS?

8 A. No.

9 Q. Have you ever held any titles in
10 relation to HCMF -- I apologize -- HCMS?

11 A. Yes.

12 Q. What titles have you held in
13 relation to HCMS?

14 A. Treasurer and acting treasurer.

15 Q. When did you first become treasurer
16 or acting treasurer of HCMS?

17 A. I don't recall the exact dates.

18 Q. Can you recall -- can you
19 approximate the year that you became the
20 treasurer of HCMS?

21 A. I don't -- I don't know.

22 Q. Are you still the treasurer of HCMS
23 today?

24 A. I am the acting treasurer for HCMS.

25 Q. And are your duties and

1 WATERHOUSE - 10-19-21

2 responsibilities as the acting treasurer for
3 HCMS and the acting treasurer for NexPoint the
4 same as your duties and responsibilities in
5 your role as the acting treasurer of HCMFA?

6 A. More or less.

7 Q. Have you ever heard of a company
8 called HCRE Partners, LLC?

9 A. Yes.

10 Q. And do you understand that that
11 entity is now known today as NexPoint Real
12 Estate Partners?

13 A. I did not know that.

14 Q. All right. Can we refer to HCRE
15 Partners as HCRE?

16 MS. DANDENEAU: Objection to form.

17 Did you mean NexPoint Real Estate
18 Partners, Mr. Morris?

19 MR. MORRIS: No.

20 MS. DANDENEAU: Oh.

21 MR. MORRIS: He said he wasn't
22 familiar that it was succeeded by that
23 entity. So --

24 MS. DANDENEAU: Okay.

25 MR. MORRIS: -- let's go with what

1 WATERHOUSE - 10-19-21

2 the witness knows.

3 Q. You're familiar with an entity
4 called HCRE Partners, LLC; correct?

5 A. Yes.

6 Q. Okay. So that is the entity that we
7 will refer to as HCRE. If you're aware of any
8 successor, that is great. If not, let's just
9 define it as such.

10 Have you ever been employed by HCRE
11 or any entity that you know to have succeeded
12 HCRE?

13 A. No.

14 Q. Did you ever serve as an officer or
15 director of HCRE or any successor?

16 A. Not that I recall.

17 Q. Okay. Can we refer to NexPoint and
18 HCMFA as the advisors?

19 A. Yes.

20 Q. In general, the advisors provided
21 investment advisory services to certain retail
22 funds; correct?

23 A. Yes.

24 Q. And we will refer to the retail
25 funds that are served by the advisors

1 WATERHOUSE - 10-19-21

2 collectively as the retail funds; is that okay?

3 A. Okay.

4 Q. Each of the retail funds is governed
5 by a board; correct?

6 A. Yes.

7 Q. And do you know the people who serve
8 on the boards of the retail funds?

9 MS. DANDENEAU: Objection to form.

10 A. I don't know all of them.

11 Q. Do you know whether the same people
12 serve on the board of each of the retail funds
13 as we've defined that term?

14 A. Which -- so when you say "retail
15 funds" -- again, I want to be -- what retail
16 funds are you referring to, because there are
17 -- there are several distinctions?

18 What retail funds are you using when
19 you refer to them?

20 Q. That is why -- that is why I tried
21 to define the terms. So let me do it again.

22 Retail funds for the purposes of
23 this deposition means any retail fund to which
24 either of the advisors provides advisory
25 services. Okay?

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2 A. Okay.

3 Q. Okay. So do you know whether the
4 same people serve on the board of each of the
5 retail funds?

6 A. I don't know.

7 Q. Were you ever employed by any of the
8 retail funds?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Okay. Do you have any title with
13 respect to any of the retail funds?

14 A. Yes.

15 Q. What titles do you hold --
16 withdrawn.

17 Do you have the same titles with
18 respect to all of the retail funds or do
19 they -- or just something else?

20 MS. DANDENEAU: Objection to form.

21 Q. Withdrawn.

22 Do you have the same title with
23 respect to each of the retail funds?

24 A. No.

25 Q. Tell me which title you have with

1 WATERHOUSE - 10-19-21

2 respect to each retail fund.

3 Actually, let's do it a different
4 way. I withdraw the question.

5 Can you give me one title you have
6 in relation to any retail fund?

7 A. Yes.

8 Q. What title -- what title can you
9 give me?

10 A. Principal executive officer.

11 Q. Do you serve as principal executive
12 officer for each of the retail funds?

13 A. No.

14 Q. Can you identify for me the retail
15 funds in which you serve as the principal
16 executive officer?

17 A. Yes. Highland Funds 1, Highland
18 Funds 2, Highland Income Fund, Highland Global
19 Allocation Fund.

20 Q. I'm sorry, you said "Global
21 Allocation Fund"?

22 A. Yes.

23 VIDEOGRAPHER: Excuse me,
24 Mr. Morris. This is the videographer. I'm
25 concerned about the lighting in the

1 WATERHOUSE - 10-19-21

2 witness' camera.

3 Do you want to go off the record and
4 make some adjustments?

5 MR. MORRIS: Sure, but just for this
6 purpose. I don't want to take a break. We
7 just started.

8 MS. DANDENEAU: Yeah, that is fine.
9 That is fine. We're going to put you on
10 mute.

11 MR. MORRIS: All right.

12 MS. DANDENEAU: I'm going to try to
13 open up some of the shades.

14 VIDEOGRAPHER: We're going off the
15 record at 10:08 a.m.

16 (Recess taken 10:08 a.m. to 10:11 a.m.)

17 VIDEOGRAPHER: We are back on the
18 record at 10:11 a.m.

19 Q. Mr. Waterhouse, when did you become
20 the principal executive officer of the four
21 retail funds that you just identified?

22 A. I don't recall.

23 Q. Do you recall the approximate year
24 that you became the principal executive officer
25 of the four funds?

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2 A. 2021.

3 Q. Did you ever hold any title with
4 respect to any of the four funds you have just
5 identified other than principal executive
6 officer?

7 A. I don't recall.

8 Q. Is it possible that you held a
9 position or a title with the four funds you
10 just identified prior to 2021?

11 A. Yes.

12 Q. But you don't recall if you did or
13 not; do I have that right?

14 A. No. You -- I thought you asked, did
15 I hold other titles.

16 Q. Did you hold any title at the four
17 retail funds for which you now serve as
18 principal executive officer at any time prior
19 to 2021?

20 A. Yes.

21 Q. What titles did you hold?

22 A. I don't recall all the titles.

23 Q. Do you recall any of the titles?

24 A. Yes.

25 Q. What titles do you recall holding at

1 WATERHOUSE - 10-19-21

2 those four retail funds before 2021?

3 A. Principal executive officer.

4 Q. Were you the principal executive
5 officer of the four retail funds that you have
6 identified?

7 A. Sorry, could you repeat the
8 question?

9 Q. Were you the principal executive
10 officer for each of the four retail funds that
11 you have identified?

12 A. Yes.

13 Q. When did you become the principal
14 executive -- withdrawn.

15 Can you give me the approximate year
16 that you became the principal executive officer
17 for each of the four retail funds you've
18 identified?

19 A. I don't recall.

20 Q. What are your duties and
21 responsibilities as the principal executive
22 officer of these four retail funds?

23 A. It is to manage the finance and
24 accounting positions.

25 Q. So at the same time you serve as the

1 WATERHOUSE - 10-19-21

2 treasurer of the advisors, you also serve as
3 the principal executive officer of these four
4 retail funds; correct?

5 A. Yes.

6 Q. Did you ever hold any title with
7 respect to any other retail fund?

8 A. Not that I recall.

9 Q. During the period that you served as
10 Highland's CFO, from time to time Highland
11 loaned money to certain of its officers and
12 employees; correct?

13 A. Yes.

14 Q. During the period that you served as
15 Highland's CFO, from time to time Highland
16 loaned money to certain --

17 A. Let me -- let me retract that,
18 sorry, that -- you asked during the time I was
19 CFO, Highland loaned moneys to employees. I
20 don't -- I don't recall that during my tenure
21 of CFO.

22 Q. You have no recollection during the
23 time that you were the CFO of Highland of
24 Highland ever loaning any money to any officer
25 or director of Highland?

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2 A. I don't recall during my tenure of
3 Highland or my -- as CFO of Highland -- yeah,
4 if there are any loans as CFO of Highland.

5 Q. I'm just talking about officers and
6 employees right now. You have no recollection
7 of Highland ever making a loan to any of its
8 officers or employees during the time that you
9 served as CFO. Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. So I thought you were saying
12 officers and employees as CFO, right, so there
13 were -- I mean, okay, yes.

14 Q. I would ask you to listen carefully
15 to my question. If I -- if I'm not clear, let
16 me know, but I'm really trying to be as clear
17 as I can.

18 A. I'm listening as carefully as I can,
19 and you are asking very specific questions in a
20 timeline. And I'm trying to answer your
21 questions as specifically as I can, and I
22 apologize if -- if I'm going back. I am -- you
23 are asking very specific questions. Thank you.

24 Q. During the period that you served as
25 Highland's CFO, from time to time Highland

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2 loaned money to certain corporate affiliates;
3 correct?

4 MS. DANDENEAU: Objection to form.

5 A. What are corporate affiliates?

6 Q. How about the ones that are in
7 Highland's audited financial statements under
8 the section entitled Loans to Affiliates. Why
9 don't we start with those. Do you have any
10 understanding of what the phrase "affiliates"
11 means?

12 MS. DANDENEAU: Objection to form.

13 A. I understand what affiliates are,
14 yet affiliates can have different meanings in
15 different contexts, so...

16 Q. Why don't you -- why don't you tell
17 me what your understanding of the term
18 "affiliate" is in relation to Highland Capital
19 Management, L.P.

20 A. Is that a -- it depends on the
21 context.

22 Q. How about the context of making
23 loans?

24 MS. DANDENEAU: Objection to form.

25 A. I didn't make the determination of

1 WATERHOUSE - 10-19-21

2 who an affiliate was or is at the time those --
3 I didn't -- that wasn't my job to make a
4 determination of who an affiliate is.

5 Q. All right. So as the CFO of
6 Highland, do you have any ability right now to
7 tell me which companies that were directly or
8 indirectly owned and/or controlled by
9 Mr. Dondero in whole or in part received loans
10 from Highland Capital Management, L.P.?

11 MS. DANDENEAU: Objection to form.

12 MS. DEITSCH-PEREZ: Objection, form.

13 A. Yes.

14 Q. Okay. Identify every entity that
15 you can think of that was directly or
16 indirectly owned and/or controlled by
17 Mr. Dondero in whole or in part that received a
18 loan from Highland Capital Management, L.P.

19 MR. RUKAVINA: Objection, legal
20 conclusion.

21 A. NexPoint Advisors, Highland Capital
22 Management Fund Advisors, HCM Services,
23 Dugaboy. Sorry, I don't think -- Dugaboy
24 doesn't fit that definition. You said owned
25 and controlled. I don't think that that

1 WATERHOUSE - 10-19-21

2 definition --

3 Q. I said owned and/or controlled.

4 A. I don't -- again, I'm not -- I'm not
5 the legal expert. I don't think it controls --
6 he controls Dugaboy, so again, I'm not the
7 legal person.

8 Q. I'm not asking you for a legal
9 conclusion, sir. I'm asking you for your
10 knowledge, okay, as the CFO -- the former CFO
11 of Highland Capital Management, other than
12 NexPoint, HCMFA, and HCMF -- HCMS, can you
13 think of any other entities that were owned
14 and/or controlled directly or indirectly in
15 whole or in part by Jim Dondero who received a
16 loan from Highland Capital Management, L.P.?

17 MS. DANDENEAU: Objection to form.

18 A. HCRE.

19 Q. Any others?

20 A. That is -- that is all I can think
21 of.

22 Q. And you're aware that from time to
23 time while you were the CFO, Highland loaned
24 money to Jim Dondero; correct?

25 A. Yes.

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2 Q. Okay. Can we refer to the four
3 entities that you just named and Mr. Dondero as
4 the affiliates?

5 A. So that would be Jim Dondero,
6 NexPoint Advisors, Highland Capital Management
7 Fund Advisors, and HCRE.

8 Q. And HCMS?

9 A. And HCMS, okay.

10 Q. And can we refer to the loans that
11 were given to each of those affiliates as the
12 affiliate loans?

13 A. Yes.

14 Q. And is it fair to say that each of
15 the affiliates were the borrowers under the
16 affiliate loans as we're defining the term?

17 MR. RUKAVINA: Objection, legal
18 conclusion.

19 A. The borrowers are whoever were on
20 the notes. I don't -- I don't know. I'm not
21 the legal person.

22 Q. But you --

23 A. I don't know.

24 Q. You do know, as Highland's former
25 CFO, that each of the affiliates that you have

1 WATERHOUSE - 10-19-21

2 identified tendered notes to Highland; correct?

3 MR. RUKAVINA: Hey, John, will you
4 just give me a running objection to legal
5 conclusion to HCM --

6 MR. MORRIS: No. No, if you want to
7 object --

8 MR. RUKAVINA: I will object every
9 time. Object to legal conclusion.

10 MR. MORRIS: That is fine.

11 A. Sorry, can you repeat the question?

12 Q. Are you aware that each of the --
13 that each of the affiliates, as we have defined
14 the term, gave to Highland a promissory note in
15 exchange for the loans?

16 MR. RUKAVINA: Objection to the
17 extent that calls for a legal conclusion.

18 A. I don't.

19 Q. No, you don't know that?

20 A. No, they didn't -- you said they
21 exchanged a promissory note for a loan. I
22 don't -- I don't understand that question, so I
23 said no.

24 Q. At the time of the bankruptcy
25 filing, did Highland have in its possession

1 WATERHOUSE - 10-19-21

2 promissory notes that were signed by each of
3 the affiliates?

4 A. Yes.

5 Q. To the best of your knowledge,
6 during the time that you served as Highland's
7 CFO, did Highland disclose to its outside
8 auditors all of the loans that were made to
9 affiliates?

10 MR. RUKAVINA: Objection, that calls
11 for a legal conclusion.

12 MS. DEITSCH-PEREZ: I also couldn't
13 hear you, John, because there was some
14 garbling on -- on the -- on the call.

15 MR. MORRIS: Folks, I've got to tell
16 you this is not going well, and I'm
17 reserving my right --

18 MS. DANDENEAU: John, it was just
19 the end of that question. It was just the
20 end of that question. I couldn't hear it
21 either. Sorry, if you could repeat it,
22 please.

23 MR. MORRIS: That is less than an
24 hour into this, but folks are trying to run
25 out the clock, and so I'm just going to

1 WATERHOUSE - 10-19-21

2 state that now.

3 MS. DANDENEAU: You know, and,
4 Mr. Morris, I really object to that. I
5 mean --

6 MR. MORRIS: Okay.

7 MS. DANDENEAU: -- Mr. Waterhouse
8 just told you he's trying to listen to your
9 questions and answer them carefully, and
10 you have no basis for saying that.

11 MR. MORRIS: Okay.

12 MS. DANDENEAU: This does not --
13 this is not an experienced witness, so he's
14 trying to do the best he can.

15 Q. Mr. Waterhouse, during the time that
16 you served as Highland's CFO, did Highland
17 disclose to its outside auditors all of the
18 loans that it made to each of the affiliates
19 that you have identified?

20 MR. RUKAVINA: Objection, legal
21 conclusion.

22 A. Yes.

23 Q. To the best of your knowledge, while
24 you were Highland's CFO, were all of the
25 affiliate loans described in Highland's audited

1 WATERHOUSE - 10-19-21

2 financial statements?

3 MR. RUKAVINA: Objection, legal
4 conclusion.

5 A. When an audit was performed, any
6 loans that were made by Highland to the
7 affiliates were disclosed to auditors.

8 Q. Are you aware of any loan that was
9 made to any affiliate that was not disclosed to
10 the auditors?

11 A. I'm not aware.

12 Q. To the best of your knowledge, did
13 each of the affiliates who were --
14 (inaudible) -- loaned from Highland execute a
15 promissory note in connection with that loan?

16 MR. RUKAVINA: Objection, legal
17 conclusion.

18 A. Sorry, you -- halfway through the
19 question it got muffled.

20 Can you repeat that again?

21 Q. To the best of your knowledge, did
22 every affiliate execute a promissory note in
23 connection with each loan that it obtained from
24 Highland?

25 MR. RUKAVINA: Objection, legal

1 WATERHOUSE - 10-19-21

2 conclusion.

3 A. Yes.

4 Q. You are not aware of any loan that
5 any affiliate ever obtained from Highland where
6 the affiliate did not give a promissory note in
7 return; is that fair?

8 A. Yes, I'm not aware.

9 Q. And to the best of your knowledge,
10 did Highland loan to each affiliate an amount
11 of money equal to the principal amount of each
12 promissory note?

13 MR. RUKAVINA: Objection, legal
14 conclusion.

15 A. Yes.

16 Q. During the time that you served as
17 CFO, did Highland ever loan money to
18 Mark Okada?

19 A. I -- I don't recall.

20 Q. Did you ever see any promissory
21 notes executed by Mark Okada?

22 A. I don't recall.

23 Q. Do you know if Highland ever forgave
24 any loan that it ever made to Mr. Okada?

25 A. I don't recall.

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2 Q. Do you recall if Mr. Okada paid back
3 all principal and interest due and owing under
4 any loan he obtained from Highland?

5 MS. DEITSCH-PEREZ: Objection to
6 form.

7 MS. DANDENEAU: Objection to form.

8 A. I don't recall.

9 Q. Do you recall whether -- during your
10 time as CFO, whether Highland ever loaned money
11 to Jim Dondero?

12 A. Yes.

13 Q. To the best of your knowledge, did
14 Mr. Dondero sign and deliver to Highland a
15 promissory note in connection with each loan
16 that he obtained from Highland?

17 A. If you are referring to the
18 promissory notes that, you know, part of
19 Highland's records, yes.

20 Q. Okay. You're not aware of any loan
21 that Mr. Dondero took from Highland that wasn't
22 backed up by -- by a promissory note with a
23 face -- with a principal amount equal to the
24 amount of the loan; correct?

25 A. Am I aware that Jim Dondero took a

1 WATERHOUSE - 10-19-21

2 loan?

3 Q. Without giving a -- let me ask a
4 better question. I'm sorry, Mr. Waterhouse.

5 Are you aware of any loan that
6 Mr. Dondero obtained from Highland where he
7 didn't give a promissory note in return?

8 A. I'm not aware.

9 Q. During the time that you served as
10 Highland's CFO, did Highland ever forgive any
11 loans, in whole or in part, that it made to
12 Mr. Dondero?

13 A. Not that I'm aware.

14 Q. At the time that you served as
15 Highland's CFO, did Highland ever forgive any
16 loan, in whole or in part, that it made to any
17 affiliate as we've defined the term today?

18 A. Not that I'm aware.

19 Q. During the time that you served as
20 Highland's CFO, did Highland ever forgive, in
21 whole or in part, any loan that it ever made to
22 any officer or employee?

23 A. Highland forgave loans to officers
24 and employees. It may not have been at the
25 time when my title was CFO.

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2 Q. Okay. And so I appreciate the
3 distinction.

4 Is it fair to say that, to the best
5 of your knowledge, Highland did not forgive a
6 loan that it made to an officer or employee
7 after 2013?

8 MS. DANDENEAU: Objection to form.

9 A. I don't recall.

10 Q. To the best of your knowledge, did
11 Highland disclose to its auditors every
12 instance where it forgave, in whole or in part,
13 a loan that it had made to one of its officers
14 or employees?

15 A. No.

16 Q. Can you think of -- can you -- can
17 you identify any loan to an officer or employee
18 that was forgiven by Highland, in whole or in
19 part, that was not disclosed to Highland's
20 outside auditors?

21 A. Look, I don't recall all of the
22 loans and the loan forgiveness. I just know as
23 part of the audit process there is a
24 materiality concept.

25 So if there were loans to employees

1 WATERHOUSE - 10-19-21
2 that were of -- you know, that were deemed
3 immaterial, those items may not have been
4 disclosed by the team to the auditors.

5 Q. I appreciate that.

6 Do you have an understanding as to
7 what the level of materiality was?

8 A. I don't recall.

9 Q. As the CFO of Highland, to the best
10 of your knowledge, did Highland disclose to its
11 outside auditors every loan that was forgiven,
12 in whole or in part, that was material as that
13 term was defined by the outside auditors?

14 A. Yes.

15 Q. And do you recall where -- do you
16 recall where the definition of materiality can
17 be found for -- for this particular purpose?

18 MS. DANDENEAU: Objection to form.

19 A. No. You -- I don't determine
20 materiality.

21 Q. Okay. I'm just asking you if you
22 can help me understand where it is, but I think
23 we will find it in a few minutes.

24 You are aware that Highland has
25 commenced lawsuits against each of the

1 WATERHOUSE - 10-19-21

2 affiliates, as we've defined the term, to
3 collect under certain promissory notes; is that
4 right?

5 A. Yes.

6 Q. And are you familiar with the notes
7 that are issue -- at issue in the lawsuits?

8 MS. DANDENEAU: Objection to form.

9 A. Generally familiar.

10 Q. Can we refer to the lawsuits that
11 Highland has commenced against the affiliates
12 collectively as the lawsuits?

13 A. Yes. And, again, the affiliates are
14 NexPoint, HCMFA, HCMS, and HCRE.

15 Q. And Mr. Dondero?

16 A. Okay. See, that is a new -- and now
17 Mr. Dondero is included in your affiliate
18 definition.

19 Q. I just --

20 A. I thought affiliates -- I thought
21 affiliates were just the four prior entities,
22 so I just want to be clear.

23 Q. I appreciate that. So let's --
24 let's keep them separate and let's refer to the
25 four corporate entities as the affiliates, and

1 WATERHOUSE - 10-19-21

2 Mr. Dondero we will call Mr. Dondero. Okay?

3 A. Okay. Thank you. As you can see,
4 Mr. Morris, there is a lot of entities -- a lot
5 here. I just want to be clear.

6 Q. Okay. Now, the affiliates of
7 Mr. Dondero signed promissory notes that are
8 not subject to the lawsuit.

9 Do you understand that?

10 MS. DANDENEAU: Objection to form.

11 A. The affiliates and Mr. Dondero
12 signed --

13 Q. You know what? I will skip it.
14 That is okay. Okay.

15 From time to time while you were
16 Highland's CFO, payments were applied against
17 principal and interests that were due under the
18 notes that were tendered by the affiliates and
19 Mr. Dondero; correct?

20 MR. RUKAVINA: Objection to the
21 extent that calls for a legal conclusion.

22 A. Yes.

23 Q. Did Highland have a process where --
24 whereby payments would be applied against
25 principal and interest against the notes that

1 WATERHOUSE - 10-19-21

2 were given by the affiliates and Mr. Dondero?

3 A. Yes.

4 Q. Can you describe the process for me?

5 A. The process, payment should be
6 applied as laid out in the -- in the promissory
7 note.

8 Q. From time to time were payments made
9 that were not required under the promissory
10 notes?

11 MS. DANDENEAU: Objection to form.

12 A. Yes.

13 Q. Who was responsible for deciding
14 when and how much the payments would be made
15 with respect to each of the notes that were
16 issued by the affiliates and Mr. Dondero?

17 A. Who was responsible for deciding how
18 much was paid prior to the due date?

19 Q. Yes.

20 A. I don't know.

21 Q. Did you approve of each payment that
22 was made against principal and interest on the
23 notes that were given by the affiliates and
24 Mr. Dondero?

25 MS. DANDENEAU: Objection to form.

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2 A. Did I approve the payments? I
3 approve -- I approve -- if there was cash -- if
4 there was cash being repaid on a note payment,
5 yes, I approved in the general sense of being
6 made aware of the payment and the amount.

7 Q. And are you the person who
8 authorized Highland's employees to effectuate
9 those payments?

10 A. Yes.

11 Q. When you gave the instruction to
12 effectuate the payment, did you obtain
13 Mr. Dondero's prior approval?

14 A. I mean, it -- I mean, it -- it
15 depends.

16 Q. Can you think of any instance where
17 you directed Highland's employees to make a
18 payment of principal or interest against any
19 note that was tendered by an affiliate or
20 Mr. Dondero that Mr. Dondero did not approve of
21 in advance?

22 A. I can't recall specifically.

23 Q. Can you identify -- withdrawn.

24 Did Mr. Dondero ever tell you that a
25 payment that was made against principal and

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2 interest due under one of the notes that was
3 tendered by an affiliate or himself should not
4 have been made?

5 A. Yes.

6 Q. Can you identify the payment for me?

7 A. It would be for -- for NexPoint
8 Advisors.

9 Q. Okay. And when did Mr. Dondero tell
10 you that a payment that you had initiated on
11 behalf of NexPoint should not have been made?

12 A. I wasn't initiating payment. It was
13 in the context of the -- I think you used this
14 term, "the advisors," so NexPoint Advisors and
15 Highland Capital Management Fund Advisors had
16 overpaid on certain agreements with Highland
17 Capital Management, L.P. And as a part of that
18 process, the advisors -- what I was told at the
19 time were in talks and negotiations and
20 discussions with Highland Capital Management,
21 L.P., on offsets in relation to those
22 overpayments.

23 Q. When did this conversation take
24 place?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall specifically.

3 Q. Do you recall what year it was?

4 A. Yes.

5 Q. What year did the conversation with
6 Mr. Dondero take place that you just described?

7 A. 2020.

8 Q. Okay. Do you remember if it was
9 December 2020?

10 A. It -- it -- I don't -- I don't
11 recall what month specifically, but it would
12 have been November or December.

13 Q. And we're talking here about a
14 payment of principal and/or interest that was
15 due -- withdrawn.

16 We're talking here about a payment
17 of principal and interest that was applied
18 against NexPoint's note; correct?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall what that payment
21 consisted of.

22 Q. Is it possible that the payment you
23 have in mind related to the shared services
24 agreement?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Are you certain that the payment --
4 that the payment that you have in mind related
5 to the promissory note that NexPoint issued in
6 favor of Highland?

7 MS. DANDENEAU: Objection to form.

8 A. Yes.

9 Q. Okay. Other than that one payment,
10 can you identify any other instance where
11 Mr. Dondero told you that a payment should not
12 have been applied against principal and
13 interest under any promissory note tendered by
14 any affiliate or Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Objection to
17 form.

18 A. Not that I recall.

19 Q. Thank you very much.

20 Do you know if Mr. Dondero approved
21 in advance of each loan made to each affiliate
22 and himself during the time that you were the
23 CFO?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Yes, generally.

3 Q. Can you identify any loan that was
4 ever made to an affiliate or to Mr. Dondero
5 that Mr. Dondero did not approve of in advance?

6 A. Other than the ones that are in
7 dispute, I'm not aware.

8 Q. Do you believe that Mr. Dondero did
9 not approve of each of the loans that are in
10 dispute in advance of the time that the loan
11 was made?

12 MS. DANDENEAU: Objection to form.

13 A. Given what is in the dispute, you
14 know, and -- and -- and the way things might --
15 yeah, I mean...

16 Q. I am not asking about the dispute,
17 and it was probably my mistake to follow you
18 there.

19 Were you aware of every loan made by
20 Highland to each of its affiliates and
21 Mr. Dondero while you were the CFO at the time
22 each loan was made?

23 A. Was I aware of every loan, yes.

24 Q. Okay. And if you put yourself back
25 in time, do you recall that any of the loans

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2 that were made to one of the affiliates or
3 Mr. Dondero during the time that you were the
4 CFO was made without Mr. Dondero's prior
5 knowledge and approval?

6 A. Not that I recall.

7 Q. Thank you. In fact, do you -- as
8 the CFO, would you have allowed Highland to
9 loan money to an affiliate or to Mr. Dondero
10 without obtaining Mr. Dondero's prior approval?

11 MS. DANDENEAU: Objection to form.

12 A. I can't -- there was so many times
13 over the years, I can't speak for every single
14 one, but generally, yes, I -- I spoke to him.

15 Q. You -- you never -- you never --
16 withdrawn. I will just take that.

17 Can you recall any payment that was
18 ever made against principal and interest on a
19 note that was issued in favor of Highland by an
20 affiliate or Mr. Dondero that you personally
21 did not know about in advance?

22 A. There are so many through the years,
23 I don't -- I don't -- I don't recall every
24 single one.

25 Q. Okay. Can you identify any payment

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2 that was made against principal and interest on
3 any note tendered by any affiliate or
4 Mr. Dondero that you didn't know about in
5 advance?

6 A. I don't recall.

7 Q. Other than Mr. Dondero -- withdrawn.
8 Did anybody at Highland have the
9 authority to make a payment against principal
10 and interest due under a loan given to the
11 affiliates and Mr. Dondero without your
12 knowledge and approval?

13 MS. DANDENEAU: Objection to form.

14 A. Sorry, there was -- to make a
15 payment on an affiliate loan, what you are
16 saying would it require my knowledge and
17 approval, yes.

18 Q. Okay. I appreciate that. Thank
19 you.

20 Did anybody at Highland have the
21 authority, to the best of your knowledge, to
22 effectuate a loan to an affiliate without
23 Mr. Dondero's prior knowledge and approval?

24 MS. DANDENEAU: Objection to form.

25 A. I can't speak for all, but

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2 generally, yes.

3 Q. Did you personally communicate with
4 Mr. Dondero to let him know each time a payment
5 of principal or interest was being made against
6 any note that was tendered by an affiliate or
7 Mr. Dondero to Highland?

8 A. I don't -- are you saying, did I let
9 Mr. Dondero know if a payment was made on any
10 affiliate or loan to Mr. Dondero? I mean,
11 not -- not every -- no.

12 Q. Let me ask it this way: Did you
13 have a practice of informing Mr. Dondero when
14 payments were made against principal and
15 interest on any note that was tendered by an
16 affiliate or Mr. Dondero?

17 MS. DEITSCH-PEREZ: Objection to
18 form.

19 MS. DANDENEAU: Objection to form.

20 A. No, I did not.

21 Q. Did Mr. Dondero ever tell you that a
22 payment of principal or interest had been made
23 against a note that was tendered by an
24 affiliate or himself that he had been unaware
25 of?

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2 A. Not that I recall.

3 Q. Are you aware that Mr. Dondero and
4 the affiliates -- withdrawn.

5 Are you aware that Mr. Dondero
6 NexPoint, HCRE, and HCMS all contend that they
7 do not have to pay on any of the notes they
8 issued because they are subject to an oral
9 agreement between Mr. Dondero and Nancy
10 Dondero, in her capacity as the trustee of the
11 Dugaboy Investment Trust?

12 MS. DANDENEAU: Objection to form.

13 A. I didn't -- I didn't -- I didn't
14 know that it was all notes.

15 Q. Okay. Are you -- did you ever learn
16 that there was an oral agreement between Jim
17 Dondero and Nancy Dondero pertaining to any
18 notes issued by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. Yes.

22 Q. Do you have any understanding as to
23 the terms of that agreement?

24 A. Yes.

25 Q. What is your understanding of the

1 WATERHOUSE - 10-19-21

2 terms of the agreement?

3 A. That there were certain milestones
4 that had to be reached.

5 Q. Do you have any understanding of the
6 terms of the agreement between Mr. Dondero and
7 Nancy Dondero concerning any of the notes
8 issued by the affiliates or Mr. Dondero other
9 than that there have to be milestones reached?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 A. There are milestones, I found out
13 yesterday, or there was some --

14 MS. DANDENEAU: Okay. I'm just
15 going to object to the extent that you
16 learned anything in conversations with
17 counsel, please don't reveal -- that is
18 privileged, and don't reveal any privileged
19 communications.

20 THE WITNESS: Okay.

21 A. So I'm not aware of anything else.

22 Q. Do you know what the milestones
23 were?

24 MS. DANDENEAU: Objection to form.

25 A. I don't.

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2 Q. Do you know anything about -- do you
3 know what promissory notes the agreement
4 covered?

5 A. I don't.

6 Q. Do you know if -- if Jim and Nancy
7 Dondero entered into one agreement or more than
8 one agreement?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. I don't know.

12 Q. Do you know if the agreement is in
13 writing?

14 A. I don't know.

15 Q. How did you learn of the existence
16 of the agreement?

17 MS. DANDENEAU: Objection to form.
18 Again --

19 A. I don't -- I don't recall who told
20 me.

21 Q. You have no recollection of who told
22 you about this agreement between Jim and Nancy
23 Dondero?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. I don't recall.

3 Q. Do you recall how you learned of the
4 agreement?

5 Was it in a meeting? Was it in a
6 phone call? Was it in an email?

7 A. I don't recall.

8 Q. Do you recall when you learned of
9 the agreement?

10 A. Not specifically.

11 Q. Do you recall what year you learned
12 of the agreement?

13 A. In -- look, I mean, there are so
14 many notes. I may be getting -- I believe it
15 was 2020.

16 Q. All right. I'm not asking about
17 notes, sir. I'm asking about the agreement
18 that you testified you knew about between Jim
19 and Don- -- Nancy Dondero. Okay.

20 Do you understand my question now?
21 Should I ask my question again?

22 A. Yeah, sure. Go ahead.

23 Q. I'm going to use the word
24 "agreement" to refer to the agreement that
25 Mr. Dondero and Nancy Dondero entered into

1 WATERHOUSE - 10-19-21

2 where you understood that certain milestones
3 had to be reached. Okay?

4 A. Uh-huh.

5 MS. DANDENEAU: Objection.

6 MS. DEITSCH-PEREZ: Object to the
7 form.

8 MR. MORRIS: Just defining a term,
9 what is the objection.

10 MS. DEITSCH-PEREZ: The objection --

11 MR. MORRIS: I will move on. I will
12 move on.

13 MS. DEITSCH-PEREZ: John --

14 Q. Sir, are you okay with that
15 definition of agreement?

16 A. Okay.

17 Q. Okay. So you don't recall who --
18 who informed you of the existence of the
19 agreement; is that right?

20 A. I don't recall.

21 Q. You don't recall who told you the
22 terms of the agreement.

23 Do I have that right?

24 A. Correct.

25 Q. And you don't recall if you learned

1 WATERHOUSE - 10-19-21

2 about the agreement in a meeting, through an
3 email, or through a phone call.

4 Do I have that right?

5 A. I don't recall.

6 Q. Can you tell me when you learned of
7 the agreement?

8 A. I don't -- I don't -- I don't
9 remember specifically.

10 Q. Can you tell me if you learned of
11 the agreement before or after the petition
12 date?

13 A. It would have been -- it would have
14 been after.

15 Q. Can you tell me if you learned of
16 the agreement before or after January 9th,
17 2020?

18 A. It would have been after.

19 Q. Can you tell me if you learned of
20 the agreement before or after you left Highland
21 Capital Management in February of 2021?

22 A. I don't -- I don't -- I don't know.

23 Q. It is possible that you learned of
24 it while you were a Highland employee.

25 Do I have that right?

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2 A. I don't remember the -- I mean, it
3 was sometime in 2021. I don't remember when.

4 Q. All right. So to the best of your
5 recollection, it was in 2021 but you don't
6 recall if it was before or after you ceased to
7 be a Highland employee.

8 Do I have that right?

9 A. Yeah, I mean, it was -- it was
10 likely after I was -- after I left Highland
11 because, if I put myself back into the last
12 days of -- of 2021, it was -- you know, the
13 communications with Mr. Dondero were -- were --
14 were -- there weren't as many communications
15 because of the circumstances.

16 Q. And so based on that you believe
17 that it is most likely that you learned of this
18 agreement sometime after you left Highland
19 employment?

20 A. I wouldn't use the term "most
21 likely." I don't recall specifically. I don't
22 recall.

23 Q. Do you recall ever telling Jim Seery
24 about this agreement?

25 A. No, I don't -- I didn't tell

1 WATERHOUSE - 10-19-21

2 Jim Seery.

3 Q. Did you tell anybody at DSI about
4 this agreement?

5 A. No.

6 Q. Did you tell any of Highland's
7 independent directors about this agreement?

8 A. No.

9 Q. Did you tell anybody at Pachulski
10 Stang Ziehl & Jones about this agreement?

11 A. No.

12 Q. Did you tell any employee of
13 Highland about this agreement?

14 A. No.

15 MS. DANDENEAU: Mr. Morris, it has
16 been an hour and a half. Is this a good
17 time for a break?

18 MR. MORRIS: Sure.

19 Q. Mr. Waterhouse, I will just remind
20 you that during the break please don't speak
21 with anybody about the deposition, the
22 substance of your testimony or anything else
23 concerning the deposition. Okay?

24 A. Yes.

25 MR. MORRIS: So it is 11:02. We're

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2 at 11:02 your time. Let's come back, I
3 guess, at 15 -- at 11:15 your time.

4 VIDEOGRAPHER: We're going off the
5 record at 11:02 a.m.

6 (Recess taken 11:02 a.m. to 11:20 a.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 11:20 a.m.

9 Q. Mr. Waterhouse, did you speak with
10 anybody during the break about this deposition?

11 A. No.

12 MS. DANDENEAU: Other than -- other
13 than his counsel.

14 Q. Did you speak to your counsel about
15 the substance of your deposition today?

16 A. No, I didn't bring it up.

17 Q. I didn't ask you if you brought it
18 up. I asked you if you had any conversation
19 with your lawyer about the substance of your
20 deposition.

21 MS. DANDENEAU: Yes, he did.

22 Q. Can you tell me what the -- you
23 discussed?

24 MS. DANDENEAU: No, I object to
25 that. He's not going to answer. That is a

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2 privileged conversation.

3 MR. MORRIS: So I just want to make
4 sure that I understand. During the break
5 you spoke with your client about the
6 substance of this deposition; is that
7 right?

8 MS. DANDENEAU: Yes, John.

9 MR. MORRIS: And you refuse -- you
10 refuse to let your client tell me what was
11 discussed; is that right?

12 MS. DANDENEAU: That's correct.

13 MR. MORRIS: You know, I had given
14 the instruction prior to the break not to
15 speak with counsel. I would have
16 appreciated --

17 MS. DANDENEAU: No, you didn't --
18 actually, that is not true, Mr. Morris.
19 You said not to speak with anyone. We
20 never have interpreted that to mean
21 conversations with counsel. That's never
22 been -- I have never, ever heard that
23 instruction.

24 MR. MORRIS: Okay. We will -- we
25 will -- we will deal with it when and if we

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2 have to.

3 Q. Mr. Waterhouse, after learning about
4 the agreement, did you ask anybody if the
5 agreement was reflected in a writing?

6 MS. DANDENEAU: Objection to form.

7 A. No.

8 Q. Did you ask anybody if the terms of
9 the agreement were memorialized anywhere?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: What is the --

12 A. No.

13 MS. DANDENEAU: Well, because you
14 keep talking about this agreement and I --
15 I -- I think, Mr. Morris, that is really
16 not clear what you mean by "the agreement."
17 And maybe you can just go back and restate
18 what that is.

19 MR. MORRIS: Okay. Your client has
20 agreed with me twice on the definition, but
21 I will try one more time.

22 Q. Mr. Waterhouse, do you understand
23 that when I use the term "agreement," I'm
24 referring to the agreement between Jim and
25 Nancy Dondero concerning certain promissory

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2 notes where you learned that one of the terms
3 of the agreement was milestones reached?

4 A. Okay.

5 Q. And did you understand that that was
6 the -- the agreement that we were referring to
7 every time we used the word "agreement" in this
8 deposition?

9 A. I don't know anything about this
10 agreement. So, look, I do -- it -- I don't
11 know whether --

12 Q. Let's -- let's try this again.

13 A. Yeah. Look, I don't know what this
14 agreement relates.

15 MS. DEITSCH-PEREZ: John, John --

16 Q. Let me try --

17 MS. DEITSCH-PEREZ: John, please let
18 the witness finish.

19 MR. MORRIS: Please stop. Please
20 stop. Please stop talking.

21 MS. DEITSCH-PEREZ: No, you stop.
22 Let the witness --

23 MR. MORRIS: Stop talking.

24 MS. DEITSCH-PEREZ: -- finish -- you
25 interrupted him.

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2 MR. MORRIS: You know what, you
3 guys, this is really wrong. It is really,
4 really wrong. Okay?

5 I had the witness agree not once,
6 but twice to the definition of agreement.
7 Okay? I'm going to try and do it a third
8 time.

9 MS. DANDENEAU: No, but, please,
10 John, really --

11 MR. MORRIS: No, please stop
12 talking. Please. It is my deposition.
13 Object to questions.

14 MS. DANDENEAU: No, but also you
15 instructed him that -- that if you were
16 going -- if you were interrupting him, that
17 he should remind you that you're
18 interrupting him and -- and --

19 MR. MORRIS: Let him do that. Let
20 him do that.

21 MS. DANDENEAU: Okay. Well, you --

22 MR. MORRIS: Please stop talking.

23 A. Okay. I don't know any of the
24 details of these agreements. I don't know
25 anything about them. I heard -- someone -- I

1 WATERHOUSE - 10-19-21
2 don't know who, I don't know when, as you
3 asked, sometime in '21, someone told me about
4 this -- or I don't honestly know -- I don't
5 even recall exactly how I was made aware of
6 this, but I was. I don't know -- I don't know
7 any of these details, and I'm getting -- again,
8 there is, you know, I -- I -- I had a passing
9 conversation with -- with Jim at some point
10 on -- on some -- on the executive comp, and I'm
11 getting confused of what is what, because
12 again, I don't know any of these details.

13 Q. Okay. Let me try again,
14 Mr. Waterhouse, and I apologize.

15 Are you aware of any agreement
16 between Jim Dondero and Nancy Dondero
17 concerning any promissory note that was given
18 to Highland by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. I've heard of an agreement. That
22 is -- that is -- I mean, if you are using aware
23 as heard, sure.

24 Q. And you understand that one of the
25 terms of the agreement is that it was based on

1 WATERHOUSE - 10-19-21

2 milestones that had to be reached; is that
3 right?

4 MS. DANDENEAU: Objection to form.

5 A. That was one of the words that was
6 used when I heard about it, yes.

7 Q. And when you heard about this
8 agreement that had a term in it concerning
9 milestones reached, did you ask the person who
10 was telling you about the agreement whether or
11 not it was in writing?

12 A. I did not.

13 Q. Did you ask any questions at all?

14 MS. DANDENEAU: Objection to form.

15 A. Not that I recall.

16 Q. But do you understand that going
17 forward, we're going to refer to the agreement
18 as the agreement that you just described that
19 you were --

20 MS. DANDENEAU: Object to the form.

21 A. Yes.

22 Q. Okay. You don't have any personal
23 knowledge concerning the terms of the
24 agreement; correct?

25 MS. DEITSCH-PEREZ: Object to the

1 WATERHOUSE - 10-19-21

2 form.

3 Q. You can answer.

4 A. I don't -- I heard about the
5 agreement. I don't know anything -- I heard
6 there was an agreement. That is -- again, as I
7 testified before -- I said before, heard about
8 it, don't know the details. I believe it was
9 sometime this year.

10 Q. Do you have any personal knowledge
11 about the terms of the agreement, sir?

12 MS. DANDENEAU: Objection to form.

13 A. Other than what I have previously
14 discussed, I don't -- I don't know.

15 Q. Did -- did Mr. Dondero tell you
16 about the existence of the agreement?

17 A. I don't recall.

18 Q. Do you recall the source of your
19 information when you learned about the
20 agreement?

21 A. No, I don't -- I don't recall. I
22 don't remember. I just -- I heard about it
23 generally. I don't remember -- I don't
24 remember who, how, if, how. I don't remember.

25 Q. You know, Mr. Waterhouse, I just

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2 want to be clear that I never would have asked
3 you to appear at this deposition if your name
4 hadn't been included in responses to discovery
5 as to somebody with knowledge about the -- who
6 was told about the existence of the agreement.

7 That is what prompted me do this,
8 and I really do feel compelled to tell you that
9 I otherwise would never have called you as a
10 witness. So I regret that you're being put
11 through this today. I had no intention of
12 burdening you or taking your time, but that is
13 the reason that we issued the subpoena is
14 because certain of the defendants identified
15 you as somebody --

16 MS. DEITSCH-PEREZ: Mr. Morris, you
17 are here to ask questions, not to have --

18 MR. MORRIS: I feel badly for the
19 guy. I really do.

20 MS. DEITSCH-PEREZ: I'm sure you do.

21 MR. MORRIS: I do. Stop.

22 MS. DEITSCH-PEREZ: You stop.

23 MR. MORRIS: I'm allowed.

24 MS. DEITSCH-PEREZ: No, you're not
25 allowed to have a chat with the witness.

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2 Q. Okay. Well, I hope that you
3 appreciate what I'm saying here,
4 Mr. Waterhouse.

5 MS. DANDENEAU: All right. Let's go
6 ahead and ask questions, and again, you're
7 entitled to probe his -- his knowledge
8 of -- whatever knowledge he has about
9 this -- this agreement and --

10 MR. MORRIS: That is what I'm doing.

11 MS. DANDENEAU: -- he will answer
12 the questions to the best that he can.

13 MR. MORRIS: That is what I'm doing.

14 Q. Mr. Waterhouse, I take it you do not
15 know which promissory notes issued by which
16 affiliates or Mr. Dondero are the subject of
17 this agreement; do I have that right?

18 A. Yes, I don't -- I don't know.

19 Q. Do you know of any way to determine
20 which promissory notes issued by the affiliates
21 and Mr. Dondero are the subject of this
22 agreement other than asking Jim or Nancy
23 Dondero?

24 MS. DANDENEAU: Objection to form.

25 A. I don't know.

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2 Q. Did you ever make --

3 A. I don't know anything about these
4 agreements.

5 Q. Did you ever make any effort to
6 determine which promissory notes are subject to
7 this agreement?

8 A. No.

9 Q. Did you ever ask anybody which
10 promissory notes are subject to this agreement?

11 A. No.

12 Q. Do you know if there is a list
13 anywhere of the promissory notes that are
14 subject to this agreement?

15 A. I'm not aware.

16 Q. Have you ever seen the terms of the
17 agreement written down anywhere?

18 A. No.

19 Q. Have you ever asked anybody whether
20 the terms of the agreement were written down
21 anywhere?

22 A. I have not.

23 Q. Did learning about the agreement
24 cause you to do anything in response?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Did anybody ever describe to you the
4 nature of the milestones that you referred to
5 earlier?

6 A. No, I don't -- I don't have any
7 details of this.

8 Q. That is fine.

9 PricewaterhouseCoopers served as
10 Highland's outside auditors prior to the
11 petition date; correct?

12 A. Yes.

13 Q. You refer to PricewaterhouseCoopers
14 as PwC?

15 A. Yes.

16 Q. PricewaterhouseCoopers audited
17 Highland's financial statements on an annual
18 basis; correct?

19 A. During my -- during my time as -- as
20 CFO, yes, PricewaterhouseCoopers was the
21 auditor.

22 Q. Do you know why Highland had its
23 annual financial statements audited each year?

24 A. Generally.

25 Q. Tell me your general understanding

1 WATERHOUSE - 10-19-21

2 as to the reason why Highland had its annual
3 financial statements audited each year.

4 A. From -- from time to time, they were
5 used -- or asked for, as part of diligence or
6 transactions or -- or things of that nature.

7 Q. And were they given to third parties
8 for purposes of diligence or transactions from
9 time to time?

10 A. As far as I'm aware, yes.

11 Q. And was it your understanding as the
12 CFO that the third parties who received the
13 financial statements in diligence or
14 transactions was going to rely on those?

15 MS. DANDENEAU: Objection to form.

16 A. I don't know -- I don't know gen --
17 I don't know specifically what they were going
18 to rely on. You know, we would get requests
19 for audited financial statements. I don't know
20 what they were relying on.

21 Q. And --

22 A. You would have to ask them.

23 Q. Did you personally play a role in
24 PwC's annual audit and the conduct of the
25 audit?

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2 MS. DANDENEAU: Objection to form.

3 A. During my tenure as CFO, I played a
4 very minimal role.

5 Q. What was the minimal role that you
6 played?

7 A. You know, again, it was -- it was to
8 check in with the team, to make sure that, you
9 know, audit -- the deadlines were being hit,
10 information was being presented to the auditors
11 in a -- in a timely fashion, but, you know,
12 other than that, it was a very capable team
13 that are still current employees of Highland
14 and, you know, they -- they conducted 99
15 percent of -- look, I don't want to give
16 percentages. I mean, this is -- but I -- I --
17 I played a minimal role towards the end.

18 Before during my earlier years as
19 CFO, I did more, and then as time went on, I
20 did less in it.

21 Q. Okay. Was there a person at
22 Highland who was responsible for overseeing
23 Highland's participation in PwC's audit during
24 the time that you were the CFO?

25 A. Yeah. I mean, there was -- there

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2 was a -- there was a point -- it varies. It
3 varies by year, in function, in time and, you
4 know, depending on the request, but yes, I
5 mean, there is -- there is -- there is
6 generally a point person of communication.

7 Q. And who was the point person from
8 2016 until the time you left Highland?

9 A. I don't -- I don't know
10 specifically, but it would have been, you
11 know -- you know, someone on the corporate
12 accounting team.

13 Q. And was there a head of the
14 corporate accounting team?

15 A. Yes, so -- yes.

16 Q. Who was the head of corporate
17 accounting for the five years prior to the time
18 you left Highland?

19 A. I don't -- if you're asking from
20 2016 on, I don't -- it was Dave Klos, but,
21 again, there was -- there was changes to the
22 team and the reporting structure. I don't
23 remember exactly when that happened during --
24 you know, over the last -- since 2016.

25 Q. Did the folks who participated and

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2 ran the audit all report to you, directly or
3 indirectly?

4 A. Yes.

5 Q. And did you have any responsibility
6 for making sure that the audit report was
7 accurate before it was finalized?

8 A. Yeah. I mean, you know, that --
9 that is -- my responsibility to the auditors
10 was -- again, is -- and the CFO is to -- we are
11 providing accurate financial statements; right?

12 And -- and -- and as part of any
13 audit, we disclose all relevant information as
14 part of any audit.

15 Q. Okay. And as the CFO, did you take
16 steps to make sure that the audit report was
17 accurate?

18 A. I mean, I would say in a general
19 sense, yes. But, again, I mean, I had a
20 very -- I had a very capable and competent
21 team. I wasn't managing them.

22 You know, part of what I do is I let
23 the team -- I want managers to grow. I want
24 managers to have rope. And that is -- you
25 know, I'm not a stand-behind-you type of guy.

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2 If you -- if you talk to my team members, I'm
3 not micromanaging people. I want people to
4 learn and grow in their function so they can go
5 on and do bigger and better things with their
6 careers.

7 And so, yes, generally I was
8 responsible for it, but I wanted the team to
9 learn and grow and be responsible for the bulk
10 of the audit.

11 Q. Did you personally review each audit
12 report before it was finalized to satisfy
13 yourself that it was accurate?

14 A. I don't -- I don't recall, you know,
15 for every single -- we're talking 2016, there
16 would have been three years, 2016 to '17, '18.
17 I don't -- we're -- we're going back
18 five years-plus. I don't -- you know, I don't
19 recall.

20 Q. Did you have a practice that you
21 employed to make sure that you were satisfied
22 that Highland's audit reports were true and
23 accurate to the best of your knowledge?

24 A. I mean, our -- the practice was set
25 up with our -- the -- the practice to put

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2 together accurate audited or accurate financial
3 statements is to your control environment.

4 So, you know, the -- so the practice
5 was to maintain a stable control environment
6 which then the output is -- is accurate
7 financial statements.

8 So -- so, you know, if I was
9 comfortable that the control environment was
10 operating, then, you know, that would dictate
11 how I would -- you know, what I might or might
12 not do in a given year.

13 Q. Okay. Do you recall ever being
14 uncomfortable with the control environment
15 during the period that you served as CFO?

16 A. Yeah. I mean, look, yes, there are
17 times -- you know, nothing is perfect. So
18 there were -- there were times when, yes, you
19 know -- there are times I learned I was
20 uncomfortable with the control environment, and
21 that is part of the management of the process
22 and having, you know -- and -- and working
23 through whatever obstacles present themselves.

24 Q. Okay. Were you ever uncomfortable
25 with the control process as it related to

1 WATERHOUSE - 10-19-21

2 reporting and disclosures of loans to
3 affiliates and Mr. Dondero?

4 MS. DANDENEAU: Objection to form.

5 A. I don't -- I don't recall --

6 Q. So you don't recall --

7 A. -- the --

8 MS. DANDENEAU: Mr. Morris --

9 A. I don't recall being uncomfortable.

10 But, again, we're going back several years. I

11 don't -- you know, the practice in an audit is

12 to disclose all information to the auditors.

13 And I don't -- I don't recall.

14 Q. As part of the process of the audit,
15 did you sign what is sometimes referred to as a
16 management representation letter?

17 A. Yes.

18 MR. MORRIS: Can we put up on the
19 screen a document that we have premarked as
20 Exhibit 33.

21 (Exhibit 33 marked.)

22 MS. DANDENEAU: Mr. Morris, that is
23 not in the binder; correct?

24 MR. MORRIS: Correct.

25 Q. So you will see, Mr. Waterhouse,

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2 this is a letter dated June 3rd. And if we
3 could go to the signature page.

4 And do you see that you and
5 Mr. Dondero signed this document?

6 A. Yes.

7 Q. That is your signature; right?

8 A. Yes.

9 MR. MORRIS: Okay. Can you go back
10 to the top.

11 MS. DANDENEAU: Mr. Morris, can you
12 have somebody post this in the chat so that
13 we have can have a copy of this, please.

14 MR. MORRIS: Yeah, sure. Asia, can
15 you do that, please.

16 Q. Okay. Do you see at the bottom of
17 the second paragraph there is a reference to
18 materiality?

19 A. Yes.

20 Q. Okay. It says, Materiality used for
21 purposes of these representations is
22 \$1.7 million.

23 Do you see that?

24 A. I do.

25 Q. And did PwC set that level of

1 WATERHOUSE - 10-19-21

2 materiality?

3 A. Yes.

4 Q. And for purposes of the audit, did
5 PwC set the level of materiality each year?

6 A. Yes.

7 Q. Did that number change over time?

8 A. I'm not aware of what materiality is
9 every single year, so -- but, you know, this
10 number would likely fluctuate.

11 Q. Okay. I'm going to go back to a
12 question I asked you earlier today. And that
13 is in connection -- this letter is issued in
14 connection with the audit for the period ending
15 12/31/2018; correct?

16 A. Yes.

17 Q. Okay. And is it fair to say that if
18 any -- actually, withdrawn. I'm going to take
19 it outside of this.

20 If Highland ever forgave the loan to
21 any affiliate or any of its officers or
22 employees, in whole or in part, to the best of
23 your knowledge, would that forgiveness have
24 been disclosed in the audited financial
25 statements if it exceeded the level of

1 WATERHOUSE - 10-19-21

2 materiality that PwC established?

3 MS. DANDENEAU: Objection to form.

4 A. So, again, during my tenure as CFO,
5 and -- Highland -- it was -- it is required to
6 disclose any affiliate loans that are in excess
7 of materiality.

8 Now, the forgiveness of those loans
9 may or may not -- I mean, since materiality
10 fluctuates every year, a -- you know, if a loan
11 was forgiven, it may or may not, you know --
12 and, look, I would want to consult the guidance
13 around this.

14 It is not something we do -- you
15 know, it is not -- you know, GAAP can be and
16 disclosures can be very specialized so, again,
17 we want to consult the guidance. But we would
18 see if and what would need to be disclosed if
19 it were deemed immaterial.

20 Q. Did you and Mr. Dondero sign
21 management representation letters of this type
22 in each year in which you served as Highland's
23 CFO?

24 A. I -- I -- I will speak for myself.
25 I signed them. There may have been others that

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2 signed as well. I don't -- I don't recall.

3 Q. But to the best of your knowledge,
4 you, personally, signed a management
5 representation letter in connection with
6 Highland's audit each year that you served as
7 the CFO; correct?

8 A. I would say generally speaking,
9 Mr. Morris. I don't recall for every single
10 year, you know, generally, but I would want to
11 refer to all the rep letters and see who signed
12 them.

13 Q. Do you recall Highland having its
14 financial statements audited in any year during
15 the period that you were a CFO where you didn't
16 sign the management representation letter?

17 A. I don't recall. But, John, we're
18 going back five, six, seven, eight, nine,
19 decade. I don't -- I don't remember.

20 Q. I don't want to go back that many
21 decades, but I'm just asking you if you recall
22 that there was you didn't sign it?

23 A. I -- I -- I don't, but my memory
24 is -- again, I -- I -- I can't tell you what I
25 did in 2012. I mean, I think generally, yes,

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2 but I don't -- I don't know for sure, and I
3 would want to rely on the document.

4 Q. Let me ask the question a little bit
5 differently then.

6 Do you have any reason to believe
7 that Highland had its annual financial audit
8 and you did not sign a management
9 representation letter in connection with that
10 audit?

11 MS. DANDENEAU: Objection to form.

12 A. I don't believe it would, but,
13 again, I would want to -- I don't recall and I
14 would want to confirm it to -- to make, you
15 know, an affirmative -- to give an affirmative
16 answer.

17 Q. Do you know whether PwC required
18 management to sign management representation
19 letters?

20 MS. DANDENEAU: Objection to form.

21 A. Yes. I mean, it -- management
22 representation letters are signed by
23 management.

24 Q. Okay. And do you know -- do you
25 have any understanding as to why PwC requires

1 WATERHOUSE - 10-19-21

2 management to sign management representation
3 letters?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't know why PwC's -- what PwC's
7 specific practice is. I know generally what
8 management representation letters are.

9 Q. Okay. Do you personally -- I'm not
10 asking about PwC. I'm asking for you -- I'm
11 asking about you, do you have an understanding
12 as to why the auditor asks for management
13 representation letters?

14 A. Okay. So you're asking me in my
15 personal capacity, yes, I have a general
16 understanding of why.

17 Q. Can you give me the general
18 understanding that you have as to why
19 management representation letters are required?

20 A. They are -- they are required to --
21 they are -- they are one of the items required
22 in an audit to help verify completeness.

23 Q. Do you have any -- any other
24 understanding as to why management
25 representation letters are required?

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2 A. That is -- that is -- other than
3 what I said, it is -- it is -- it is required
4 so -- to ensure that the -- you know, there
5 is -- there is completeness in what is being
6 audited.

7 Q. Did you -- did you have a practice
8 whereby you and Mr. Dondero conferred about the
9 management representation letters before you
10 signed them?

11 A. No.

12 Q. Did you have a practice --
13 withdrawn.

14 Do you see just the next sentence
15 after the materiality, there is a sentence that
16 states: We confirm, to the best of our
17 knowledge and belief, as of June 3rd, 2019, the
18 date of your report, the following
19 representations made to you during your audit.

20 Do you see that sentence?

21 A. Yes.

22 Q. Okay. Did you understand when you
23 signed this letter that you were confirming the
24 representations that followed?

25 A. When I signed this management

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2 letter -- representation letter, yes.

3 Q. Okay. Did you discuss this letter
4 with Mr. Dondero before you signed it?

5 A. I don't recall.

6 Q. Do you recall if Mr. Dondero asked
7 you any questions before he signed the letter?

8 A. I don't recall.

9 Q. Do you recall if you asked
10 Mr. Dondero any questions before you signed
11 this letter?

12 A. I don't recall.

13 Q. Is it fair to say that Mr. Dondero
14 did not disclose to you the existence of the
15 agreement that we have -- as we've defined that
16 term prior to the time you signed this letter?

17 MS. DANDENEAU: Objection to form.

18 A. I don't think I understand the
19 question. So, again, you are saying, did
20 Mr. Dondero not disclose to me the existence of
21 this letter?

22 Q. No, I apologize.

23 Did Mr. Dondero disclose to you the
24 existence of the agreement prior to the time
25 you signed this letter on June 3rd, 2019?

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2 A. The agreement -- the agreement that
3 we talked about earlier?

4 Q. Correct.

5 A. Look, as I said earlier, the first
6 time I heard of this agreement was sometime
7 this year.

8 Q. Okay. Can we turn -- let's just
9 look at a couple of items on the list. If we
10 can go to page 33416. Do you see in Number 35
11 it talks about the proper recording or
12 disclosure in the financial statements of ND
13 relationships and transactions with related
14 parties.

15 Do you see that?

16 A. I do.

17 Q. As the CFO, do you have any
18 understanding as to whether Dugaboy is a
19 related party?

20 A. I don't recall.

21 Q. Do you know whether any of the
22 affiliates are related parties?

23 A. If -- if it was NexPoint, HCMFA,
24 HCMS, HCRE, yeah, if -- if that is the
25 affiliate definition, and there. In ASC 850 --

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2 again, I mean, I haven't looked at ASC 850 in
3 quite some time, but, you know, if -- if there
4 is a control language, you know, ASC 850, would
5 that -- that section in GAAP would -- would
6 pick up and define what are related parties.

7 So, you know, like I said, if -- one
8 of the four entities I just described, if -- if
9 they are in that control definition of ASC 850,
10 they would be picked up in 35D.

11 Q. Do you -- do you have any reason to
12 believe that they would be picked up in that
13 definition, based on your knowledge and
14 experience?

15 A. I -- I believe that entities
16 controlled under GAAP are -- are affiliates.

17 Q. Okay. Would Mr. Dondero also
18 qualify as a related party for purposes of
19 Section 35D, to the best of your knowledge?

20 A. Yeah, I don't -- I don't know. I
21 would think -- I would have to read the code
22 section to see if someone personally -- is it
23 talking about related parties. So, look, if
24 your own in control, yeah, I mean, I would have
25 to read the section.

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2 Q. To the best of your knowledge, was
3 the existence of the agreement ever disclosed
4 to PwC?

5 A. I'm not -- I'm not aware.

6 Q. Do you recall if the agreement was
7 ever disclosed in Highland's audited financial
8 statements?

9 A. I don't -- I don't remember if it
10 was in every Highland's audited financial
11 statements during my tenure. We would have to
12 read the financial statements to see what was
13 disclosed, but I'm not -- I mean, as I sit here
14 today, I'm not aware.

15 Q. That is all I'm asking for.

16 A. I'm not aware.

17 Q. Can we go to the next page, please,
18 and look at 36. 36 says, we have disclosed to
19 you the identity of the partnership's related
20 party relationships and all the related party
21 relationships and transactions of which we are
22 aware.

23 Do you see that?

24 A. Yes.

25 Q. To the best of your knowledge, as of

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2 June 3rd, 2019, did Highland disclose to PwC
3 the identity of the partnership's related
4 parties and all the related party relationships
5 and transactions of which it was aware?

6 A. I mean, I can speak for myself as
7 signer of this representation letter. I
8 disclosed what -- what, you know, what --
9 what -- what I knew. Sorry, look, yes, so I --
10 I disclosed what I knew.

11 Q. Okay. Can we go to page 419. Do
12 you see at the end there is a reference to
13 events that occurred since the end of the
14 fiscal year and the date of the letter?

15 A. Yes.

16 Q. And were you aware of that -- of
17 that provision of the management representation
18 letter before you signed the document?

19 A. Yes.

20 Q. Do you have an understanding as to
21 why PwC asked for that confirmation of that
22 particular part of the management
23 representation letter?

24 A. It is -- it is -- it is just -- it
25 is a typical audit request.

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2 Q. And do you understand -- do you have
3 an understanding that PwC wanted to know that
4 as of the date of the audit whether any
5 material changes had occurred since the end of
6 the fiscal year, using the definition of
7 materiality that is in this particular
8 management representation letter?

9 A. It -- it is -- it is -- it is a --
10 it is as described. It is just a poorly worded
11 question, so it is hard for me to say yes.

12 Q. If I asked you this, I apologize,
13 but did you ever learn when the agreement was
14 entered into?

15 A. I don't -- I don't -- like I said
16 before, I don't know or have any details of the
17 agreement.

18 Q. Okay. Did you ever ask anybody when
19 the agreement was entered into?

20 A. I did not.

21 Q. Let's look at the audited financial
22 statements. We will put up on the screen a
23 document that has been premarked as Exhibit 34.

24 (Exhibit 34 marked.)

25 MS. DANDENEAU: And again, if Ms. La

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2 Canty could please put that in the chat
3 room, that would be great.

4 MR. MORRIS: I will assure you we
5 will put every document in the chat room.

6 Q. Now, I'm just going to ask you
7 questions that are related to the provisions of
8 this report that concern the affiliate loans,
9 but again, Mr. Waterhouse, if there is any part
10 of the document that you need to see or that
11 you think you might need to see in order to
12 refresh your recollection to answer any of my
13 questions, will you let me know that?

14 A. Yes.

15 Q. Because this is a pretty lengthy
16 document, but do you see that the cover page
17 here is the Highland consolidated financial
18 statements for the period ending December 31st,
19 2018?

20 A. Yes.

21 Q. If we can go to -- I think it is the
22 next one, looking for PwC's signature line.

23 MS. CANTY: I'm sorry, John, did you
24 say something?

25 MR. MORRIS: Yes, can we turn the

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2 page. I think it is 215. Yes, stop right
3 there, just above -- I'm sorry, I want to
4 see just the date of the report.

5 Q. Okay. Do you see at the bottom of
6 that page there, Mr. Waterhouse,
7 PricewaterhouseCoopers has signed this audit
8 report?

9 A. Yes, I see their signature.

10 Q. Okay. And it is the dated same day
11 as your management representation letter; is
12 that right?

13 A. It is -- yes, it is the same day.

14 Q. Was that the practice to sign the
15 management representation letter on the same
16 day that the audit report was signed?

17 A. Yes, that is typical in every audit.

18 Q. Can we just scroll down to the
19 balance sheet on the next page.

20 Do you see that there is a line
21 there that says, Notes and Other Amounts Due
22 from Affiliates?

23 A. Yes.

24 Q. Does that line, to the best of your
25 knowledge, include the amounts that were due

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2 under the affiliate under the notes signed by
3 the affiliates and Mr. Dondero?

4 MR. RUKAVINA: Objection to the
5 extent that calls for a legal conclusion.

6 A. I mean, I would want to see the
7 detail and the build to this \$173,398,000, but,
8 yes, I mean, if -- if -- given what we
9 discussed before, you know, it -- it should
10 capture that.

11 Q. And -- and while you were the CFO of
12 Highland, were all notes held by Highland that
13 were issued by an affiliate or Mr. Dondero
14 carried as assets on Highland's balance sheets?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Object to form.

17 A. I don't -- I don't know how else
18 they would be carried.

19 Q. Okay. Can you think of any -- are
20 you aware of any promissory note issued by an
21 affiliate or Mr. Dondero that was not carried
22 on Highland's audited financial balance sheets?

23 A. I'm -- I'm -- I'm not aware.

24 Q. Okay. Are you aware of any category
25 of asset on Highland's balance sheet in which

1 WATERHOUSE - 10-19-21

2 any of the promissory notes issued by an
3 affiliate or Mr. Dondero would have been
4 included?

5 MS. DANDENEAU: Objection to form.

6 A. Sorry, am I aware of any asset of an
7 affiliate being included --

8 Q. That -- let me -- let me try again.

9 Do you see there is a number of
10 different assets that are described on this
11 balance sheet?

12 A. Yes.

13 Q. One of the assets that is described
14 is Notes and Other Amounts Due from Affiliates;
15 right?

16 A. Yes.

17 Q. And it is reasonable to conclude
18 that the notes from the affiliates and
19 Mr. Dondero are included in that line item;
20 right?

21 A. Yes, based on this description.
22 Again, I would want to see a build of this to
23 100 percent confirm, but based on the
24 description, the asset description, it is -- it
25 is likely.

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2 Now, does that mean absolute? I
3 don't know.

4 Q. Do you have any reason to believe
5 that the promissory notes would have been
6 carried on the balance sheet in a category
7 other than Notes and Other Amounts Due from
8 Affiliates?

9 A. If they were deemed -- no. If they
10 were deemed an affiliate, you know, under GAAP,
11 they should be carried in that line.
12 Otherwise, it would go into another line.

13 Q. Okay. And do you see the total
14 asset base as of December 31st, 2018, was
15 approximately \$1.04 billion?

16 A. Yes.

17 Q. Is my math correct that the Notes
18 and Other Amounts Due from Affiliates
19 constituted approximately 17 percent of
20 Highland's assets as of the end of 2018?

21 A. Well, so how are you defining
22 Highland?

23 Q. Highland Capital Management, L.P.,
24 the entity that this audit is subject to -- or
25 the subject of.

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2 A. On a consolidated or unconsolidated
3 basis?

4 Q. I'm looking at the balance sheet.
5 It is a consolidated balance sheet. Okay?

6 Does the Notes and Other Amounts Due
7 from Affiliates constitute approximately
8 17 percent of the total assets of Highland
9 Capital Management, L.P., on a consolidated
10 basis?

11 MS. DANDENEAU: Objection to form.

12 A. I don't have a calculator in front
13 of me but I will take your math, if you are
14 taking the 173 divided by the billion.

15 Q. Okay.

16 A. If that is accurate, yes. But,
17 again, on a consolidated basis.

18 Q. And on an unconsolidated basis the
19 percentage would be higher; correct?

20 A. I -- no. I don't know.

21 Q. Well, okay. That is fair.

22 MR. MORRIS: Can we turn to
23 page 241, please.

24 Q. Do you see that this is a section of
25 the audit report that is entitled Notes and

1 WATERHOUSE - 10-19-21

2 Other Amounts Due from Affiliates?

3 A. Sorry, I can't see the -- the --

4 Q. It is at the top.

5 A. Notes and Other Amounts Due from

6 Affiliates, yes, I see that. I don't -- I

7 don't have a page number, but I'm on a page

8 that says at the top: Notes and Other Amounts

9 Due from Affiliates.

10 Q. Okay. And that is the same title of

11 the line item on the balance sheet that we just

12 looked at; right? Notes and Other Amounts Due

13 from Affiliates?

14 A. Yes.

15 Q. And is it your understanding, based

16 on your experience and knowledge as the CFO,

17 that this is the section of the narrative that

18 ties into the line item that we just looked at?

19 A. Yes.

20 Q. And is this section of the audit

21 report intended to describe and disclose all of

22 the material facts concerning the Notes and

23 Other Amounts Due from Affiliates?

24 MS. DANDENEAU: Objection, form.

25 A. This -- these notes -- these notes

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2 of the financial statements are -- the purpose
3 is to disclose any material items in relation
4 to that balance sheet line item.

5 Q. Okay. And all of the information,
6 to the best of your knowledge, that is set
7 forth in this section of the audit report was
8 provided by Highland; correct?

9 A. Yes, it would have been provided by
10 the corporate accounting team.

11 Q. Okay. And the corporate accounting
12 team, did that team report to you in the
13 organizational structure?

14 A. Yes.

15 Q. And did you have any concerns about
16 the controls that were in place to make sure
17 that the information provided with respect to
18 Notes and Other Amounts Due from Affiliates was
19 accurate and complete?

20 MS. DANDENEAU: Objection to form.

21 A. Not that I recall.

22 Q. Okay. Do you recall ever being
23 concerned that any portion of the Notes and
24 Other Amounts Due from Affiliates in any audit
25 report was inaccurate, incomplete, or not

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2 reliable?

3 A. I didn't -- I had concerns about,
4 you know, like I talked about before, of there
5 were -- there were potentially issues in the
6 control environment. But as far as it relates
7 to the audited financial statements, any -- the
8 team would work with the auditors to disclose
9 all -- all notes in Highland's possession.

10 And any -- any notes that were
11 deemed material by the auditor, right, these
12 were disclosed in these -- in this section, you
13 know, in -- in the notes to the consolidated
14 financial statements as you presented.

15 Q. Do you recall ever having a
16 conversation with anybody at any time
17 concerning the accuracy of the section of audit
18 reports that relates to Notes and Other Amounts
19 Due from Affiliates?

20 MS. DANDENEAU: Objection to form.

21 A. You know, as -- as -- I didn't have
22 direct conversations with
23 PricewaterhouseCoopers as I had, you know --
24 I -- I had the team that managed this.

25 Again, I wasn't anywhere chose to

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2 being the point person of this audit. And I
3 can't recall, you know, when -- you know, I
4 don't even know if I was ever the point person
5 during my tenure as CFO.

6 I don't know if PwC had any concerns
7 when they were performing those audit
8 procedures. They may have and they may have --
9 and it may not have been communicated to me. I
10 don't know.

11 MR. MORRIS: All right. I move to
12 strike.

13 Q. And I'm going to ask you to listen
14 carefully to my question.

15 Did you -- do you recall ever having
16 a conversation with anybody at any time
17 concerning the accuracy of the reporting
18 provided in the audited financial statement on
19 the topic of Notes and Other Amounts Due?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall for this, but that
22 doesn't mean that it didn't exist.

23 Q. Okay. But you have no reason to
24 believe, as you sit here right now, that you
25 ever discussed with anybody concerns over the

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2 accuracy of the section of the audit reports
3 called Notes and Other Amounts Due from
4 Affiliates; correct?

5 MS. DANDENEAU: Object to the form.

6 MS. DEITSCH-PEREZ: Objection to
7 form.

8 A. I don't recall having any
9 conversations. But, again, I mean, this is --
10 this is two years ago.

11 Q. I'm just asking for your
12 recollection, sir.

13 A. Yes.

14 Q. If you don't recall, this will --

15 A. Yeah.

16 Q. (Overspeak) -- if you don't
17 recall --

18 A. Yeah, I don't -- I don't recall.

19 Q. Do you know who was responsible for
20 drafting the audit report?

21 A. Are you asking the actual Highland
22 employee responsible? I mean, it was
23 Highland's responsibility, so, I mean, that
24 is --

25 Q. Right.

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2 A. -- Highland's responsibility.

3 Highland's responsibility.

4 Q. Who, at Highland, was responsible
5 for drafting this section of the audit report?

6 A. I -- I don't know the answer to
7 that. Again, there was a team who worked on
8 this. And I don't know, you know, whether it
9 was the staff or the manager.

10 Again, this is where I let the teams
11 manage. And, you know, there may be a
12 corporate accountant who worked on this. I
13 just -- you know, I wasn't part of that process
14 to give that person experience. I don't know.

15 Q. Do you recall having any
16 communications with anybody at any time
17 concerning this section of the report?

18 A. Yeah, I don't recall.

19 Q. Do you recall whether you ever told
20 anybody at any time that any aspect of this
21 section of the report was inaccurate or
22 incomplete?

23 A. I don't recall.

24 Q. As you sit here today, do you have
25 any reason to believe that this section of the

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2 audit report is incomplete or inaccurate in any
3 way?

4 And I'm happy to give you a moment
5 to -- to look at it, if you would like.

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Same.

8 A. I mean, I would have to look at -- I
9 would have to look at the bill to the note
10 schedule to make sure I know you presented me
11 with materiality, but again, there might be a
12 note as of 12/31/18 that somehow was -- was
13 under materiality not disclosed. I don't -- I
14 don't know. I would need more information.

15 Q. Okay. But without more information,
16 you have no reason to believe anything this
17 section is inaccurate; correct?

18 MS. DANDENEAU: Objection to form.

19 A. I don't. I mean, you know, this was
20 part of the audit.

21 Q. Thank you. Now, you will see if we
22 could scroll just a little bit more that each
23 of the first five paragraphs concerns
24 specifically the four affiliates that we've
25 been discussing and Mr. Dondero.

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2 MR. MORRIS: If we could go the
3 other way, La Asia. We don't need Okada.
4 We're going to have to thread the needle.
5 Okay. Good, perfect.

6 Q. Do you see those five paragraphs
7 certain the four affiliates and Mr. Dondero as
8 we've been referring to today?

9 A. Yes.

10 Q. Okay. And do you see at the end of
11 every paragraph it states, quote: A fair value
12 of a partnership's outstanding notes receivable
13 approximates the carrying value of the notes
14 receivable?

15 A. Yes, I see that.

16 Q. Do you have an understanding of what
17 that means?

18 A. Yes.

19 Q. What is your understanding of that
20 sentence?

21 A. It is the -- again, the -- the fair
22 value, right, which is -- which is what the --
23 what Highland could sell that asset for. This
24 statement is comparing the fair value of the
25 notes to the carrying value, so the carrying

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2 value is the line item that you showed me
3 earlier that is in Notes and Other Amounts Due
4 from Affiliates.

5 Q. Okay. Is another way to say this is
6 that the fair market value of the notes equals
7 the principal amount and -- withdrawn.

8 Is the fair way to interpret this
9 that the fair market value of the notes equals
10 all remaining unpaid principal and interest due
11 under the notes?

12 MS. DANDENEAU: Object to the form.

13 MS. DEITSCH-PEREZ: Objection, form.

14 A. I don't know the answer to that,
15 because I don't recall where -- where any --
16 where -- in what line item was the interest
17 component reported.

18 Q. All right. Well, if we look in this
19 audit report, you will see in the middle of the
20 first paragraph, for example, it states that as
21 of December 31st, 2018, total interest and
22 principal due on outstanding promissory notes
23 was approximately \$5.3 million.

24 Do you see that?

25 A. I do.

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2 Q. Is that the carrying value or the
3 fair value?

4 A. That would be the carrying value --

5 Q. And is the last --

6 A. -- in my opinion.

7 Q. Okay. And it is in your opinion as
8 the chief financial officer of Highland during
9 the period of time that you described; right?
10 It is an educated opinion?

11 A. I'm reading this at face value. I'm
12 taking that as that is carrying value.

13 Q. Okay. And does the last sentence
14 say that the carrying value is roughly
15 approximate to the fair market value?

16 MS. DANDENEAU: Objection to form.

17 MS. DEITSCH-PEREZ: Objection, form.

18 A. Again, this note to the financial
19 statement is specific to notes and other
20 amounts due from affiliates.

21 Q. Correct.

22 A. If the interest component is
23 reported elsewhere on the balance sheet, you
24 know, it -- it -- it could be off. Again, I
25 don't have the detail. I don't know, but yes,

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2 look, I mean, if you -- I mean, if you are
3 saying the 5.3 million is in the notes and
4 other amounts due from affiliates, then the
5 last statement is saying the fair value
6 approximates 5.3 million. That is what that
7 last sentence is saying.

8 Q. Do you see in the middle of the
9 first paragraph -- not in the middle, the next
10 to last sentence there is a statement that the
11 partnership will not demand payment on amounts
12 that exceed HCMFA's excess cash availability
13 prior to May 31st, 2021.

14 Do you see that?

15 A. I do.

16 Q. Do you know when Highland agreed not
17 to demand payment as described in that
18 sentence?

19 A. I don't know specifically.

20 Q. Do you know why Highland agreed not
21 to demand payment on HCMFA's notes until May
22 2021?

23 A. Yes.

24 Q. Why was that decision made?

25 A. You know, well, it -- it -- that

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2 decision was made as to not put HCMFA into a
3 position where it didn't have sufficient assets
4 to pay for the demand note.

5 Q. And at the time the agreement was
6 entered into, pursuant to which the partnership
7 wouldn't demand payment, did HCMFA have
8 insufficient assets to satisfy the notes if a
9 demand had been made?

10 MS. DANDENEAU: Objection to form.

11 A. I don't have HCMFA's financial
12 statements in front of me as of 12/31/18.

13 Q. Was there a concern that HCMFA would
14 be unable to satisfy its demands under the
15 notes if demand was made?

16 MS. DANDENEAU: Objection to form.

17 A. Well, there is -- I don't recall --
18 I mean, there is something, right, in place to
19 basically not demand payment until May 31, 2021
20 as detailed here.

21 Q. And who made the decision to enter
22 into -- who made the decision on behalf of
23 Highland not to demand payment until May 31st,
24 2021?

25 A. I'm trying to remember. I don't

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2 remember exactly -- I don't remember if it was
3 myself or -- or Jim Dondero who -- who -- there
4 was -- there was something signed, from what I
5 recall, that -- that -- that backed up this
6 line item in the -- in the notes I'm -- look,
7 I'm, I'm --

8 Q. We will get to that.

9 A. You --

10 Q. I'm just --

11 A. You have -- I mean --

12 Q. We're going to give that to you.

13 I'm going to give that to you.

14 A. You -- you -- you have all the
15 documents. I don't have the documents, and
16 that is what makes it so hard. I don't have
17 any documents to prepare for this deposition;
18 right? You have all -- I don't -- I don't -- I
19 don't remember, but, you know, again, it would
20 probably be myself or Jim.

21 Q. Do you know if Highland received
22 anything in return for its agreement not to
23 make a demand for two years?

24 A. I don't -- I don't think it referred
25 anything.

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2 Q. And did you and Mr. Dondero discuss
3 HCMFA's ability to satisfy the notes if a
4 demand was made at the time this agreement was
5 entered into?

6 MS. DANDENEAU: Objection to form.

7 A. I don't -- I don't -- I don't recall
8 having a specific conversation, if I did, or --
9 or David Klos.

10 Q. Okay. I'm just asking if you recall
11 any conversations that you had.

12 A. I don't recall.

13 Q. Okay. Do you know why Highland
14 loaned the money to HCMFA that is the subject
15 of the notes described in this paragraph?

16 A. I don't remember specifically why
17 5.3 million was loaned. I mean, I -- it would
18 have to be put in the context.

19 Q. Do you have any recollection at all
20 as to why Highland ever loaned any money to
21 HCMFA?

22 A. Yes.

23 MS. DANDENEAU: Objection to form.

24 Q. What do you remember about that?

25 A. There was a Highland Global

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2 Allocation Fund, which was a -- a fund managed
3 by Highland Capital Management Fund Advisors.
4 There was a -- we -- I'm just telling you,
5 there was -- there was -- there was a -- a
6 ultimately a NAV error found in this fund while
7 it was an open-ended fund and, you know, there
8 were amounts owed by the advisor in -- in
9 relation to that NAV error.

10 There were also, for the same fund,
11 that same fund was ongoing an
12 open-end-to-close-end conversion, and as part
13 of that proposal, shareholders who voted for
14 the conversion received compensation from the
15 advisor.

16 Q. All right. Now, the events that
17 you're describing occurred in the spring of
18 2019; right?

19 A. These started back -- I think, I
20 mean --

21 Q. I apologize.

22 A. -- that -- I mean, the answer to
23 that is no.

24 Q. I apologize, the loans that were
25 made in connection with the events that you're

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2 describing occurred in May 2019; right?

3 MR. RUKAVINA: Objection to the
4 extent that calls for a legal conclusion.

5 A. I don't recall specifically what
6 amounts of money were moved when, for what
7 purpose.

8 Q. Okay. Fair enough. Going to the
9 next paragraph, do you recall that NexPoint
10 Advisors had obtained a number of loans from
11 Highland, and they rolled up those loans into
12 one note in approximately 2017?

13 A. This is for NexPoint Advisors?

14 Q. Yes.

15 A. I -- I mean, I don't -- I don't
16 recall the NexPoint Advisors loan being a
17 roll-up loan, but --

18 Q. Do you know why?

19 A. But, look, if you have documents
20 that show -- I mean, look, I just don't recall.

21 Q. Okay. That is fair. Do you know
22 why -- do you have any recollection as to why
23 Highland loaned money to NexPoint?

24 A. Yes.

25 Q. Why did High -- why do you recall --

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2 what is the reason you recall Highland lending
3 money to NexPoint?

4 A. I mean, I was just -- I just -- I
5 just recall. I mean, I just -- I don't
6 remember why.

7 Q. I understand. And I'm asking you if
8 you recall --

9 A. Oh, why -- I thought you say --
10 NexPoint Advisors was launching a fund which
11 is -- I believe that the legal name is NexPoint
12 Capital, Inc. And it -- it provided a
13 co-invest into that fund.

14 And, from what I remember, the --
15 the -- that NexPoint borrowed money from
16 Highland at the time to make that co-invest.

17 Q. So this was an investment that
18 NexPoint was required to make; is that right?

19 MS. DANDENEAU: Objection to form.

20 A. I don't know if it was required to
21 make, I don't recall that, or if it just made
22 it.

23 Q. Okay. But your recollection is that
24 NexPoint made an investment and they borrowed
25 money from Highland to finance the investment.

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2 Do I have that right?

3 A. Yes.

4 Q. How about HCRE? Do you know why
5 HCRE borrowed money from Highland?

6 A. I don't remember specifically.

7 Q. Do you remember generally?

8 A. Generally, yeah -- I mean, yes.

9 Q. Can you tell me your general
10 recollection as to why Highland loaned money to
11 HCRE?

12 A. For -- for -- for investment
13 purposes.

14 Q. So HCRE made the investment and it
15 obtained a loan, or loans, from Highland in
16 order to finance that investment or those
17 investments.

18 Do I have that right?

19 A. I mean, I -- you know, generally.

20 Q. Okay. How about Highland Management
21 Services, Inc.?

22 Do you have any recollection as to
23 why HCMS borrowed money from Highland?

24 A. Generally.

25 Q. What is your general recollection as

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2 to why HCMS borrowed money from Highland?

3 A. For -- for investment purposes.

4 Q. So it is the same thing, HCMS wanted
5 to make investments and it borrowed money from
6 Highland in order to finance those investments;
7 is that right?

8 A. I mean, yes, generally. I mean, I
9 can't -- I don't -- on the services, there --
10 there are several loans in these schedules.
11 You know, I can't remember why every single one
12 of these were made, but I would say, yeah, I
13 mean, generally.

14 Q. Okay. I appreciate that.

15 MR. MORRIS: Let's go to the page
16 with Bates No. 251. La Asia, are you
17 there?

18 MS. CANTY: Sorry, John. It went
19 out for a minute. Can you say that again.
20 I don't know what is going on.

21 MR. MORRIS: The page with Bates
22 No. 251, can we go to that.

23 MS. CANTY: Yes, sorry.

24 MR. MORRIS: Keep going to the
25 bottom. Yeah, there you go.

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2 Q. Do you see, Mr. Waterhouse, that
3 there is a section there called Subsequent
4 Events?

5 A. I do.

6 Q. And does this relate to the last
7 sentence above the signature line on the
8 management representation letter that we talked
9 about earlier where you made the representation
10 that you disclosed subsequent events?

11 A. I mean, it relates to it, but not in
12 its entirety.

13 Q. Okay.

14 MR. MORRIS: If we can scroll up to
15 capture the entirety of this section right
16 here.

17 Q. And what do you mean by that, sir?

18 MR. MORRIS: Yeah, right there.
19 Perfect.

20 A. There are -- there are different
21 subsequent events in -- under GAAP. So there
22 are -- and -- and -- so what we see in the
23 notes to the financial statements are one type
24 of subevent.

25 Q. Okay. And -- and would the type of

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2 subsequent event relating to affiliate loans be
3 captured in this section if they were -- if
4 they were made after the end of the fiscal year
5 and prior to the issuance of the audit report?

6 A. Yes, if they were deemed material or
7 disclosable.

8 Q. Okay. I appreciate that.

9 Do you see the next to the last
10 entry there? It says, Over the course of 2019
11 through the report date, HCMFA issued
12 promissory notes to the partnership in the
13 aggregate amount of \$7.4 million?

14 A. Yes.

15 Q. And does that refresh your
16 recollection that those are the notes that
17 related to the NAV error that you mentioned
18 earlier?

19 A. I don't -- I don't remember the
20 exact. Again, there are -- I mentioned two
21 line items; right?

22 Q. Yes.

23 A. I mean, it was the GAAP conversion
24 process plus the -- the NAV error. I don't
25 have the details. I don't recall specifically

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2 if -- you know, what -- if that 7.4 million was
3 solely attributable to the NAV error.

4 Q. Okay. But there is no question that
5 Highland told PricewaterhouseCoopers that over
6 the course of 2019 HCMFA issued promissory
7 notes to the partnership in the aggregate
8 amount of \$7.4 million; correct?

9 A. In the course of the audit, we would
10 have produced all promissory notes in our
11 possession, including the ones that are
12 detailed here.

13 Q. Do you recall that you signed the
14 two promissory notes that are referenced in
15 that provision?

16 MS. DANDENEAU: Objection to form.

17 A. I didn't recall initially but I've
18 been reminded.

19 Q. Okay. And -- and do you recall that
20 those notes are dated May 2nd and May 3rd,
21 2019?

22 A. Yes.

23 Q. So that was just a month before the
24 audit was completed; correct?

25 A. Yes. I think we had a June 3rd

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2 date, right, if -- if my memory serves me
3 right.

4 Q. Yes, I will represent to you that
5 your memory is accurate in that regard.

6 Did anybody ever instruct you as the
7 CFO to correct this statement that we're
8 looking at in subsequent events?

9 A. So let me understand. You're saying
10 when I was CFO at Highland Capital did anyone
11 ever ask me to correct the -- over the course
12 of 2019 through the report date HCMFA issued
13 promissory notes, this statement?

14 Q. Right.

15 A. Not that I'm aware.

16 Q. While you were the CFO of Highland,
17 did anybody ever tell you that that sentence
18 was wrong?

19 A. Not that I'm aware.

20 Q. Highland -- withdrawn.
21 HCMFA disclosed these notes in its
22 own audited financial statements; right?

23 MR. RUKAVINA: Objection, form.

24 A. I assume that these would be
25 material -- if these are material financial

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2 statements, yes, they -- they -- they should be
3 and they were likely disclosed.

4 Q. Now, there is no statement
5 concerning the 2019 notes about the forbearance
6 that we looked at in the affiliated note
7 section of the report; right?

8 MS. DANDENEAU: Objection to form.

9 Q. I'll withdraw. That was bad.

10 Do you recall when we were looking
11 at the paragraph concerning HCMFA earlier it
12 had that disclosure about the agreement whereby
13 Highland wouldn't ask for demand on the -- on
14 the HCMFA notes?

15 A. Yes.

16 Q. That forbearance disclosure is not
17 made with respect to the 2019 notes; right?

18 A. Not -- look, not that I can recall,
19 unless -- unless it was done at a subsequent
20 day.

21 Q. Right. And it is not in the
22 subsequent event section that we're looking at
23 right now where the 2019 notes are described;
24 right?

25 A. Right. But this is through

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2 June 3rd. It could have been done on June 4th.

3 I don't -- I don't -- I don't recall.

4 Q. Okay.

5 MR. MORRIS: Can we put up on the
6 screen the HCMFA audit report. And while
7 we're --

8 MS. DANDENEAU: What exhibit is
9 this?

10 MR. MORRIS: La Asia, what number is
11 that?

12 MS. CANTY: 45.

13 MR. MORRIS: So this will be marked
14 as Exhibit 45.

15 (Exhibit 45 marked.)

16 MS. CANTY: Yeah, and I will put it
17 in the chat.

18 MS. DANDENEAU: Thank you.

19 Q. Okay. All right. Do you see that
20 this is the consolidated financial statements
21 for HCMFA for the period ending 12/31/18?

22 A. Yes.

23 Q. As the treasurer of HCMFA at the
24 time, did you have to sign a management
25 representation letter similar to the one that

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2 we looked at earlier for Highland?

3 A. I would imagine I would have been
4 asked to. I don't recall if I did.

5 Q. Do you recall ever being asked by an
6 auditor to sign a management representation
7 letter and then not doing it?

8 A. No.

9 MR. MORRIS: Can we just scroll down
10 again. I just want to see the date of the
11 document.

12 A. I mean, let me -- you know, there
13 are different versions to management
14 representation letters I will qualify.

15 Yes, there are certain -- from time
16 to time auditors can make representations
17 that -- in the rep letter that is being
18 proposed that are inaccurate or out of scope or
19 things like that and they've asked for
20 signature.

21 In that context, yes. I mean, you
22 know -- I mean, if I have been asked to sign
23 and make those representations and those
24 representations are invalid, yes, I would not,
25 I mean, I -- I wouldn't sign that.

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2 Q. Okay. PricewaterhouseCoopers served
3 as HCMFA's outside auditors as well; correct?

4 A. Yes.

5 Q. Do you see that this audit report is
6 signed on June 3rd, 2019, just like the
7 Highland audit report?

8 A. That is correct.

9 Q. And did the process of -- of
10 preparing HCMFA's audit report, was that the
11 same process that Highland followed when it did
12 its audit report at this time?

13 A. I mean, it is a different entity.
14 There are different assets. You know, it --
15 it -- it is -- as you saw, Highland's
16 financials are on a consolidated basis. This
17 is different, so it is under the same control
18 environment and team.

19 Q. Okay. I appreciate that. So the
20 same control environment and team participated
21 in the preparation of the audit for Highland
22 and for HCMFA at around the same time; correct?

23 A. Yes.

24 MR. MORRIS: Can we go to page 17 of
25 the report. I don't have the Bates number.

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2 Q. Okay. Do you see that just like
3 Highland's audited financial report, HCMFA's
4 audited financial report also has a section
5 related to subsequent events?

6 A. Yes.

7 Q. And am I reading this correctly that
8 just as Highland had done, HCMFA disclosed in
9 its audited financial report a subsequent event
10 that related to the issuance of promissory
11 notes to Highland in the aggregate amount of
12 \$7.4 million in 2019?

13 A. That is what I see in the report.

14 Q. And you were the treasurer of HCMFA
15 at the time; right?

16 A. Yes, to the best of my knowledge.

17 Q. And did anybody ever tell you prior
18 to the time of the issuance of this audit
19 report that that sentence relating to HCMFA's
20 2019 notes was inaccurate or wrong in any way?

21 A. Not that I recall.

22 Q. As you sit here right now, has
23 anybody ever told you that that sentence is
24 inaccurate or wrong in any way?

25 A. Not that I recall.

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2 Q. I apologize if I asked you this
3 already, but has anybody ever told you at any
4 time that you are not authorized to sign the
5 promissory notes that are the subject of the
6 sentence we're looking at?

7 A. Not that I recall.

8 Q. Did anybody ever tell you at any
9 time that you had made a mistake when you
10 signed the promissory notes that are the
11 subject of this sentence?

12 A. Say that again. Did anyone ever say
13 that I made a mistake?

14 Q. Let me ask the question again.
15 Did anybody ever tell you at any
16 time that you made a mistake when you signed
17 the two promissory notes in Highland's favor on
18 behalf of HCMFA in 2019?

19 A. Not that I recall.

20 MR. MORRIS: Let's just look at the
21 promissory notes quickly. Can we please
22 put up Document Number 1, and so this is in
23 the pile that y'all have. We'll just go
24 for a few more minutes and we can take our
25 lunch break.

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2 Q. All right. So I don't know if you
3 have seen this before, sir. Do you see that
4 this is a complaint against HCMFA?

5 A. Yes, I am looking at it on the
6 screen.

7 Q. Okay. And have you ever seen this
8 document before?

9 A. I went through some of these
10 documents with my counsel here yesterday.

11 MR. MORRIS: All right. Can we go
12 to Exhibit 1 of this document.

13 Q. Do you see Exhibit 1 is a
14 \$2.4 million promissory note back in 2019?

15 A. Yeah, I found it in the book. Yes,
16 I have it here in front of me.

17 Q. And this is a demand note, right, if
18 you look at Paragraph 2?

19 A. Yes.

20 Q. And this is a note where the maker
21 is HCMFA, and Highland is the payee; right?

22 A. Yes.

23 MR. MORRIS: And if we can scroll
24 down, can we just see Mr. Waterhouse's
25 signature.

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2 Q. Is that your signature, sir?

3 A. Yes, it is.

4 Q. And did you sign this document on or
5 around May 2nd, 2019?

6 A. I don't recall specifically signing
7 this, but this is my signature.

8 Q. Okay. And do you recall that
9 Highland transferred \$2.4 million to HCMFA at
10 or around the time you signed this document?

11 A. I don't recall specifically. I
12 would want to, as I sit here today, go back and
13 confirm that, but again, presumably that --
14 that -- that did happen.

15 Q. You wouldn't have signed this
16 document if you didn't believe that HCMFA
17 either received or was going to receive
18 \$2.4 million from Highland; is that fair?

19 A. I mean, it -- if -- if -- if there
20 wasn't a transfer of value, yeah, I mean, you
21 know, I would have no reason to -- to sign a
22 note.

23 Q. And -- and Highland wouldn't have
24 given this note to PricewaterhouseCoopers if --
25 withdrawn.

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2 HCMFA wouldn't have given this note
3 to PricewaterhouseCoopers if it hadn't received
4 the principal value of -- of the note in the
5 form of a loan; correct?

6 MR. RUKAVINA: Objection, legal
7 conclusion, speculation and form.

8 A. Again, we -- what we provided to PwC
9 were, as part of the audit, any promissory
10 notes executed and outstanding. You know, as a
11 part of the audit, they, you know, they -- they
12 have copies of all the bank statements,
13 things -- things of that sort.

14 MR. MORRIS: Okay. Can we go to
15 Exhibit 2.

16 (Exhibit 2 marked.)

17 Q. Do you see that this is a promissory
18 note dated May 3rd, 2019 in the amount of
19 \$5 million?

20 A. Yes.

21 Q. Do you believe this is also a demand
22 note if you look at Paragraph 2?

23 A. Yes.

24 Q. And do you see that HCMFA is the
25 maker, and Highland is the payee?

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2 A. Yes.

3 Q. And if we go to the bottom, can we
4 just confirm that that is your signature?

5 A. Yes.

6 Q. And together these notes are the
7 notes that are referred to both in Highland and
8 HCMFA's audited financial reports in the
9 subsequent event sections; correct?

10 MS. DANDENEAU: Objection to form.

11 A. They -- they -- they totaled
12 \$7.4 million, so presumably, yes.

13 Q. Okay. And you were authorized to
14 sign these two notes; correct?

15 MR. RUKAVINA: Objection, legal
16 conclusion.

17 A. Yeah. I mean, I'm -- I was the
18 officer of -- of HCMFA. You know, I -- I'm not
19 the legal expert on -- on what that -- what
20 that confers to me or what it doesn't. I mean,
21 that is my signature on the notes.

22 Q. And you believed you were authorized
23 to sign the notes; is that fair?

24 A. I signed a lot of documents in my
25 capacity, just because it is operational in

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2 nature. So, you know, to me this was just
3 another document, to be perfectly honest.

4 Q. Sir, would you have signed
5 promissory notes with the principal amount of
6 \$7.4 million if you didn't believe you were
7 authorized to do so?

8 MS. DANDENEAU: Objection to form.

9 Q. Are you frozen?

10 A. No. I'm just -- you know, it is --
11 you know, again, I typically don't sign
12 promissory notes, and I don't recall why I
13 signed these, but -- you know, but I did.

14 Q. All right. So listen carefully to
15 my question. Would you have ever signed
16 promissory notes with a face amount of
17 \$7.4 million without believing that you were
18 authorized to do so?

19 A. No. I mean, I'm -- I'm putting my
20 signature on there, so no.

21 Q. Okay. And would you have signed two
22 promissory notes obligating HCMFA to pay
23 Highland \$7.4 million without Mr. Dondero's
24 prior knowledge and approval?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. You know, from -- from what I recall
4 around these notes, you know, I don't recall
5 specifically Mr. -- Mr. Dondero saying to -- to
6 make this a loan.

7 So my conversation with Mr. Dondero
8 around the culmination of the NAV error as
9 related to TerreStar which was a -- a -- I
10 think it was a year and a half process. I
11 don't know, it was a multi-month process, very
12 laborious, very difficult.

13 When we got to the end, I had a
14 conversation with Mr. Dondero on where to, you
15 know, basically get the funds to reimburse the
16 fund, and I recall him saying, get the money
17 from Highland.

18 Q. And so he told you to get the money
19 from Highland; is that right?

20 A. That is what I recall -- in my
21 conversation with him, that is -- that is what
22 I can recall.

23 Q. Do you know who drafted these notes?

24 A. I don't.

25 Q. Did you ask somebody to draft the

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2 notes?

3 A. I didn't ask -- I don't specifically
4 ask people to draft notes really. I mean,
5 again, you know, the legal group at Highland is
6 responsible and has always been responsible for
7 drafting promissory notes.

8 Q. So based on your -- based on the
9 practice, you believe that somebody from the
10 Highland's legal department would have drafted
11 these notes. Do I have that right?

12 MS. DEITSCH-PEREZ: Object to the
13 form. John, I also asked you for the Word
14 versions of these notes so we could look at
15 the properties, and you have not provided
16 them. Are you intending to?

17 MR. MORRIS: No.

18 Q. Can you answer my question, sir?

19 A. Again, I --

20 MS. DANDENEAU: Do you want him to
21 repeat it?

22 A. Yeah, why don't you repeat it?

23 Q. Sure. Mr. Waterhouse, based on the
24 practice that you have described in your
25 understanding, do you believe that these notes

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2 would have been drafted by somebody in the
3 legal department?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Yes.

7 Q. Okay. And do you know who would
8 have instructed -- do you have any knowledge as
9 to who would have instructed the legal
10 department to draft these notes?

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 A. It was whoever was working -- I
14 mean, it was likely someone on the team. I
15 mean, I don't remember exactly on every note or
16 every document, but, again, a lot of these
17 things of this nature -- they're operational in
18 nature -- were handled by the team.

19 The team knows to -- I mean, we
20 don't draft documents. We're not lawyers.
21 We're not attorneys. It is not what I do or
22 accountants do.

23 So they are always instructed to go
24 and -- and go to the legal team to get
25 documents like this drafted. Also, when you go

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2 to the legal team, the -- you know, we always
3 loop in compliance. And compliance -- when you
4 go to the legal team, compliance is part of
5 legal team. They're made aware of -- of -- of
6 these types of transactions.

7 Q. And do you believe that you had
8 the -- withdrawn.

9 Did you ever tell Mr. Dondero --
10 (inaudible) -- did you see those?

11 A. Sorry.

12 MS. DEITSCH-PEREZ: I did not hear
13 the end of that question.

14 Q. Did you ever tell Mr. Dondero that
15 you signed these two notes?

16 A. I don't recall ever -- no, I don't
17 recall having a conversation with him.

18 Q. Did you ever discuss these two notes
19 with him at any time?

20 A. The conversation, I recall, was what
21 I described earlier. And that is the only time
22 I recall ever discussing this.

23 Q. Okay. But the corporate accounting
24 group had a copy of this -- of these two notes.
25 And pursuant to the audit process, the

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2 corporate accounting group gave the two notes
3 to PricewaterhouseCoopers in connection with
4 the audit; correct?

5 MS. DANDENEAU: Objection to form.

6 A. Yes. I mean, that is -- yeah, I
7 mean, they -- unless the legal team can also
8 retain copies of items like this. I mean, I
9 don't know everything that they would retain as
10 well.

11 The legal team would also, if they
12 had documents as part of audits, turn that over
13 to the auditors as well. So it could have been
14 the corporate accounting team. It could be
15 someone on the legal team.

16 Q. All right. So you didn't -- you
17 didn't draft this note; right?

18 A. I -- I -- I did not.

19 Q. But somebody at Highland did; is
20 that fair?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 A. I don't know. I mean, we can go to
24 the legal team. I don't -- I'm not sitting
25 behind someone in legal. Maybe they went to

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2 outside counsel. I have no idea.

3 Q. Did you have any reason to believe
4 you weren't authorized to sign this note,
5 either of these two notes?

6 A. I think I have already answered that
7 question.

8 Q. Okay. You didn't give these notes
9 to PricewaterhouseCoopers; correct?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall giving these to
12 PricewaterhouseCoopers.

13 Q. And in the practice that you have
14 described, somebody in the corporate accounting
15 group would have given these two notes to
16 PricewaterhouseCoopers; correct?

17 MS. DANDENEAU: Objection to form.

18 A. I think I've answered that. I said
19 either the corporate accounting team or maybe
20 the legal team.

21 MR. MORRIS: Okay. Why don't we
22 take our lunch break here.

23 VIDEOGRAPHER: We're going off the
24 record at 1:04 p.m.

25 (Recess taken 1:04 p.m. to 1:49 p.m.)

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2 VIDEOGRAPHER: We are back on the
3 record at 1:49 p.m.

4 Q. Mr. Waterhouse, did you speak with
5 anybody during the break about the substance of
6 this deposition?

7 A. I spoke to -- to Deb and Michelle.

8 Q. About the substance of the
9 deposition?

10 A. Yes.

11 Q. Can you tell me what you talked
12 about?

13 MS. DANDENEAU: No. We object on
14 the basis of privilege.

15 Q. Okay. You are going to follow your
16 counsel's objection here?

17 A. Yes.

18 Q. Okay.

19 MR. MORRIS: Can we put up on the
20 screen Exhibit 35.

21 (Exhibit 35 marked.)

22 Q. Are you able to see that document,
23 sir?

24 A. Yes.

25 Q. Have you ever seen an incumbency

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2 certificate before?

3 A. I have.

4 Q. Do you have a general understanding
5 of what an incumbency certificate is?

6 A. I have a general understanding.

7 Q. What is your general understanding?

8 A. You know, those -- my general
9 understanding is that the incumbency
10 certificate basically lists folks that can --
11 are like authorized signers.

12 Q. Okay. And do you see that this is
13 an incumbency certificate for Highland Capital
14 Management Fund Advisors, L.P.?

15 A. Yes.

16 Q. Okay. And if we could scroll down
17 just a little bit, do you see that it's dated
18 effective as of April 11th, 2019?

19 A. Yes, I see that.

20 Q. Okay. And is that your signature in
21 the middle of the signature block?

22 A. Yes, it is.

23 Q. And by signing it, did you accept
24 appointment as the treasurer of HCMFA effective
25 as of April 11th, 2019?

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2 A. Again, I'm not the legal -- I don't
3 know if this makes me the treasurer or the
4 appointment. I don't know -- I don't know
5 that, so I don't -- I don't know if that
6 document -- again, I think -- again, I'm not
7 the legal expert. I think isn't there --
8 aren't there other legal documents that detail
9 who the officers are that could be incorporated
10 or things like that? Again, I don't want to
11 play armchair attorney here.

12 Q. I'm not asking you for a legal
13 conclusion. I'm asking you for your knowledge
14 and understanding. When you signed this
15 document, did you understand that you were
16 accepting an appointment as the treasurer of
17 HCMFA?

18 MS. DANDENEAU: Objection to form.

19 MS. DEITSCH-PEREZ: Objection, form.

20 A. Again, I don't think this -- that
21 wasn't my understanding. I don't think this
22 makes -- this document makes me the treasurer.

23 Q. What do you think this document --
24 why did you sign this document?

25 MS. DEITSCH-PEREZ: Objection to

1 WATERHOUSE - 10-19-21

2 form.

3 MR. MORRIS: You're objecting to the
4 form of the question when I asked him why
5 did you sign the document? What is the
6 basis for the objection?

7 MS. DEITSCH-PEREZ: Because, John, I
8 think that it does call for a legal
9 conclusion other than -- with him saying
10 because somebody told me to sign this
11 document. But if you want to go there,
12 that is fine.

13 MR. MORRIS: Okay.

14 MS. DANDENEAU: I don't think --
15 he's already said he's not a lawyer.

16 MR. MORRIS: I'll allow the witness
17 to answer this question.

18 Q. Why did you sign this document, sir?

19 A. I mean, our -- our legal group would
20 bring by these incumbency certificates from
21 time to time. I have no idea why they're being
22 updated, and I was asked to sign.

23 Q. Did you ask anybody, what is this
24 document?

25 A. No.

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2 Q. Did anybody tell you why they needed
3 you to sign the document?

4 A. Not that I can recall.

5 Q. You testified earlier that you
6 understood that you served as the acting
7 treasurer for HCMFA; correct?

8 A. Yes.

9 Q. How did you become the acting
10 treasurer of HCMFA?

11 MS. DANDENEAU: Objection to form.

12 A. I don't -- I don't know the legal --
13 I don't know the legal mechanic of how I became
14 the acting treasurer.

15 Q. I'm not asking for the legal
16 mechanic. I'm asking you as the person who
17 is --

18 MS. DANDENEAU: John, you said --

19 MR. MORRIS: Stop.

20 MS. DANDENEAU: -- how did you
21 become the treasurer. That is --

22 MR. MORRIS: Please stop.

23 MS. DANDENEAU: That is a legal
24 question.

25 MR. MORRIS: I am not asking any

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2 legal questions, to be clear. I'm asking
3 for this witness' understanding as to how
4 he became the acting treasurer of HCMFA.
5 If he doesn't know, he can say he doesn't
6 know, but this legal stuff is nonsense, and
7 I really object to it.

8 Q. Sir, I'm asking you a very simple
9 question.

10 MS. DANDENEAU: Argumentative.

11 Q. You testified -- you testified that
12 you became the acting treasurer of HCM --
13 HCMFA; correct?

14 A. Yes.

15 Q. How did that happen?

16 MS. DANDENEAU: Again, object to
17 form.

18 MR. MORRIS: I can't wait to do this
19 in a courtroom. Good God.

20 Q. Go ahead, sir.

21 A. I don't know the exact process of
22 how that happened.

23 Q. Do you have any idea whether signing
24 this document was part of the process?

25 MR. MORRIS: You know what --

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2 MS. DANDENEAU: Objection.

3 MR. MORRIS: -- withdrawn. You guys
4 want to do this, I can't wait. I can't
5 wait. This is the craziest stuff ever.

6 MS. DANDENEAU: John, he said he's
7 not a lawyer, and you are asking him for a
8 legal conclusion, and he says he doesn't
9 know, and you persist.

10 MR. MORRIS: Okay.

11 MS. DANDENEAU: So you can ask these
12 questions --

13 MR. MORRIS: Did anyone -- please
14 stop talking.

15 MS. DANDENEAU: -- at another
16 point -- no, no, no, I'm entitled to talk,
17 too; right? If you're going to make these
18 accusations as if we're trying to stonewall
19 you, this is not the witness to ask that
20 question.

21 MR. MORRIS: I can't -- I can't
22 wait -- I can't wait to do this in a
23 courtroom. I will just leave it at that.

24 MS. DANDENEAU: That's right, I'm
25 sure you can't.

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2 Q. Did anyone ever tell you, sir, that
3 even though you were the acting treasurer of
4 HCMFA, that you were not authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. I'm not sure I understand the
8 question. I wasn't -- I mean, I'm -- I'm the
9 current acting treasurer.

10 Q. Did anybody ever tell you at any
11 time that even though you were the acting
12 treasurer of HCMFA, that you were not
13 authorized to sign the two promissory notes
14 that we looked at before lunch?

15 MS. DANDENEAU: Objection to form.

16 A. Not that I recall.

17 Q. Did anybody ever tell you at any
18 time that you were not authorized to sign the
19 two promissory notes that we looked at before
20 lunch?

21 A. Not that I recall.

22 Q. Did anybody ever tell you at any
23 time that you should not have signed the two
24 promissory notes that we looked at before
25 lunch?

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2 A. Not that I recall.

3 Q. Did you ever tell anybody at any
4 time that you weren't authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. Not that I recall.

8 Q. Did you ever tell anybody at any
9 time that you made a mistake when you signed
10 the two promissory notes that we looked at
11 before lunch?

12 A. Not that I recall.

13 Q. As you sit here right now, do you
14 have any reason to believe that you were not
15 authorized to sign the two documents that we
16 looked at before lunch?

17 MS. DANDENEAU: Objection to form.

18 A. If -- if this is the -- the valid
19 incumbency certificate, I mean, this does --
20 this does detail who the signers are.

21 Q. Okay. And looking at that document,
22 does that give you comfort that you were
23 authorized to sign the two promissory notes
24 that we looked at before lunch?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 MS. DANDENEAU: Objection, form.

4 A. Yes.

5 Q. As of October 20th -- withdrawn.

6 I'm trying to take your mind back to
7 a year ago, October 2020. Do you recall at
8 that time that the boards of the retail funds
9 were making inquiries about obligations that
10 were owed by the advisors to Highland in
11 connection with their 15(c) review?

12 MS. DANDENEAU: Objection to form.

13 A. I don't -- I don't recall.

14 Q. As of October 2020, you had no
15 reason to believe you weren't authorized to
16 sign the two promissory notes that we just
17 looked at; correct?

18 MS. DANDENEAU: Objection, form.

19 MS. DEITSCH-PEREZ: Objection to
20 form.

21 A. I didn't think about it in October
22 of 2020, but I mean --

23 Q. Did you have any reason to believe
24 at that time that you weren't authorized to
25 sign the two notes that we just looked at?

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2 A. Not that I'm aware, no.

3 Q. Did you have any reason to believe a
4 year ago that you made a mistake when you
5 signed those two notes?

6 A. Not that I'm aware.

7 Q. A year ago you believed that HCMFA
8 owed Highland the unpaid principal amounts that
9 were due under those two notes; correct?

10 A. They're -- they're promissory notes
11 that were -- as you presented, that were --
12 that were executed. Whether they're valid or
13 if there's other reasons, I didn't -- I don't
14 know.

15 Q. I'm not asking you whether they're
16 valid or not. I'm asking you for your state of
17 mind. A year ago you believed that HCMFA
18 was -- was obligated to pay the unpaid
19 principal amount under the two notes that you
20 signed; correct?

21 A. Yeah, I'm -- I'm -- yes.

22 Q. Thank you. Are you aware -- you're
23 aware that -- that in 2017, NexPoint issued a
24 note in favor of Highland in the approximate
25 amount of \$30 million; correct?

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2 A. I'm -- I'm -- I'm generally aware.

3 Q. Okay. And are you generally aware
4 that from time to time, after the note was
5 issued by NexPoint, that moneys were applied to
6 principal and interest that were due under the
7 NexPoint note?

8 A. Yes, I'm generally aware.

9 Q. Okay. And did anybody ever tell you
10 that the payments that were made against the
11 NexPoint notes were made by mistake?

12 A. Yes.

13 Q. And is it the one payment that we
14 talked about earlier today?

15 A. We talked about a lot of things
16 today. What payment are we talking about?

17 Q. Okay. Who told you that any payment
18 made against the NexPoint note was made by
19 mistake?

20 A. D.C. Sauter.

21 Q. When did Mr. Sauter tell you that?

22 A. I don't -- I don't remember
23 specifically.

24 Q. Do you remember what payments --

25 A. Sometime -- sometime this year.

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2 Q. Sometime in 2021?

3 A. Yes.

4 Q. Do you remember what payment he was
5 referring to?

6 A. It was the -- the payment made in
7 January of 2021 or -- yeah, January of -- of
8 this -- January of 2021.

9 Q. Okay. So did anybody ever tell you
10 at any time that any payment that was made
11 against principal --

12 A. And -- and -- and -- hold on, and it
13 may have been other -- again, it may have been
14 that payment or -- or there may have been what
15 he was explaining, a misapplication of prior
16 payments as well.

17 Q. Can you -- can you give me any
18 specificity -- withdrawn.

19 Withdrawn. Can you tell me
20 everything that Mr. Sauter told you about --
21 about errors in relation to payments made
22 against principal and interest due under the
23 NexPoint note?

24 MS. DANDENEAU: Can I just --

25 MR. RUKAVINA: Hold on. Hold on.

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2 I'm going to object here, and I'm going to
3 instruct the witness not to answer
4 depending on the discussion that you had --
5 Mr. Waterhouse, I'm the lawyer for
6 NexPoint, and as everyone here knows, D.C.
7 Sauter is in-house counsel.

8 So if you and Mr. Sauter were having
9 a factual discussion and him preparing his
10 affidavit, et cetera, then go ahead and
11 answer that. But if you were having a
12 discussion as to our legal strategy in this
13 lawsuit, or anything having to do with
14 that, then do not answer that.

15 And if you need to talk to either
16 your counsel or me about that, then we need
17 to have that discussion now.

18 A. Okay. Yeah, I don't -- I don't
19 really know how to make that distinction, so
20 maybe I need to talk to counsel before I
21 answer, or if I can answer.

22 Q. Let me just ask you this question:
23 Did -- did you have any conversation with
24 Mr. Sauter about any payment of principal and
25 interest prior to the time that you left

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2 Highland's employment, or did it happen after
3 you left Highland's employment?

4 A. I don't -- I don't recall if -- I
5 don't recall. I mean, it was sometime in 2021.
6 I don't remember if it was before or after I
7 was let go from Highland.

8 Q. Okay. So -- so nobody told you
9 prior to 2021 that any error or mistake was
10 made in the application of payments against
11 principal and interest due on the NexPoint
12 note. Do I have that right?

13 A. Yeah, I don't -- I don't recall this
14 being in 2020.

15 Q. Okay. And it didn't happen in 2019;
16 correct?

17 A. I don't recall that happened.

18 Q. And it didn't happen in 2018;
19 correct?

20 A. I don't -- I don't recall that
21 happening.

22 Q. And it didn't happen in 2017;
23 correct?

24 A. I don't recall.

25 Q. But -- but you believe the

1 WATERHOUSE - 10-19-21
2 conversation took place in 2021. You just
3 don't remember if it was before or after you
4 left Highland's employment. Do I have that
5 right?

6 A. It was sometime this year. I
7 don't -- I don't remember.

8 Q. Okay. Did you report this
9 conversation to Mr. Seery at any point?

10 A. I don't believe so.

11 Q. Did you report this conversation to
12 anybody at DSI at any time?

13 A. I don't recall.

14 Q. Do you have -- you don't have a
15 recollection of ever doing that; correct?

16 A. Yeah, that's right. I don't recall
17 doing that.

18 Q. Do you recall telling anybody at
19 Pachulski Stang about the conversation you
20 recall with Mr. Sauter?

21 A. No, I don't -- I don't recall.

22 Q. Did you tell any of the independent
23 board members about your conversation with
24 Mr. Sauter?

25 A. I don't recall.

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2 Q. Did you tell any of the employees at
3 Highland before you left Highland's employment
4 about this call that you had with Mr. Sauter?

5 MS. DANDENEAU: Objection to form.

6 A. No, I don't -- no, I don't recall.

7 Q. NexPoint -- to the best of your
8 knowledge, did NexPoint ever file a proof of
9 claim against Highland to try to recover moneys
10 that were mistakenly paid against the principal
11 and interest due under the note?

12 A. Okay. Hold on. You are saying did
13 NexPoint Advisors file a proof of claim to
14 Highland for errors related to payments under
15 the NexPoint note to Highland?

16 Q. Correct.

17 A. I'm -- I'm -- I'm not -- I'm not
18 aware.

19 Q. Are you aware --

20 A. I'm not the legal person here, I
21 don't know.

22 Q. I'm just asking for your knowledge,
23 sir.

24 A. Yeah, I don't know. I'm not aware.

25 Q. Are you aware of any claim of any

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2 kind that NexPoint has ever made to try to
3 recover the amounts that it contends were -- or
4 that Mr. Sauter contend were mistakenly applied
5 against principal and interest due under the
6 NexPoint note?

7 A. I'm not aware.

8 MS. DANDENEAU: Objection to form.

9 Q. Okay. The advisors' agreements with
10 the retail funds are subject to annual renewal;
11 correct?

12 A. Yes.

13 Q. And do you participate in the
14 renewal process each year?

15 A. Yes.

16 Q. What role do you play in the renewal
17 process?

18 A. I'm -- I'm asked by the retail board
19 to walk-through the advisors financials.

20 Q. And do you do that in the context of
21 a board meeting?

22 A. Yes, it is -- yes, it is typically
23 done in a board meeting.

24 Q. And do you recall the time --
25 does -- does the renewal process happen around

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2 the same time each year?

3 A. Yes, it is -- it is around the same
4 time every year.

5 Q. And what -- what time period of the
6 year does the renewal process occur?

7 A. Approximately the September
8 timeframe.

9 Q. During that process, in your
10 experience, does the board typically conduct
11 its own diligence and ask for information?

12 A. Does the board ask for lots of -- I
13 mean, just -- I mean, lots of information as a
14 part of that -- that -- as part of that board
15 meeting and that process.

16 Q. Okay. And do you recall that the
17 process in 2020 spilled into October?

18 A. Yes. Yes.

19 Q. Okay. And as part of the process in
20 2020, the retail board asked -- asked what are
21 referred to as 15(c) questions; right?

22 A. I guess I don't want to be -- they
23 asked 15(c) -- are you saying they asked 15(c)
24 questions and this is why it went into October
25 or --

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2 Q. No, I apologize.

3 Do you have an understanding of
4 what -- of what 15(c) refers to in the context
5 of the annual renewal process?

6 A. Yes, generally.

7 Q. All right. What is your general
8 understanding of the term "15(c)" in the
9 context of the annual renewal process?

10 A. I -- I think 15(c) is the section
11 that -- that -- you know, that -- that the
12 board has to evaluate every year, the retail
13 board. They have to, you know, go through,
14 evaluate, and go through that approval process
15 on a yearly basis.

16 Q. Okay.

17 MR. MORRIS: Can we put up on the
18 screen Exhibit 36, please.

19 (Exhibit 36 marked.)

20 MR. MORRIS: I guess let's just
21 start at the bottom so Mr. Waterhouse can
22 see what is here.

23 Q. You see this begins with an email
24 from Blank Rome to a number of people.

25 MR. MORRIS: And if we can scroll

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2 up -- keep going just a little bit.

3 Q. You will see that there is an email
4 from Lauren Thedford to Thomas Surgent and
5 others where she reports that she was attaching
6 and reproducing below additional 15(c)
7 follow-up questions from the board.

8 Do you see that?

9 A. Yes.

10 Q. And do you see Question No. 2 asks
11 whether there are any material outstanding
12 amounts currently payable or due in the future
13 (e.g., notes) to HCMLP by HCMFA or NexPoint
14 Advisors or any other affiliate that provides
15 services to the funds?

16 Do you see that?

17 A. Yes.

18 Q. And -- and did you -- do you recall
19 that in -- in October of 2020 the retail boards
20 were asking for that information?

21 A. I don't recall it, but there --
22 they're obviously asking in this email.

23 Q. Okay.

24 MR. MORRIS: Can we scroll up a
25 little bit, please.

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2 Q. And then do you see that
3 Ms. Thedford includes you on the email string
4 on Tuesday, October 6th, at 5:52?

5 A. Yes.

6 Q. And she asks you and Dave Klos and
7 Kristin Hendrix for advice on that particular
8 Request No. 2 that I have just read; right?

9 A. Yes.

10 Q. Okay. Can you tell me who
11 Ms. Thedford is?

12 A. She was an attorney that was in the
13 legal group.

14 Q. At Highland Capital Management,
15 L.P.?

16 A. I'm -- I'm -- I'm -- I don't
17 remember if she was an employee of Highland or
18 any of the advisors.

19 Q. Okay. Do you know if she served as
20 the corporate secretary for both HCMFA and
21 NexPoint?

22 A. Yes.

23 Q. And -- okay.

24 Do you know whether Ms. Thedford
25 held any positions in relation to the retail

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2 funds as we defined that term?

3 A. Yes.

4 Q. What is your understanding of the
5 positions that Ms. Thedford held at the retail
6 funds?

7 A. I -- I recall her being an officer.
8 I don't recall her title.

9 Q. Okay. Is she still an officer at
10 any of the retail funds today?

11 A. No.

12 Q. Do you know when she ceased to be an
13 officer of the retail funds?

14 A. Approximately.

15 Q. And when did she approximately cease
16 to be an officer of the retail funds?

17 A. It was in -- it was in early of
18 2021.

19 Q. Okay. Do you know when she became
20 an officer of the retail funds?

21 A. I don't recall.

22 Q. To the best of your recollection,
23 was she an officer of the retail funds in
24 October of 2020?

25 A. I believe so.

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2 Q. Okay. Do you know what title she
3 held in her capacity as an officer, if any?

4 A. I told you I don't remember.

5 Q. Okay. So she sends this email to
6 you at 5:52 p.m. on October 6th.

7 And if we can scroll up to the
8 response, you responded a minute later with a
9 one-word answer: Yes.

10 Do you see that?

11 A. Yes.

12 Q. And -- and yes is -- yes was in
13 response to the retail board's Question No. 2,
14 right, whether there are any material
15 outstanding amounts currently payable or due in
16 the future?

17 A. Yes.

18 MR. MORRIS: And can we scroll up to
19 see what happened next.

20 Q. So Ms. Thedford writes back to you a
21 few minutes later and she asks whether you
22 could provide the amounts.

23 Do you see that?

24 A. Yes.

25 Q. And then you respond further and you

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2 refer her to the balance sheet that was
3 provided to the board as part of the 15(c)
4 materials.

5 Do you see that?

6 A. Yes.

7 Q. And -- and did the advisors provide
8 to the board certain balance sheets in 2020 in
9 connection with the 15(c) review?

10 A. Yes, they did.

11 Q. Okay. And were the amounts that
12 were outstanding or that were to be due in the
13 future by the advisors to Highland included in
14 the liability section of the balance sheet that
15 was given to the retail board?

16 A. Yes. Notes would be reflected as
17 liabilities.

18 Q. Okay. And --

19 A. If I'm understanding your question
20 correctly.

21 Q. You are. And -- and -- and those
22 liabilities you -- you were -- you believed
23 were responsive to the retail board's question;
24 correct?

25 A. Yes.

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2 Q. Okay. And then if we can scroll up,
3 you see Ms. Thedford responds to you
4 nine minutes later with a draft response.

5 Do you see that?

6 A. Yes.

7 Q. And she says that she is taking from
8 the 6/30 financials certain information about
9 amounts that were due to HCMLP and affiliates
10 as of June 30th, 2020.

11 Do you see that?

12 A. I do.

13 Q. Okay. And did you believe, as the
14 treasurer of NexPoint and HCMFA and as the CFO
15 of Highland, that the information that
16 Ms. Thedford obtained from the 6/30 financials
17 was accurate and responsive in relation to the
18 retail fund board's question?

19 A. I just want to make sure I
20 understand the question.

21 Are you saying that the financial
22 information provided to the retail board as
23 part of the 15(c) process, which included
24 financial statements as of June 30th of 2021,
25 did I feel like those were responsive to their

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2 questions?

3 Q. Yes.

4 A. Yes.

5 Q. Thank you.

6 MS. DEITSCH-PEREZ: John, it is not
7 in the chat yet. Can you just make sure it
8 gets put in there.

9 MR. MORRIS: Sure.

10 MS. CANTY: I put it in there. I
11 think maybe I just sent it directly, so let
12 me make sure it says to everyone. But I
13 did put it in there. I will try again.

14 MR. MORRIS: Thank you, La Asia.

15 MS. DANDENEAU: What number is it.

16 MR. MORRIS: What, the Bates number?

17 MS. DEITSCH-PEREZ: No, the --
18 this -- yeah, 36 is not in the chat.

19 MR. MORRIS: Okay. We'll get it.

20 MS. DANDENEAU: I think that
21 Ms. Canty just sent it to me originally.
22 Sorry.

23 MR. MORRIS: Okay. We will get it
24 there.

25 MS. CANTY: Okay. It is there now

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2 for everyone.

3 MS. DEITSCH-PEREZ: Got it. Thank
4 you.

5 Q. Do you recall if the proposed
6 response that Ms. Thedford crafted was
7 delivered to the retail board with the -- with
8 the yellow dates having been completed?

9 A. I don't know.

10 MR. MORRIS: Davor, I'm going to ask
11 that the advisors and -- the advisors of
12 both HCMFA and NexPoint produce to me any
13 report that was given to the retail board
14 concerning the promissory notes at issue,
15 including the obligations under the notes.

16 Q. Do you know -- do you know if
17 ultimately NexPoint informed the retail board
18 in response to its question that NexPoint owed
19 Highland approximately 23 or \$24 million?

20 MS. DANDENEAU: Objection to the
21 form.

22 A. Sorry, are you asking, did NexPoint
23 tell the retail board that it owed Highland?

24 Q. Let me ask a better question,
25 Mr. Waterhouse.

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2 Did -- do you know if anybody ever
3 answered the retail board's question that was
4 Number 2?

5 A. I don't -- I can't say for sure.

6 Q. Okay. Do you recall -- I think you
7 testified earlier that you walked through the
8 advisors' financials with the retail board;
9 correct?

10 A. Yes.

11 Q. And as part of that process, did you
12 disclose to the retail board the obligations
13 that NexPoint and HCMFA had to Highland under
14 promissory notes?

15 A. The retail board, as I stated
16 earlier, receives financial information,
17 balance sheet, income statement information
18 from the advisors. That information is
19 provided to the retail board in connection with
20 the 15(c) process.

21 So any notes between the advisors
22 and the Highland would be -- anything would be
23 detailed in those financial statements.

24 Q. Do you recall in 2020 ever speaking
25 with the retail board about the advisors'

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2 obligations under the notes to Highland?

3 MS. DANDENEAU: Objection to form.

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall specifically.

7 Q. Do you have any general recollection
8 of discussing with the retail board the
9 advisors' obligations to Highland under the
10 notes that they issued?

11 MS. DANDENEAU: Object to the form.

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. I just recall generally just -- it
15 is just -- I present the financial statements,
16 and if they have questions, I answer their
17 questions and walk them through.

18 I don't recall what they asked. I
19 don't recall where the discussion went. I
20 don't recall anything of that nature.

21 Q. Okay. Do you know if anybody on
22 behalf of HCMF -- HCMFA ever told the retail
23 board that HCMFA had no obligations under the
24 two 2019 notes that you signed? Withdrawn.

25 Do you know whether anybody on

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2 behalf of HCMFA ever told the retail boards
3 that you weren't authorized to sign either of
4 the two 2019 notes?

5 MS. DANDENEAU: Objection to form.

6 A. I'm not aware.

7 Q. Are you aware of anybody on behalf
8 of HCMFA ever telling the retail boards that
9 your execution of the two 2019 notes was a
10 mistake?

11 MS. DANDENEAU: Objection to form.

12 A. I'm not aware.

13 Q. Are you aware of anybody on behalf
14 of HCMFA ever telling the retail boards that
15 HCMFA did not have to pay the amounts reflected
16 in the two notes that you signed in 2019?

17 A. I'm not aware.

18 Q. Do you know whether anybody ever
19 told the retail boards -- withdrawn.

20 Do you know whether anybody ever
21 told the retail boards that Highland has
22 commenced a lawsuit to recover on the two notes
23 that you signed in 2019?

24 A. I'm not aware.

25 Q. Are you aware of anybody informing

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2 the retail boards that Highland has sued to
3 recover on the NexPoint note?

4 A. I'm not aware.

5 Q. Do you know whether anybody ever
6 told the retail board that Highland had
7 declared a default with respect to the two
8 HCMFA notes that you signed in 2019?

9 A. I'm not aware.

10 Q. Are you aware of anybody ever
11 informing the retail boards that Highland had
12 declared a default under the NexPoint note?

13 A. I'm not aware.

14 Q. Are you aware of anybody telling the
15 retail board that Highland made a demand for
16 payment under the 2019 notes that you signed on
17 behalf of HCMFA?

18 A. I'm not aware.

19 Q. Let's -- let's see if there is a
20 response to Ms. Thedford's email, if we can
21 scroll up.

22 Do you see you responded to
23 Ms. Thedford five minutes after she provided
24 the draft response to you?

25 A. Yes.

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2 Q. Okay. And do you see that Dustin
3 Norris is copied on this email?

4 A. Yes, he is.

5 Q. Great. Do you know whether
6 Mr. Norris held any positions at either of the
7 advisors as of October 6, 2020?

8 A. I will go back to -- I'm not the
9 legal expert of what appoints you or how or
10 why, but you did see Dustin's name on the
11 incumbency certificate that you produced
12 earlier.

13 Q. Do you know what his title was in
14 October of 2020?

15 MS. DANDENEAU: Objection to form.

16 A. I don't -- I don't recall.

17 Q. Was he -- did he have a title with
18 each of the advisors, to the best of your
19 recollection?

20 A. I don't recall.

21 Q. Do you know why he is included on
22 this email string?

23 A. I didn't add Dustin. It looks like
24 Lauren did. I don't know why she added him or
25 not. You would have to ask her.

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2 Q. Does Mr. Norris play a role in
3 formulating the advisors' responses to the
4 questions asked by the retail board in
5 connection with the 15(c) annual review?

6 MS. DANDENEAU: Objection to form.

7 A. He -- Dustin Norris is there in the
8 board meetings. But -- so he has a role, yes.

9 Q. Okay. And does Mr. Norris hold any
10 positions, to the best of your knowledge, in
11 relation to any of the retail funds?

12 A. I don't -- I don't believe he does.

13 Q. How about Mr. Post, do you know
14 whether Mr. Post holds any position in either
15 of the advisors?

16 A. I mean, he -- he -- yes.

17 Q. What is your understanding of the
18 positions that Mr. Post holds in relation to
19 the advisors?

20 MS. DANDENEAU: Objection to form.

21 A. He is an employee of NexPoint
22 Advisors. He is also the chief compliance
23 officer for -- for NexPoint.

24 Q. Who is the chief compliance officer
25 for HCMFA, if you know?

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2 MS. DANDENEAU: Objection to form.

3 A. That would be Jason as well.

4 Q. Okay. Now, looking at your
5 response, you noted initially that nothing was
6 owed under shared services. Do I have that
7 right in substance?

8 A. Yeah. I think I'm being responsive
9 to Lauren's question here, whether any of the
10 shared service invoices are outstanding.

11 Q. Right.

12 A. Yes.

13 Q. And that is because -- and that is
14 because the retail the retail board has asked
15 for the disclosure of all material obligations
16 that were owed to HCMLP either then or in the
17 future; isn't that right?

18 MS. DANDENEAU: Objection to form.

19 Q. We can go back down and look.

20 A. Look, I don't know if that's a
21 material item, I mean, again, but sure.

22 Q. Okay. But there were no shared
23 services outstanding; correct?

24 MS. DANDENEAU: Objection to form.

25 A. That is what this email seems to

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2 indicate.

3 Q. And you wouldn't have written it if
4 you didn't believe it to be true at the time;
5 correct?

6 A. Correct.

7 Q. And when you referred to shared
8 services outstanding, what you meant there was
9 that neither NexPoint nor HCMFA owed Highland
10 any money under the shared services agreements
11 that they had with Highland as of October 6th,
12 2020; right?

13 A. I don't know if it is as of October
14 6, 2020 or if it was from -- like through the
15 financials -- through the date of the
16 financials as of June 30.

17 Q. Okay. And then you noted that
18 HCMA -- the HCMFA note is a demand note; right?

19 A. Yes.

20 Q. And then you referred Ms. Thedford
21 to Kristin Hendrix for the term of the NexPoint
22 note. Do I have that right?

23 A. Yes.

24 Q. And then you refer to that agreement
25 that is referenced in the 2018 audited

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2 financials about Highland's agreement not to
3 make demand upon HCMFA until May 2021; correct?

4 A. Correct.

5 Q. And then -- and then the next thing
6 you write is that the attorneys think that BK
7 doesn't change that, but don't know for sure at
8 the end of the day.

9 Do you see that sentence?

10 A. Yes.

11 Q. Which attorneys were you referring
12 to?

13 A. I don't remember.

14 Q. Did you have a conversation with
15 attorneys concerning whether the bankruptcy
16 would change or alter in any way the agreement
17 not to make a demand under the HCMFA note?

18 A. Look, yeah, I mean, I don't
19 specifically remember, but generally, I mean,
20 it is in this email. I don't -- I don't -- I
21 don't -- I don't remember who I talked to or,
22 you know, was it inside counsel, outside
23 counsel, but obviously I talked to somebody.

24 Q. Do you have any recollection --

25 A. Well, I don't even know if it's --

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2 actually, it may not even have been me. I say
3 the attorneys in, you know, a lot of -- like I
4 talked about the team.

5 It could have been someone on the
6 team, like, hey, we need to run this down, and
7 maybe they talked to attorneys again and
8 relayed that information to me.

9 So I really don't know if I spoke or
10 someone else did or -- or, I mean, and maybe it
11 wasn't even from corporate accounting. Maybe
12 it was, you know, other -- I'm kind of
13 summarizing, you know, again, so I don't really
14 know -- I can't really say for sure. I don't
15 remember how I came about of this knowledge.

16 Q. I appreciate your efforts,
17 Mr. Waterhouse, but I will just tell you that
18 if I ask a question and you don't know the
19 answer or you don't recall, I'm happy to accept
20 that. I don't -- I don't want you to
21 speculate, so I want to be clear about that.
22 So I appreciate it.

23 Let me just ask you simply: Do you
24 know what attorneys -- can you identify any of
25 the attorneys who thought that the bankruptcy

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2 process didn't change the agreement?

3 A. I don't recall.

4 Q. Okay. Perfect.

5 And then let's look at the last
6 sentence. It says, quote: The response should
7 include, as I covered in the board meeting,
8 that both entities have the full faith and
9 backing from Jim Dondero, and to my knowledge
10 that hasn't changed.

11 Do you see that?

12 A. Yes.

13 Q. Okay. Prior to October 6th, 2020,
14 had you told the retail board that HCMFA and
15 NexPoint have the full faith and backing from
16 Jim Dondero?

17 A. Yes.

18 Q. Do you remember in the context in
19 which you told the retail board that?

20 A. I mean, generally, yes.

21 Q. Tell me what you recall.

22 A. So we were walking through the
23 financials from the advisors; right? So as I
24 described to you, you have got HCMFA and NPA.
25 And these -- the financials, you know, show

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2 they have liabilities on them that exceed
3 assets.

4 So the retail board has asked, okay,
5 you know, how -- you know, if -- if these
6 liabilities come due or they're payable, you
7 know, how does that come about?

8 And, you know, the response is,
9 well, the advisors have the -- the full faith
10 and backing from -- from Jim Dondero.

11 Q. And how did you know that the
12 advisors had the full faith and backing from
13 Jim Dondero? What was the basis for that
14 statement that you made to the retail board?

15 A. I talked to Jim about it at some
16 point in the past.

17 Q. And did you tell Mr. Dondero that
18 you were going to inform the retail board that
19 the advisors had his full faith and backing
20 before you actually told that to the retail
21 board?

22 A. I don't recall having that
23 conversation.

24 Q. Do you recall if you ever informed
25 Mr. Dondero that you had disclosed or told the

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2 retail board that the advisors had the full
3 faith and backing of Mr. -- Mr. Dondero?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall discussing that with
7 him at the time.

8 Q. When you told this to the board, was
9 Mr. Dondero participating in the discussion?

10 A. Not that I recall.

11 Q. Withdrawn. Was it not -- withdrawn.

12 Do you recall whether -- when you
13 covered this issue with the board, was that in
14 a -- a Zoom call or a Webex call? Was it a
15 telephone call? Was it in-person? Like where
16 were you physically in relation to the board?

17 A. I believe I was at home.

18 Q. Okay. Can you identify every person
19 that you recall who was present for this
20 disclosure other than -- other than the board
21 members themselves?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't recall everyone on the call.

25 Q. Can you identify anybody who was on

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2 the call?

3 A. Other than the board members?

4 Q. Yes.

5 A. Lauren Thedford. I mean, there
6 are -- there are many -- my section is just one
7 of many sections that are just -- you know, as
8 you can appreciate, this is a long board
9 meeting.

10 I can't recall specifically, really
11 even generally, or who was on when this was
12 discussed. But Lauren was typically on for the
13 entire time.

14 Q. I apologize if I asked you this, but
15 do either of Mr. Norris or Mr. Post hold any
16 positions relative to the retail funds?

17 A. I think you asked me this already,
18 John.

19 Q. Okay. I just don't recall. Can you
20 just refresh my recollection if I did, in fact,
21 ask you the question?

22 A. I don't believe -- if we can go
23 back. I don't believe Mr. Norris has a title
24 at the retail funds. Mr. -- and Mr. Post is
25 the CCO of the advisor, the advisors.

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2 Q. Okay. Do you know if either of them
3 have a position with the retail board -- with
4 the retail funds?

5 A. I don't believe Mr. Norris has a
6 position with the retail funds.

7 Q. All right. What about Mr. Post?

8 A. Mr. Post is the CCO of the advisors.

9 Q. Okay. Does he hold any position --

10 A. I don't believe so.

11 Q. -- with the retail funds?

12 A. I don't believe so.

13 Q. Okay.

14 A. I don't know if being the CCO for
15 the advisor conveys something for the retail
16 funds. Again, I am not -- that is the legal
17 compliance part of it. I don't know.

18 Q. Why did you tell the retail board
19 that the advisors have the full faith and
20 backing from Mr. Dondero?

21 MS. DANDENEAU: Objection to form.

22 A. It is -- it is -- it is what has
23 been discussed with them prior.

24 Q. And were you -- were you trying to
25 give them comfort that even though the

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2 liabilities exceeded the assets that the
3 advisors would still be able to meet their
4 obligations as they become due?

5 MS. DANDENEAU: Objection to form.

6 MS. DEITSCH-PEREZ: Object form.

7 A. I -- I can't -- I don't remember
8 specifically the conversation, but generally --
9 you know, generally, yes. And that is why --
10 but, you know, again, in this email saying, you
11 know, I am sure I qualified it with the retail
12 board, you know, as I said I like -- you know,
13 to my knowledge, that hasn't changed. But,
14 again, generally -- generally that is what I
15 remember.

16 Q. Okay. Do you recall if in the
17 advisors' response to the retail board's
18 question if the response included any statement
19 concerning Mr. Dondero and -- and the full
20 faith and backing that he was giving to the
21 advisors?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't -- I don't remember
25 specifically what was provided.

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2 Q. Okay.

3 A. And I don't really -- I don't really
4 remember generally either.

5 Q. Okay.

6 MR. MORRIS: So -- so, again, I'm
7 just going to ask Mr. Rukavina if your
8 clients can produce as soon as possible the
9 15(c) response, the written response that
10 the advisors made, if any, to the board's
11 Question No. 2.

12 I'm not looking for the whole
13 response, but I certainly want the response
14 to Question No. 2.

15 Q. Do you have a general understanding
16 as to the amount by which -- withdrawn.

17 Did -- did the assets of --
18 withdrawn.

19 Did the liabilities of HCMFA exceed
20 its assets in 2020?

21 MS. DANDENEAU: Objection to form.

22 MS. DEITSCH-PEREZ: Objection, form.

23 A. I believe I have already answered
24 that question earlier, I think. I believe I
25 said yes.

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2 Q. Okay. And did the liabilities of
3 NexPoint exceed its assets in 2020?

4 MS. DEITSCH-PEREZ: Objection to
5 form.

6 A. I don't believe so.

7 Q. Okay. So -- so it was only one of
8 the two advisors who had liabilities that
9 exceeded the value of the assets.

10 Do I have that right?

11 MS. DEITSCH-PEREZ: Objection to
12 form.

13 MS. DANDENEAU: Form.

14 A. Yes.

15 Q. And do you know, ballpark, the
16 amount by which the value of HCMFA's
17 liabilities exceeded their assets in 2020?

18 MS. DANDENEAU: Objection to form.

19 A. I don't -- I don't recall.

20 MR. MORRIS: I had specifically
21 requested in discovery the audited
22 financial reports for both advisors and
23 NexPoint. I think I may have gotten one
24 for NexPoint but I'm still waiting for the
25 balance. And I'm going to renew my request

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2 for those documents too.

3 Q. Let's go to the next exhibit, which
4 is Number 10. So I think it is in your stack,
5 Mr. Waterhouse.

6 MR. MORRIS: And we can take the one
7 down from the screen and put up Number 10
8 for everybody.

9 (Exhibit 10 marked.)

10 Q. And I don't know if you have ever
11 seen this before, but I'm really putting it up
12 on the screen for purposes of turning to the
13 very last page of the document.

14 So this is a document that we have
15 been -- that we premarked as Exhibit 10. And
16 we're turning to the last page of the document,
17 which is a document that was filed in the
18 adversary proceeding 21-3004. And -- no, I
19 apologize, I think we -- right there. Perfect.

20 And it is page 31 of 31.

21 MR. MORRIS: I think there may have
22 been some something erroneously stapled to
23 the hard copy that I gave you folks, but
24 I'm looking for page 31 of 31 in the
25 document that begins with the first page of

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2 Exhibit 10.

3 Q. Do you have that, Mr. Waterhouse?

4 A. I don't have it yet. I'm looking.

5 Q. All right. If you look at the top
6 right-hand corner, you will see it says page
7 hopefully something of 31?

8 A. Yes, I've got it now.

9 Q. Okay. You have got 31 of 31. You
10 can take a moment to read that, if you would
11 like.

12 A. (Reviewing document.) Okay.

13 Q. Have you ever seen this before?

14 A. I don't know if I have seen this
15 specific document, but, you know, I've --
16 I'm -- I'm aware of it.

17 Q. And is this the document that you
18 had in mind when you sent that email to
19 Ms. Thedford that we just looked at where you
20 said that Highland had agreed not to make a
21 demand upon HCMFA until May 2021?

22 A. Honestly, I don't -- it wasn't this
23 document. I mean, it's something like this,
24 yes. I mean, yes.

25 Q. Well --

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2 A. It is something like this, but I
3 don't think it was this specific document.

4 Q. Well, but this document does say in
5 the last sentence that Highland agreed not to
6 seek -- not to demand payment from HCMFA prior
7 to May 31, 2021; right?

8 A. Yes.

9 Q. And are you aware of any other
10 document that was ever created pursuant to
11 which Highland agreed not to demand payment on
12 amounts owed by HCMFA before May 31, 2021?

13 A. Hold on. Are you asking, am I aware
14 of a document that by HCMFA that basically says
15 otherwise?

16 Q. No. Let me try again.

17 Are you aware of any other document
18 pursuant to which -- pursuant to which Highland
19 agreed not to make a demand on HCMFA until May
20 31st, 2021?

21 A. I'm -- I think there was something
22 in connection with -- with the -- with the
23 audit that basically says the same thing.

24 Q. Okay. And do you think that the
25 audit is referring to this particular document?

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2 A. I don't know.

3 Q. All right. This document is dated
4 April 15, 2019. Do you see that?

5 A. I do.

6 Q. And do you remember that the audit
7 was completed on June 3rd, 2019?

8 A. Yes.

9 Q. And do you recall that the audited
10 financials -- and I'm happy to pull them up if
11 you would like, but do you recall that the
12 audited financials included a reference to the
13 agreement pursuant to which Highland agreed not
14 to make a demand until May 31st, 2021?

15 A. Yes, I remember.

16 Q. And as part of the process, would
17 you have expected the corporate accounting team
18 to have provided a copy of this document to
19 PwC?

20 MS. DANDENEAU: Objection to form.

21 A. Yes, I would have expected something
22 like this, or again, you know, some document
23 that basically states -- states the deferral
24 till May 31 of 2020.

25 Q. Okay.

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2 A. May 31 of 2021, excuse me.

3 Q. And this document states the
4 deferral that you just described; correct?

5 A. It does.

6 Q. And this document states the
7 deferral that was described in the audited
8 financial statements that we looked at before;
9 correct?

10 A. It does.

11 MR. MORRIS: Okay. Can we scroll
12 down just a little bit to see who signed on
13 behalf of the acknowledgment there.

14 Q. Okay. So Mr. Dondero signed this
15 document on behalf of both HCMFA and Highland;
16 do you see that?

17 A. I do.

18 Q. Okay. Did you discuss this document
19 or the -- withdrawn.

20 Did you discuss the concept of the
21 deferral with Mr. Dondero in the spring of
22 2019?

23 A. I think I testified I don't recall.

24 Q. Okay. Do you know whose idea it was
25 to issue the acknowledgment in this form?

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2 A. I don't recall.

3 MR. MORRIS: Can we scroll back up
4 to the document, please.

5 Q. Do you see in the beginning it says,
6 reference is made to certain outstanding
7 amounts loaned from Highland to HCMFA for
8 funding ongoing operations.

9 Do you see that?

10 A. Yes.

11 Q. And were you aware as the CFO of
12 Highland and as the treasurer of HCMFA that as
13 of April 15, 2019, Highland had made certain
14 loans to HCMFA to fund HCMFA's ongoing
15 operations?

16 A. Yes.

17 Q. And were you aware that those loans
18 were payable on demand and remained outstanding
19 as of December 31st, 2018?

20 A. Yes.

21 Q. And were you aware that those
22 amounts were payable on demand, and they
23 remained outstanding as of April 15, 2019?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Well, this -- this document dated
3 April 15, 2019 says they have been deferred to
4 May 31, 2021.

5 Q. Right. But I'm just sticking to the
6 first paragraph where they refer to the
7 outstanding amounts. And in the end it says
8 the -- it remained outstanding on December
9 31st, 2018, and I think you told me that you
10 understood that, and then I'm just trying to
11 capture the last piece of it.

12 Did you understand that there were
13 amounts outstanding from the loan that Highland
14 made to HCMFA to fund ongoing operations as of
15 April 15th, 2019?

16 A. Yes.

17 Q. Thank you. Let's look at the next
18 sentence. HCMFA expects that it may be unable
19 to repay such amounts should they become due
20 for the period commencing today and continuing
21 through May 31st, 2021.

22 Do you see that?

23 MS. DANDENEAU: Objection to form.

24 A. I do.

25 Q. As the CFO -- withdrawn.

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2 As the treasurer of HCMFA, did you
3 believe that -- do you believe that statement
4 was true and accurate at the time it was
5 rendered?

6 A. I mean, it -- it -- the answer to
7 that is I really didn't have any -- I didn't
8 have an opinion really.

9 Q. Did you do anything to educate
10 yourself in April of 2019 on the issue of
11 whether HCMFA could repay the amounts that it
12 owed to Highland should they become due?

13 A. I don't believe so.

14 Q. Did you at any time form any
15 opinions as to HCMFA's ability to repay all
16 amounts due to Highland should they become due?

17 A. Not really. I guess I don't...

18 Q. Well, you told the retail board that
19 HCMFA's liabilities exceeded their assets in
20 2020; correct?

21 A. Yes.

22 Q. Based on the work that you did to
23 prepare for the retail board, did you form any
24 view as to whether HCMFA would be unable to
25 repay the amounts that it owed to Highland

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2 should they become due?

3 MS. DANDENEAU: Objection to form.

4 A. I mean, I -- when you look at that,
5 to answer you, completely, you know, again,
6 if -- the response I gave the retail board was,
7 you know, the -- the advice -- HCMFA advisors
8 have the -- have the full faith and backing of
9 Jim Dondero. So I didn't form an opinion of
10 whether the advisor could pay it or not.

11 Q. Did you form any view as to whether
12 the advisors could repay the amounts that it
13 owed to Highland should they become due without
14 the full faith and backing of Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Form.

17 A. I mean, if you -- if you -- if you
18 take that last statement out, I mean, it would
19 be difficult for HCMFA to pay back demand notes
20 at that time.

21 Q. And it was precisely for that reason
22 that you told the retail board that -- that the
23 retail -- that the advisors had the full faith
24 and backing of Mr. Dondero; correct?

25 MS. DANDENEAU: Objection to form.

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2 A. I mean, yes, as the mouthpiece, I
3 was relaying information.

4 Q. Okay. And you relayed that
5 information with the knowledge and approval of
6 Mr. Dondero; correct?

7 MS. DEITSCH-PEREZ: Object to the
8 form.

9 A. As I stated in the email, I don't
10 believe, and I think I testified I don't
11 believe I had conversations with Mr. Dondero at
12 the time of that board meeting.

13 Q. Did you tell the retail board that
14 the advisors had the full faith and backing of
15 Mr. Dondero without Mr. Dondero's prior
16 approval?

17 A. Yeah, I -- I -- yes, I'm -- like I
18 said, I think I testified earlier, I'm sure I
19 qualified it as well.

20 Q. What do you mean by that?

21 MS. DANDENEAU: Objection to form.

22 A. Again -- again, like I said in the
23 email, it has the full faith and backing of Jim
24 Dondero unless that has changed.

25 Q. Actually that is not what you said,

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2 so let's put the email back up.

3 A. It is -- it is -- it is in the
4 email.

5 Q. Let's put the email back up. You
6 didn't say unless it has changed. You said you
7 believe it hasn't changed; right?

8 A. Okay. And to my knowledge that
9 hasn't changed, that is what it says.

10 Q. That's right.

11 A. But, again, I mean, that is -- I
12 don't know everything. And I'm not in every
13 conversation. I'm not -- to presume that I am,
14 is -- and you have to put myself -- as you
15 started this out, Mr. Morris, I was at home in
16 October of 2020 with COVID -- or, you know,
17 under these COVID times that we described is
18 very difficult.

19 We have all been working at home for
20 really the first time ever, undergoing
21 processes, procedures, control environments
22 that have been untested, and there is poor
23 communication.

24 So I am relaying, as I'm telling you
25 now, what is in the email. And unless

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2 something has changed -- to my knowledge, it
3 hasn't changed, but it could have changed.

4 Q. When you say that the advisors have
5 the full faith and backing from Mr. Dondero,
6 did you intend to convey that, to the extent
7 the advisors were unable to satisfy their
8 obligations as they become due, Mr. Dondero
9 would do it for them?

10 MS. DANDENEAU: Object to the form.

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 And, John, we have given you a lot
14 of leeway here but this does not seem
15 relevant to this case. You seem sort of
16 taking a complete sort of diversion into
17 the allegations and the complaint just
18 filed on Friday, and so I would ask you to
19 move on because --

20 MR. MORRIS: And I will tell you --
21 I will tell you that I have never read that
22 complaint cover-to-cover. I have nothing
23 to do with the prosecution of those claims.
24 And this issue that we're talking about
25 right now is related solely to the

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2 promissory notes that your clients refuse
3 to pay.

4 So I'm going to continue to ask my
5 questions, and I would ask the court
6 reporter to read back my last question.

7 (Record read.)

8 MS. DEITSCH-PEREZ: And then I
9 believe there were objections to form.

10 Q. You can answer the question.

11 A. Yes.

12 Q. Thank you very much, sir.

13 MR. MORRIS: Can we go back to the
14 other document, please?

15 Q. Mr. Waterhouse, do you know if this
16 document was ever shared with the retail board?

17 A. I don't recall.

18 Q. Did you ever share it with the
19 retail board?

20 A. I don't recall.

21 Q. Did you ever tell the retail board
22 about the substance of this document?

23 A. I don't recall.

24 Q. Did you ever tell the retail board
25 that Highland had agreed not to make a demand

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2 against HCMFA until May 2021?

3 A. I don't recall.

4 Q. Do you know whether anybody on
5 behalf of the advisors ever informed the retail
6 board that Highland had agreed on April 15,
7 2019, not to make a demand against HCMFA under
8 the promissory notes?

9 A. I don't recall.

10 Q. Did you instruct Ms. Thedford or
11 anybody else responding to the retail board's
12 15(c) inquiry to disclose this document?

13 A. Did I instruct Ms. Thedford or
14 anyone else to -- to -- to produce this, to
15 disclose this document? Is that what you -- I
16 just want to make sure.

17 Q. Uh-huh.

18 A. Yeah, I don't -- I don't recall.

19 Q. Did you instruct anybody to inform
20 the retail board, in response to their question
21 as part of the 15(c) process, to -- to tell the
22 retail board about Highland's agreement not to
23 make a demand until 2021?

24 MS. DANDENEAU: Objection to form.

25 A. I don't recall.

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2 Q. Did you ever inform PwC that HCMFA's
3 liabilities exceeded its assets?

4 MS. DANDENEAU: Object to the form.

5 A. I don't -- I don't think I told
6 them. I mean, they -- they audited the
7 financial statements.

8 Q. Did -- do you know if anybody on
9 behalf of Highland ever informed
10 PricewaterhouseCoopers that HCMFA may be unable
11 to repay amounts owing to Highland, should they
12 become due?

13 MS. DANDENEAU: Objection to form.

14 A. Yes. Again, I think I testified
15 earlier that -- that this was communicated to
16 the auditors.

17 Q. Ideally --

18 A. I don't know who exactly did that.
19 I don't recall doing it, but, yeah, it was --
20 it was communicated. And that is why -- I
21 mean, there is a disclosure in the financial
22 statements; right?

23 Q. There is, and that disclosure
24 relates to the last sentence of this document;
25 correct?

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2 A. Yes.

3 Q. Do you recall looking in the
4 document and seeing anything that was disclosed
5 with respect to the sentence above that?

6 A. No.

7 Q. Do you know whether anybody on
8 behalf of Highland ever informed
9 PricewaterhouseCoopers that HCMFA expects that
10 it may be unable to repay amounts due and owing
11 to Highland should they become due?

12 MS. DEITSCH-PEREZ: Object to the
13 form. I think that is the third time.

14 A. I don't recall. Again, as I said,
15 we -- all of this was given to the auditors.

16 Q. Do you know if Highland received
17 anything of value in exchange for its agreement
18 not to demand payment on amounts owed by HCMFA
19 prior to May 31st, 2021?

20 MS. DEITSCH-PEREZ: Object to the
21 form. That is the second time.

22 MS. DANDENEAU: Object to the form.

23 A. I have answered this question.

24 MR. RUKAVINA: Hold on. Object to
25 legal conclusion. Go ahead.

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2 A. I have answered this question
3 before.

4 Q. And the answer was no?

5 A. I'm not aware.

6 Q. Now, this acknowledgment can't
7 possibly apply to the two notes that you signed
8 on behalf of HCMFA because those notes were
9 signed on May 2nd and May 3rd, 2019; is that
10 right?

11 MS. DANDENEAU: Objection to form.

12 A. Unless there is a drafting error.

13 Q. Okay. Are you aware of a drafting
14 error?

15 A. I'm not aware. I didn't -- I wasn't
16 part of -- I didn't sign this note or this
17 acknowledgment. I didn't draft it.

18 Q. But you do see it is dated April 15,
19 2019; right?

20 A. Yes.

21 Q. And this was a document that was
22 actually included by the advisors in a pleading
23 they filed with the Court; right?

24 MR. RUKAVINA: Well, I don't know
25 that so I object to form.

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2 Q. Okay. Let's go to the first page of
3 the document and just confirm that.

4 MR. AIGEN: Mr. Morris, I just note
5 that you already said there was some error
6 with the document that is listed as
7 exhibit --

8 MR. MORRIS: No. No, no, no.

9 MS. DEITSCH-PEREZ: Oh, okay.

10 MR. MORRIS: What I said is that
11 there is a few pages that were mistakenly
12 stapled to the end of the document.

13 MS. DEITSCH-PEREZ: Okay.

14 MR. MORRIS: There is no problem
15 with this document.

16 MS. DEITSCH-PEREZ: And just so
17 we're clear that the document -- the pages
18 that start with defendant's amended answer
19 are not intended to be part of this
20 document?

21 MR. MORRIS: That's correct.

22 MS. DEITSCH-PEREZ: And that the --
23 but it is your representation that the rest
24 of the document is -- is -- is correct
25 because we don't -- we don't have any way

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2 of verifying that, we're just --

3 MR. MORRIS: You do, actually. You
4 could just go to Docket No. 21-3004.

5 MS. DEITSCH-PEREZ: If you want to
6 stop this deposition so we can go and pull
7 that document up, we're happy to do it. So
8 I am just asking you for your
9 representation.

10 MR. MORRIS: Sure. I gave that.

11 MS. DEITSCH-PEREZ: Okay.

12 Q. So do you see that this is a
13 document that was actually filed with the Court
14 by Highland Capital Management Fund Advisors?

15 A. No. I get with the first page in
16 the section. Maybe I'm looking at the wrong
17 thing. It says, Highland Capital Management.

18 Q. Don't worry about it. Don't worry
19 about it.

20 A. Maybe I went back -- okay.

21 MR. MORRIS: All right. Can we put
22 up on the screen Exhibit 2.

23 (Exhibit 2 marked.)

24 MR. MORRIS: I think it is
25 Exhibit 1.

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2 MS. DANDENEAU: I'm sorry, John, did
3 you say Exhibit 2 or Exhibit 1?

4 MR. MORRIS: It is Exhibit 2 in the
5 binders so it is premarked Exhibit 2. And
6 now I'm asking -- right there -- going to
7 Exhibit 1 to the document that was marked
8 as Exhibit 2.

9 MS. DANDENEAU: Got it. In the
10 binder there is no --

11 MS. DEITSCH-PEREZ: There is no
12 Exhibit 1.

13 MR. MORRIS: All right. So look at
14 the one on the screen.

15 Q. Do you see, Mr. Waterhouse, that
16 this is a promissory note dated May 31st, 2017,
17 in the approximate amount of \$30.7 million?

18 A. Yes.

19 Q. And do you see that the maker of the
20 note is NexPoint?

21 A. Yes.

22 Q. And that Highland is the payee; is
23 that right?

24 A. Yes.

25 Q. Okay. And do you see in Paragraph 2

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2 this is an annual installment note?

3 A. Can you scroll down.

4 Q. Sure.

5 MR. MORRIS: Can we scroll down --
6 yeah, there you go.

7 A. Right there, yeah. Yes.

8 MR. MORRIS: And can we scroll down
9 to the signature line.

10 Q. And do you recognize that as
11 Mr. Dondero's signature?

12 A. Yes.

13 Q. And is this the promissory note that
14 we talked about earlier where NexPoint had made
15 certain payments in the aggregate amount of
16 about 6 to \$7 million against principal and
17 interest?

18 A. I don't recall discussing the
19 aggregate principal amounts of 6 to \$7 million,
20 but -- so I don't -- I don't recall that prior
21 discussion with those amounts.

22 Q. All right. Let's take a look.
23 NexPoint always included this promissory note
24 as a liability on its audited financial
25 statements; right?

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2 A. Yes.

3 Q. And NexPoint had its financial
4 statements audited; isn't that correct?

5 A. Yes.

6 Q. And was the process of NexPoint's
7 audit similar to the process you described
8 earlier for Highland and HCMFA?

9 A. Yes, it is similar.

10 Q. Okay.

11 MR. MORRIS: Can we put up
12 NexPoint's audited financials and let
13 everybody know what exhibit number it is,
14 La Asia?

15 MS. CANTY: It is going to be
16 Exhibit 46.

17 (Exhibit 46 marked.)

18 Q. And do you see, sir, that we've put
19 up NexPoint Advisors' consolidated financial
20 statements and supplemental information for the
21 period ending December 31st, 2019?

22 A. Yes.

23 Q. Did you participate in the process
24 whereby these audited financial statements were
25 issued?

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2 A. I didn't participate directly, as
3 I've described before, about the -- the team
4 performing the audit.

5 Q. Do you recall when the audit of
6 NexPoint's financial statements for the period
7 ending December 31st, 2019 was completed?

8 A. Yes.

9 Q. And when do you recall it being
10 completed?

11 A. In January of 2021.

12 Q. Do you know why the 2019 audit
13 report wasn't completed until January of 2021?

14 A. Yes.

15 Q. Why was the NexPoint audit report
16 for the period ending 12/31/19 not completed
17 until January 2021?

18 A. Because we had to deal with working
19 from home from -- with COVID, and on top of all
20 of our daily responsibilities and job duties
21 at -- at providing -- at Highland providing
22 services to NexPoint, we had to do all of this
23 extra work for a bankruptcy that was filed in
24 October of 2019.

25 MR. MORRIS: Can we go to the

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2 balance sheet on page 3? Okay. Stop right
3 there.

4 Q. Do you see under the liabilities
5 section, the last item is note payable to
6 affiliate?

7 A. Yes.

8 Q. And is that the note that we just
9 looked at?

10 MS. DANDENEAU: Objection to form.

11 Q. Withdrawn.

12 Is that the approximately
13 \$30 million note that we just looked at that
14 was dated from 2017?

15 MS. DANDENEAU: Objection to form.

16 A. I believe no.

17 Q. Okay. You're not aware of any other
18 note that was outstanding from NexPoint to
19 Highland as of the end of the year 2019, other
20 than that one \$30 million note; right?

21 A. I don't recall.

22 Q. And as of the end of 2019, the
23 principal amount that was due on the note was
24 approximately \$23 million; right?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. Approximately.

4 Q. And does that refresh your

5 recollection that between the time the note was

6 executed and the end of 2019, that NexPoint had

7 paid down approximately \$7 million?

8 A. Yes. If we are just doing the math,

9 yes.

10 Q. Okay. Did NexPoint complete its

11 audit from 2020?

12 A. Sorry, you kind of broke up. Do

13 NexPoint complete?

14 Q. The audit of its financial

15 statements for the period ending December 31st,

16 2020?

17 A. No.

18 Q. No, it's not complete?

19 A. No, it is not complete.

20 Q. Did HCMFA complete its audit for the

21 year ending December 31st, 2020?

22 A. No.

23 MR. MORRIS: Can we go to page 15,

24 please, the paragraph at the bottom.

25 Q. Do you see that NexPoint has

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2 included under notes payable to Highland a
3 reference to the amounts that were outstanding
4 as of the year-end 2019 under the note that we
5 looked at just a moment ago?

6 A. Yes. Are you talking about the
7 second paragraph?

8 Q. I'm actually talking about first
9 paragraph. Do you understand that the first
10 paragraph is a reference to the 2017 note, and
11 the amounts that were -- the principal amount
12 that was outstanding as of the end of 2019?

13 MS. DANDENEAU: Objection to form.
14 John, do you mean the first paragraph of
15 that page?

16 MR. MORRIS: No, the first paragraph
17 under notes payable to Highland.

18 A. Yeah, I see the paragraph, and
19 again, this is what I answered earlier. I
20 believe so, just because I don't -- again, this
21 is a number in a balance sheet, and without
22 matching it up and seeing the detail with the
23 schedule like I kind of talked about for
24 Highland's financial statements, it is a little
25 bit more difficult to tie everything in

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2 perfectly together.

3 Q. Okay. But you're not aware of any
4 note that was outstanding at the end of 2019
5 from NexPoint to Highland other than whatever
6 principal was still due and owing under the
7 \$30 million note issued in 2017; correct?

8 A. Well, it -- I don't -- there is
9 reference in the second paragraph. I don't --
10 I don't -- I don't recall what that is
11 referring to, so I don't -- I don't know.

12 Q. Well, if you listen carefully to my
13 question, right, I'm asking about notes that
14 were outstanding at the end of 2019, and if we
15 look at the paragraph you just referred to, it
16 says that during the year there were new notes
17 issued totaling \$1.5 million, but by the end of
18 the year, no principal or interest was
19 outstanding on the notes.

20 Do you see that?

21 A. Oh, I do, yes.

22 Q. So does that refresh your
23 recollection that there were no notes
24 outstanding from NexPoint to Highland other
25 than the principal remaining under the original

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2 \$30 million 2017 note that we looked at a
3 moment ago?

4 A. Well, we're at the bottom of the
5 page. Is there anything on page 16?

6 Q. That is a fair question, sure. That
7 is it.

8 A. Okay. So it appears that that is
9 the only note that is detailed in the notes in
10 the financial statement.

11 Q. And you don't have any memory of any
12 other note other than the 2017 note, right,
13 being outstanding as of the end of the year?

14 A. I deal with thousands of
15 transactions every year. I don't really have a
16 very specific memory for what exactly was
17 outstanding.

18 MR. MORRIS: Why don't we take a
19 break now. We've been going for a little
20 while. It's 3:26. Let's come back at
21 3:40.

22 VIDEOGRAPHER: We're going off the
23 record at 3:26 p.m.

24 (Recess taken 3:26 p.m. to 3:39 p.m.)

25 VIDEOGRAPHER: We are going back on

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2 the record at 3:39 p.m.

3 Q. All right. Mr. Waterhouse, we -- I
4 don't think we have a lot more here.

5 To the best of your knowledge and
6 recollection, were all affiliate loans and all
7 loans made to Mr. Dondero recorded on
8 Highland's books and records as assets of
9 Highland?

10 MS. DANDENEAU: Object to the form,
11 asked and answered.

12 A. To my knowledge, yes.

13 Q. Okay. Can you recall any loan to
14 any affiliate or Mr. Dondero that was not
15 recorded on Highland's books and records as an
16 asset?

17 A. Like during my time as CFO? I don't
18 recall.

19 Q. How about after the time that you
20 were CFO? Did you recall that there was a loan
21 by Highland to an affiliate or to Mr. Dondero
22 that hadn't been previously recorded on
23 Highland's books as an asset?

24 MS. DANDENEAU: Objection to form.

25 A. I guess I don't understand the

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2 question. I left Highland as of -- I'm not
3 aware of -- I left Highland in February --
4 probably the last day of February of 2021.

5 Q. Okay.

6 A. I'm not -- I'm not aware of any --
7 I'm not aware of anything past that date.

8 Q. Okay. While you were the CFO at
9 Highland, did Highland prepare in the ordinary
10 course of business a document that reported
11 operating results on a monthly basis?

12 A. Yes.

13 Q. And are you generally familiar with
14 the monthly operating reports?

15 A. Yeah. You are referring to the
16 reports that we filed to the Court every month?

17 Q. I apologize, I'm not. I'm taking
18 you back to the pre-petition period. There was
19 a report that I have seen that I'm going to
20 show you, but I'm just asking for your
21 knowledge.

22 MR. MORRIS: Let's put it up on the
23 screen, Exhibit 39.

24 (Exhibit 39 marked.)

25 Q. Do you see this is a document that

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2 is called operating results?

3 A. Yeah, that's the title of it.

4 Q. Okay. And was a report of operating
5 results prepared by Highland on a monthly basis
6 during the time that you served as CFO?

7 A. No.

8 Q. Are you familiar with a document of
9 this type? And we can certainly look at the
10 next page or two to refresh your recollection.

11 A. I'm just looking at the title. I
12 don't really -- again, as I discussed before, I
13 don't have any records or documents or emails
14 or appointments or anything that I was able to
15 use prior to -- prior to this deposition, so
16 I'm doing the best I can.

17 Q. Okay. You don't need to apologize.
18 I'm just asking you if you are familiar with
19 the document called Operating Results that was
20 prepared on a monthly basis at Highland?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 Q. If you're not, you're not.

24 A. I don't believe this was prepared on
25 a monthly basis.

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2 Q. Okay. Do you see that this one
3 is -- is dated February 2018?

4 A. Yes.

5 Q. Do you have -- do you believe --
6 have you ever seen a document that was
7 purporting to report operating results for
8 Highland?

9 MS. DANDENEAU: Objection to form.

10 A. Yes.

11 Q. Okay. And when you say that you
12 don't believe it was produced on a monthly
13 basis, was it produced on any periodic bases to
14 the best of your recollection?

15 A. I believe it was -- it was prepared
16 on an annual basis.

17 Q. Okay.

18 MR. MORRIS: Can we look at the next
19 page.

20 Q. Do you see that there is a statement
21 here called: Significant items impacting
22 HCMLP's balance sheet?

23 And it is dated February 2018.

24 A. Yes.

25 Q. Do you recall that there was a

1 WATERHOUSE - 10-19-21

2 report that Highland prepared that identified
3 significant items impacting the balance sheet?

4 A. A report that was prepared.

5 Q. Let me ask a better question: Did
6 Highland prepare reports to the best of your
7 recollection that identified significant items
8 that impacted its balance sheet?

9 A. Well, so Highland prepared a -- a
10 monthly close package. And maybe I'm
11 getting -- and -- and maybe change names at one
12 time or maybe I'm just -- again, just
13 misremembering -- but in that, yes, there is a
14 page that would detail just changes in -- you
15 know, just changes month over month on the
16 balance sheet.

17 Q. Okay. And maybe it is my fault.
18 Maybe I didn't know the proper name for it.
19 But let's use the phrase "monthly close
20 package."

21 Did Highland prepare a monthly close
22 package in the ordinary course of business
23 during the time that you served as CFO?

24 MS. DANDENEAU: Objection to form.

25 A. Yes.

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2 Q. And did the monthly close package
3 that Highland prepared include information
4 concerning significant items that impacted
5 Highland's balance sheet?

6 A. Yes, it had a page like that is --
7 that is on the screen that detailed items
8 like -- of that nature.

9 Q. And do you know who -- was there
10 anybody at Highland who was responsible for
11 overseeing the preparation of the monthly
12 reporting package?

13 A. That would have been -- again, it
14 varies over time during my tenure as CFO.
15 It -- it varied over -- over time, but -- but
16 typically a -- a corporate accounting manager.

17 Q. And who were the corporate
18 accounting managers during your tenure as CFO?

19 A. It would have been Dave Klos and
20 Kristin Hendrix.

21 Q. And did the corporate accounting
22 manager deliver to you drafts of the monthly
23 close package before it was finalized?

24 A. Sometimes.

25 Q. Was that the practice even if there

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2 were exceptions to the practice?

3 A. The practice meaning that they
4 sometimes lured them to me?

5 Q. That that was the expectation even
6 if circumstances prevented that from happening
7 from time to time.

8 MS. DEITSCH-PEREZ: Object to the
9 form.

10 A. I -- I would say it started out that
11 way but over the years it -- it was not
12 enforced.

13 Q. Okay. So you were -- you reviewed
14 and approved monthly -- monthly reporting
15 packages for a certain period of time and then
16 over time you stopped doing that.

17 Do I have that right?

18 MS. DANDENEAU: Objection to form.

19 A. Yes, I mean, if you're talking about
20 a formal meeting where we sit down and go
21 through and approve it. I would say that was
22 standard practice a decade -- you know, early
23 on. And as time went on that -- that -- that
24 practice wasn't followed.

25 Q. Okay.

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2 A. And, quite frankly, I don't even
3 know if these were -- these were sent to me
4 even in any capacity.

5 Q. What was the purpose of preparing
6 the monthly reporting package -- withdrawn.

7 What was the purpose of preparing
8 the monthly close package?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. The -- the original purpose was so
12 that it would just -- it would be a report that
13 was reviewed monthly with senior management.

14 Q. Who was included in the idea of
15 senior management?

16 A. You know, I think originally when
17 this was conceived that would have been like
18 Jim Dondero and Mark Okada.

19 Q. Were monthly reporting -- withdrawn.

20 Were monthly close packages prepared
21 to the best of your knowledge until the time
22 you left Highland?

23 A. To my knowledge -- I don't know,
24 actually. I mean, to my knowledge, I believe
25 it was being -- that was still being done. I

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2 don't know because, again, I wasn't reviewing
3 them. I hadn't reviewed a close package for --
4 for a long time. But I believe the standard
5 practice that was still being carried out.

6 Q. Did you ever have any discussions
7 with the debtor's independent board concerning
8 any promissory notes that were issued by any of
9 the affiliates or Mr. Dondero?

10 A. I can't -- I can't -- I can't recall
11 specifically.

12 Q. Did you speak with the independent
13 board from time to time?

14 A. Yes, from -- from -- from time to
15 time I had discussions with the independent
16 board members, you know, either -- either, you
17 know, by themselves or wholly, you know, as --
18 as a -- as a combined work.

19 Q. Okay. Before we talk about
20 Mr. Seery, do you recall ever having a
21 conversation with Mr. Nelms or Mr. Dubel
22 concerning any promissory note that was
23 rendered by one of the affiliates or
24 Mr. Dondero to Highland?

25 A. I don't recall any conversations

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2 specifically.

3 Q. Do you know if the topic was ever
4 discussed, even if you don't remember it
5 specifically?

6 MS. DANDENEAU: Objection to form.

7 A. It -- it -- it may have. I don't
8 know. I don't recall.

9 Q. Do you recall ever discussing any
10 promissory note issued by any of the affiliates
11 or Mr. Dondero with James Seery?

12 A. I don't -- I don't recall
13 specifically.

14 Q. Do you recall generally ever
15 discussing the topic of promissory notes issued
16 by any of the affiliates or Mr. Dondero to
17 Highland with Mr. Seery?

18 A. Nothing -- nothing is really jumping
19 out at me.

20 Q. Do you recall if you ever told
21 Mr. Seery that any of the affiliates or
22 Mr. Dondero didn't have an obligation to pay
23 all amounts due and owing under their notes?

24 A. I don't recall having that
25 conversation.

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2 Q. Did you ever tell Mr. Seery that you
3 had any reason to believe that the amounts
4 reflected in the notes issued by the affiliates
5 and Mr. Dondero were invalid for any reason?

6 A. I don't -- I don't recall.

7 Q. Did you tell Mr. Dondero -- did you
8 tell Mr. Seery that you thought the promissory
9 notes issued by the advisors and Mr. Dondero
10 that were outstanding as of the petition date
11 were assets of the estate?

12 A. I don't recall having a specific
13 conversation about those -- you know, those
14 notes outstanding as -- as of the petition date
15 being assets on the estate. I mean, we put
16 together -- you know, they're in the books and
17 records of the financial statements. I don't
18 recall having a specific conversation.

19 Q. Did you ever prepare any documents
20 that were delivered to Mr. Seery that concerned
21 the promissory notes issued by any of the
22 affiliates or Mr. Dondero?

23 MS. DANDENEAU: Objection to form.

24 A. Did I produce any that concerned --
25 you mean did I just -- did I give Mr. Seery

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2 anything that -- that said I have concerns over
3 these notes?

4 Q. No. Let me try again. Maybe it was
5 my question.

6 Did you ever give Mr. Seery any
7 information concerning any of the notes that
8 were issued by any of the affiliates or
9 Mr. Dondero?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall if I did or not. I
12 don't -- I don't remember. I mean, you have my
13 emails. You may have asked. Again, I don't --
14 I don't know.

15 MR. MORRIS: Can we put up the
16 document that has been premarked as Exhibit
17 39?

18 MS. DANDENEAU: John, that is this
19 document, isn't it?

20 MR. MORRIS: Oh, yeah, it might be,
21 as a matter of fact. Let's go to Number
22 40.

23 (Exhibit 40 marked.)

24 Q. During the bankruptcy,
25 Mr. Waterhouse, did you prepare documents that

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2 were filed with the bankruptcy court?

3 A. I didn't -- I didn't prepare them
4 personally.

5 Q. Did people prepare them under your
6 direction?

7 A. Yes. There were members of the team
8 that prepared them, and they worked in -- you
9 know, there were members of DSI that were
10 involved in the process as well.

11 Q. To the best of your knowledge, did
12 DSI rely on the employees of Highland for the
13 information that they used to prepare the
14 bankruptcy filings?

15 A. Yes. The books and records were
16 with the Highland personnel.

17 Q. Okay. And do you see on the screen
18 here, there is a document that we have marked
19 as Exhibit 40 that is -- that is titled Summary
20 of Assets and Liabilities?

21 A. Uh-huh.

22 Q. Okay. And do you recall reviewing
23 any summary of assets and liabilities before it
24 was filed with the bankruptcy court?

25 A. Yes, I recall reviewing this at a

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2 high level.

3 Q. And did you believe that it was
4 accurate at the time it was filed?

5 A. I didn't have any other reason to
6 believe otherwise.

7 Q. Okay. Do you see that the total
8 value of all properties listed in Part 1 is
9 approximately \$410 million?

10 MS. DEITSCH-PEREZ: Objection to
11 form.

12 A. Yes, it is in 1c.

13 Q. Yes.

14 A. Yes, I see that.

15 Q. Okay. If we go to the second page,
16 now I think I may just have excerpts here, just
17 so everybody is clear, but if we scroll down to
18 the second page, you will see that there is
19 a -- a little further. There you go. You will
20 see there is a reference to Item 71, notes
21 receivable.

22 Do you see that?

23 A. I do.

24 Q. And that was a reference to the
25 notes receivable from the affiliates and

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2 Mr. Dondero, among others; is that right?

3 MS. DANDENEAU: Objection to form.

4 A. Yes. The affiliate notes and the
5 Dondero notes were in this amount, but they
6 weren't -- again, like you said, and among
7 others.

8 Q. Okay. We will look at the
9 specificity because I'm not playing gaming
10 here, but do you know if the \$150 million of
11 notes receivable was included within the
12 \$410 million of total value of the debtor's
13 assets?

14 MS. DANDENEAU: Objection to form.

15 A. I -- I -- I believe so.

16 Q. Right. And so is it fair to say
17 that as of the date this document was prepared,
18 the notes receivable were more than one-third
19 of the value of the debtor's assets?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 MS. DANDENEAU: Object to the form.

23 A. Again, if you are just taking the
24 math, 150 divided by whatever the \$400 million
25 number is above, then yes, you get there.

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2 Q. Okay.

3 A. You know, but as of the time of this
4 filing, that is what was put in this filing,
5 right, but, you know, I mean, numbers --
6 numbers change, facts and circumstances change.

7 Q. But as the CFO of Highland, the
8 debtor in bankruptcy, did you believe that this
9 number accurately reflected the total amount
10 due under the notes receivable?

11 A. That is what we had in our books and
12 records.

13 Q. Okay. And did you believe as the
14 CFO that the books and records accurately
15 reported the then value of the debtor's assets?

16 MS. DANDENEAU: Objection to form.

17 A. We didn't -- as part of this filing,
18 there was no fair value measurement or
19 anything. These were just accounting entries
20 for the promissory notes. There is no analysis
21 for impairment or fair market value adjustments
22 or anything of that nature. This is purely
23 taking numbers and putting them in our form.

24 Q. Did you do any impairment analysis
25 at any time while you were employed by

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2 Highland?

3 A. Yes, we did do impairment analysis
4 on -- on assets.

5 Q. Okay. Did you ever do an impairment
6 analysis on any of the promissory notes that
7 were given to Highland by any of the affiliates
8 or Mr. Dondero?

9 A. Not that I recall.

10 Q. Under what circumstances do you
11 prepare impairment analyses?

12 A. As -- as -- if you're preparing
13 financials in accordance with GAAP, generally
14 accepted accounting principles, if you're
15 preparing full GAAP financials, you should be
16 preparing -- you should be undergoing on a
17 periodic basis any fair market value
18 adjustments to assets.

19 As I was instructed at the time of
20 the petition date, we weren't producing GAAP
21 financials. So this wasn't something I was
22 worried about nor concerned about.

23 Q. Okay. Were NexPoint and HCMFA and
24 Highland's audited financial statements
25 prepared in accordance with GAAP?

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2 A. The audited financials -- yes,
3 audited financial statements are prepared in
4 accordance with GAAP.

5 Q. Do you recall whether any of
6 Highland or HCMFA or NexPoint ever made a fair
7 market value adjustment to any of the notes
8 issued by any of the affiliates or Mr. Dondero
9 to Highland?

10 A. I do not recall that happening, but
11 the -- it is because under -- under GAAP,
12 the -- the treatment of liabilities is
13 different than assets.

14 Q. Okay. So then let's just focus on
15 Highland's audited financial statements.

16 The last audited financial
17 statements were for the period ending December
18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had -- you had an obligation
21 to disclose anything to PricewaterhouseCoopers
22 concerning any subsequent events between the
23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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2 A. Correct.

3 Q. Okay. To the best of your
4 knowledge, as Highland's CFO, did Highland ever
5 make any fair market value adjustments to any
6 of the promissory notes that were carried on
7 its balance sheet and that were issued by any
8 of the affiliates or Mr. Dondero?

9 A. I think I answered that question
10 earlier. I don't recall doing that for any of
11 the -- those -- those notes. So it would have
12 included the audit for the -- for the 2018
13 period.

14 Q. Okay.

15 MR. MORRIS: Can we go to the next
16 page.

17 Q. Do you see this is a note a list of
18 notes receivable? Do you see that?

19 A. Yes, I do.

20 Q. And do you see that this ties into
21 the page that we were just looking?

22 A. I'm sorry, can we go back to the
23 prior page? I mean, it was at 150,331,222. It
24 was on the prior page. Next page. Yes, it
25 agrees.

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2 Q. Okay. So now let's look at that
3 schedule. So this was the face amount of all
4 of the promissory notes that Highland held at
5 the time this document was filed with the
6 bankruptcy court; right?

7 A. Yes.

8 Q. There is a footnote there that says,
9 doubtful or uncollectible accounts are
10 evaluated at year-end.

11 Do you see that?

12 A. I do.

13 Q. Okay. And is it fair to say that as
14 of the year-end 2018, the year before this,
15 that to the extent any of these notes were
16 outstanding at that time, they weren't deemed
17 to be doubtful or uncollectible?

18 A. Yeah. For the 2018 audit, there
19 weren't any -- there weren't any adjustments to
20 fair value.

21 Q. Okay. And during the bankruptcy, do
22 you recall that Highland subsequently reserved
23 for the Hunter Mountain Investment Trust note?

24 A. Yes.

25 Q. Why did Highland -- were you

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2 involved in the decision to reserve the Hunter
3 Mountain Investment Trust note?

4 A. I was not.

5 Q. Do you know why Highland decided to
6 reserve for the Hunter Mountain Investment
7 Trust note?

8 A. I don't know yet decision was made.
9 I believe it was made by someone at DSI.

10 Q. Okay. I'm just asking if you know
11 why.

12 Did you ever ask anyone why they
13 reserved for that particular note?

14 A. I don't recall.

15 Q. Do you know whether the debtor
16 reserved for any other note on this list during
17 the bankruptcy?

18 A. Again, I don't recall. I wasn't
19 part of any process of -- again, like any fair
20 value adjustments or anything to that degree.
21 Like I said, a lot of that was done by DSI and
22 it was kind of out of our court.

23 Q. Okay. Do you know if any note
24 receivable on this list was ever deemed by the
25 debtor to be doubtful or uncollectible?

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2 A. I don't -- I don't have a
3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with
5 anybody at any time about whether any of the
6 notes receivable on this list should be deemed
7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were
9 told we didn't have to keep GAAP financials.
10 We weren't having -- you know, there is no
11 underlying audits being performed, so I mean,
12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation
15 with anybody about any of the notes receivable
16 and whether they should be deemed to be
17 doubtful or uncollectible? Did you have the
18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody
22 that you believed any of the notes receivable
23 on this list should be doubtful -- should be
24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall. I mean, it may have
3 happened, you know, again, when we initially
4 getting DSI up to speed and going through
5 financials, it may have happened, but I don't
6 recall specifically.

7 Q. While you were the CFO of Highland
8 during the time that the company was in
9 bankruptcy, did you have any reason to believe
10 that any of the notes receivable on this list
11 other than Hunter Mountain Investment Trust
12 should have been characterized as doubtful or
13 uncollectible?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Form.

16 A. I didn't know. I didn't form an
17 opinion. Bankruptcy was new to me. It still
18 is new to me, even after going through this.
19 So I really didn't know what to expect nor
20 really -- you know, I didn't know.

21 MR. MORRIS: I move to strike.

22 Q. During the period of Highland's
23 bankruptcy when you were serving as CFO, did
24 you have any reason to believe any of the notes
25 on this list were doubtful or uncollectible?

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2 MS. DEITSCH-PEREZ: This is like the
3 fifth time you've asked it. Object to the
4 form.

5 MR. MORRIS: I'm moving to strike,
6 if you haven't noticed, because he's not
7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering
9 the question, you just didn't like it, like
10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't -- we brought up a
14 myriad of issues at the start of the bankruptcy
15 case. I don't recall if this was one of them,
16 but, again, there are a lot of things we
17 couldn't change. Even, you know, I was told
18 status quo, blah, blah, blah, right, there is a
19 stay, you can't -- you know, I don't recall
20 specifically, but that doesn't mean it didn't
21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in
24 bankruptcy and you served as CFO, did you have
25 any reason to believe that any of the notes

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2 receivable on this list were doubtful or
3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,
9 yes, we -- at the beginning after filing and we
10 were getting DSI and others up to speed, you
11 know, we had a myriad of discussions of a lot
12 of things and this was likely one of them. I
13 don't -- but I don't recall specifically we
14 talked --

15 Q. I don't want to know -- I don't want
16 to know what was --

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him
19 finish his answer.

20 A. I spoke -- we had -- we were
21 bringing Fred Karesa and Brad Sharp (phonetic)
22 up to speed on all of these items, contracts,
23 and investments and going through -- we had
24 hours and hours and hours of discussion. And
25 then not only do I have to repeat this not

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2 once, twice, three, four times with -- you
3 know, I mean, we -- I don't -- I don't remember
4 the sum culmination of all these discussions.
5 They all kind of blend together.

6 MR. MORRIS: Okay. I move to strike
7 and I will try one more time.

8 Q. Did you ever tell anybody at DSI
9 that you believed any of the notes receivable
10 on this list were doubtful or uncollectible?

11 MS. DANDENEAU: Object to form.

12 A. Potentially.

13 Q. Potentially you told them or
14 potentially they were doubtful or
15 uncollectible?

16 A. Potentially I told them that we
17 needed to look at the value of these -- of
18 these assets.

19 Q. Okay. Did you -- okay. It is
20 potential that you told them and it is
21 potentially that you didn't; right?

22 MS. DANDENEAU: Objection to form.

23 A. I've gone through that. I don't
24 recall specifically.

25 Q. So you should just -- I don't want

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2 to tell what you to do. Do you have --

3 MS. DANDENEAU: Good.

4 Q. Other than -- other than telling
5 them that they should look at the values, do
6 you have any recollection whatsoever of ever
7 having told anybody at DSI that any of the
8 notes receivable on this page were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. I recall having general discussions
14 about everything on our balance sheet which
15 would have included these -- these notes
16 receivable.

17 Q. Okay.

18 A. I don't recall specifically where
19 those discussions delved into.

20 Q. Do you recall any discussion at all
21 on the topic of whether any of these notes on
22 this list were doubtful or uncollectible?

23 MR. AIGEN: Mr. Morris, how on earth
24 is that question different from the
25 question that you just asked for the last

1 WATERHOUSE - 10-19-21

2 five times? I mean, really I thought you
3 were -- (overspeak.)

4 MR. MORRIS: Because he never
5 answered it.

6 MS. DEITSCH-PEREZ: Are you
7 listening to him?

8 MR. MORRIS: You know --

9 MS. DEITSCH-PEREZ: He basically
10 said that he had a conversation with DSI
11 that went over all of this stuff and that
12 conversation could have included the notes
13 but he doesn't recall specifically.

14 What more do you want him -- to ask
15 of him?

16 MR. MORRIS: I want him -- I would
17 love him to say -- I would like him to
18 testify to the truth, and that is he has no
19 recollection.

20 MS. DEITSCH-PEREZ: Well, the truth
21 as you would like to see it, but -- but he
22 is testifying truthfully. And I -- and, by
23 the way, I move to strike that comment --

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: -- because it

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2 suggests that he has not testified
3 truthfully.

4 MR. MORRIS: I will ask my question
5 again. And if at any time you want to
6 direct him not to answer, that is your
7 prerogative.

8 Q. Mr. Waterhouse, do you have any
9 recollection at all of ever telling anybody
10 from DSI that any of these notes were doubtful
11 or uncollectible?

12 MS. DANDENEAU: Object to form.

13 A. I don't remember specifically.

14 Q. Do you remember generally that
15 specific topic?

16 A. We generally talked about assets,
17 values. If -- we had discussions of that and
18 collectability in nature. I mean, of Highland,
19 the funds, the CLOs, the entire complex. We
20 had discussions like that, which is, you know,
21 as you look at a billion dollar consolidated
22 balance sheet.

23 So I generally remember -- this is
24 billions of dollars, including these assets --
25 having discussions of this -- of this type.

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2 Q. Do you believe that an affiliate
3 loan on this list was doubtful or
4 uncollectible? Would you have told that to
5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like -- again, if we --
9 if -- if we weren't preparing financial
10 statements in accordance with GAAP, and -- you
11 know, if DSI at that point -- they were --
12 again, I was new to bankruptcy.

13 The CRO is -- we are delegating
14 everything to the CRO. All the decisionmaking.
15 Remember -- remember when you and I went into
16 Delaware Court and we were saying DSI basically
17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and
19 basically we're running everything through DSI.
20 That was what this was like in the early part.

21 Everything was communicated through
22 DSI. So DSI says this. DSI says that. That
23 is what we're doing, and we're pointing out
24 things to them.

25 Now, they decide what direction this

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2 goes.

3 Q. Did you point out that any of
4 these --

5 A. I don't recall specifically.

6 Q. Okay. At any time that you served
7 as Highland's CFO, did you ever point out to
8 DSI that any of these loans were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. If you're asking me if I had a
14 conversation with DSI, if any of these loans
15 were doubtful or uncollectible, I don't recall
16 specifically.

17 Q. Do you recall that the debtor filed
18 on the docket monthly operating reports?

19 A. Yes.

20 Q. You prepared those personally,
21 didn't you?

22 MS. DEITSCH-PEREZ: Objection to
23 form.

24 A. I didn't personally prepare them,
25 the team did with DSI.

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2 Q. But you signed them; correct?

3 A. My signature is on the MORs.

4 Q. And you signed them as the preparer
5 of the document; correct?

6 A. Yes, I did this pursuant to DSI's
7 instructions.

8 Q. Okay. You wouldn't have signed the
9 document if you didn't believe it to be
10 accurate; correct?

11 A. If I had reason to believe it
12 wasn't, presumably I wouldn't have signed it.

13 Q. Okay. And do you have any reason to
14 believe right now that any monthly operating
15 report that has your signature on it was
16 inaccurate in any way?

17 MS. DEITSCH-PEREZ: Object to the
18 form.

19 A. My understanding of the monthly
20 operating reports is we were filing them in
21 accordance with the standards set by the Court.
22 It wasn't -- you know, again, I don't -- you
23 know, it wasn't GAAP. It wasn't these other
24 standards, so I testified I didn't have
25 experience in this. The CRO was running the

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2 show. I followed their advice.

3 Q. But you assured yourself that
4 everything in the report was accurate before
5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO
8 and their team and their experience and their
9 guidance for doing this for many, many, many
10 years to -- to -- to categorize and put things
11 in ways on the form.

12 You know, my team had -- had not
13 filled out these forms before and needed all of
14 this guidance. I'm not an expert in this. I
15 have oversight of it. I signed the form. DSI
16 told me to.

17 Q. And you and your team are the source
18 of the information that DSI used to create the
19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with
22 the -- with -- with the corporate accounting
23 team.

24 Q. Okay. And the corporate accounting
25 team was the corporate accounting team that was

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2 under your direction; correct?

3 A. Yes.

4 Q. So -- so your team was responsible
5 for maintaining Highland's books and records;
6 correct?

7 A. I'm sorry, my team was responsible?

8 Q. Correct.

9 A. Yes. They -- they -- they were
10 the -- the -- the general ledger of Highland,
11 that responsibility was with the corporate
12 accounting team.

13 Q. The corporate accounting group
14 reported to you; correct?

15 A. Yes.

16 MR. MORRIS: Can we put up 41,
17 please.

18 (Exhibit 41 marked.)

19 Q. All right. You will see that this
20 is a report that is dated January 31st, 2020,
21 but it is for the month ending December 2019.

22 Do you see that?

23 A. I do.

24 Q. And you signed this report in your
25 capacity as the chief financial officer of

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2 Highland; correct?

3 A. Yes.

4 Q. And you're the preparer -- you're
5 identified as the preparer of the report;
6 correct?

7 A. That is correct.

8 Q. Do you recall participating in the
9 preparation of monthly operating reports?

10 A. As I testified earlier, it was put
11 together, you know, with the team. The team
12 worked with DSI to put these monthly operating
13 reports together. We had no experience at this
14 time of the monthly operating reports or things
15 of this nature.

16 MR. MORRIS: Can you turn to the
17 next page, please.

18 Q. Do you see a line item under assets
19 due from affiliates?

20 A. Yes, I do.

21 Q. Okay. And to the best of your
22 knowledge and understanding, as the person who
23 is identified as the preparer of this report,
24 does that line item include the affiliate loans
25 that we've been talking about?

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2 A. Again, I would have to see, just
3 like we did with the financial statements of
4 Highland and NexPoint, I would have to see a
5 detailed build, but, you know, if you look at
6 the other line items, you know, the only other
7 place it could be would be in -- in other
8 assets.

9 Q. Okay. And as a matter of
10 arithmetic, is it fair to say that is the value
11 of the assets due from affiliates was more than
12 25 percent of the value of Highland's total
13 assets as of 12/31/2019?

14 MS. DANDENEAU: Objection to form.

15 A. I'm really not doing the mental math
16 right now, so I've been going at this depo for
17 hours, so I'm really not -- you know --

18 Q. All right. No problem.

19 A. -- these are millions of dollars.

20 Q. Let's look at the Footnote 1,
21 please. Do you see there is a reference to the
22 Hunter Mountain note?

23 A. Yes, I see that in Footnote 1.

24 Q. Okay. And that's the reserve that
25 was taken against that note?

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2 A. Yes, that is what this indicates.

3 Q. Okay. And were you aware that the
4 reserve was being taken on that it was?

5 A. I was -- I was aware, yeah, at some
6 point, yes.

7 Q. Okay. And are you aware of any
8 reserve being taken with respect to any other
9 note that was issued in favor of Highland?

10 A. Again, as I testified, we didn't go
11 through an analysis on -- on -- on the other
12 notes.

13 Q. Can we turn --

14 A. I believe -- I believe it says that
15 in Footnote 1, fair value has not been
16 determined with respect to any of the notes.

17 So this footnote -- footnotes, look,
18 there has been no determination.

19 Q. Okay. The determination was made in
20 the audited financial statements just six
21 months earlier; right? We saw that earlier?

22 A. That was as of 12/31/18. I mean,
23 things -- circumstances -- there's a bank --
24 circumstances change, things change -- things
25 change over time, you know, facts and

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2 circumstances change. Again, you have to do an
3 analysis.

4 Q. Okay. And you do recall that in
5 Highland's 2018 financial statement, all of the
6 notes issued by affiliates and Mr. Dondero that
7 were due at year-end had a fair value equal to
8 the carrying value; correct? We looked at
9 that?

10 A. Yes. That was in the -- in the
11 disclosure for the -- for the affiliate notes,
12 yes.

13 Q. And -- and you were obligated to
14 share with PwC any subsequent events between
15 the end of 2018 and the date that you signed
16 your management representation letter on June
17 3rd, 2019; correct?

18 MS. DEITSCH-PEREZ: Object to the
19 form.

20 A. Yes. I -- I -- I signed the
21 management, you know, my signature is in the
22 management representation letter -- I hope I'm
23 answering your question -- that is dated in
24 June with the representations made in that
25 management representation letter.

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2 Q. Okay. And there was nothing that
3 caused PricewaterhouseCoopers to include in
4 subsequent events any adjustment to the
5 conclusion that the fair value of the affiliate
6 notes and the notes issued by Mr. Dondero
7 equaled the carrying value; correct?

8 MS. DANDENEAU: Objection to the
9 form.

10 A. That is correct. That is what was
11 in the -- in the -- in the footnotes.

12 Q. Okay. So are you aware of anything
13 that occurred between June 3rd, 2019 and
14 December 31st, 2019 that would have caused the
15 fair value of the notes to differ from the
16 carrying value?

17 A. Yeah. Highland filed for
18 bankruptcy, things changed -- I mean, there was
19 a bankruptcy filed in October of -- of -- of
20 2019, right, the petition date that we've
21 described earlier.

22 I mean, I had a -- I guess looking
23 back naively, I thought we were going to get an
24 audit from PwC for year-ended 2019, and when we
25 had discussions with PwC, they were like, are

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2 you crazy, we're not auditing this. Values
3 change, all these things change, bankruptcy
4 changes the entire scenario. I mean -- and
5 they're like, we're not -- we're not touching
6 this.

7 And so, you know, I was like, okay,
8 sorry, I get it, okay, no an audit.

9 I mean, it is -- you know, and --
10 you know, and we weren't preparing GAAP
11 financial statements.

12 Again, I didn't know what we were
13 doing in relation to our financial statements,
14 but these were the discussions I was having at
15 the time. And yeah, I mean, filing bankruptcy
16 from what I got from outside auditors and
17 others involved changed things dramatically.

18 Q. Okay. Highland wasn't the obligor
19 under any of the notes that we're talking
20 about; correct?

21 A. No.

22 Q. So --

23 A. That's right.

24 Q. So can you identify any fact that
25 would cause the fair value to deviate from the

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2 carrying value during the seven-month period
3 between June 3rd and the end of the year, 2019?

4 MS. DANDENEAU: Objection to form.

5 A. No. I mean, I'm putting myself back
6 at that time, right. Hindsight is 2020, but we
7 didn't do an analysis, but we would have done a
8 fulsome analysis and looked at all of the facts
9 and circumstances at the time, but asset values
10 change. You know, there could have been a
11 market crash in hindsight in 2020, which --
12 which affected entities' abilities.

13 There could have been all of these
14 things, right, that -- that happen. It is --
15 it is easy to look back in hindsight, but when
16 you are looking at this in -- in realtime, the
17 analysis is different, and again, we didn't do
18 an analysis.

19 Q. Okay. You didn't do an analysis.

20 Do I have that right?

21 A. I don't -- I don't recall doing one
22 or maybe -- you know, I don't recall doing one.

23 MR. MORRIS: Okay. I'm going to
24 take a break. I may be done, so the time
25 now is -- is 4:30 your time. Let's just

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2 take a short break until 4:40 your time.

3 MS. DANDENEAU: Okay.

4 VIDEOGRAPHER: We're going off the
5 record, 4:31 p.m.

6 (Recess taken 4:31 p.m. to 4:43 p.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 4:43 p.m.

9 MR. MORRIS: I have no further
10 questions.

11 MR. RUKAVINA: Okay.

12 Mr. Waterhouse, I will go next.

13 EXAMINATION

14 BY MR. RUKAVINA:

15 Q. Sir, my name is Davor Rukavina. I'm
16 the lawyer for --

17 MR. MORRIS: Hey, Davor, just before
18 you begin, I just want to put on the record
19 Highland's objection to documents that were
20 produced to me 10 minutes before the
21 deposition began.

22 MR. RUKAVINA: What the basis of
23 your objection?

24 MR. MORRIS: That they were due
25 quite some time ago, and the fact that you

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2 had -- I just think it's appropriate to --
3 to dump documents on somebody 10 minutes
4 before the deposition. I just think
5 that's --

6 MR. RUKAVINA: Well, these are
7 documents Highland produced. I'm not aware
8 of any rule I have to give you advance
9 documents when I know for the record that
10 other than the exhibits that you sent to us
11 last week, most of the exhibits you used
12 today you did not provide to me prior to
13 this deposition.

14 MR. MORRIS: No, but the documents
15 were produced by me in -- in litigation,
16 right?

17 MR. RUKAVINA: I'm going to use
18 primarily, John, the documents that you
19 produced to me today, but you may.

20 MR. MORRIS: Primarily. I've got --
21 I've got my objection. You have got your
22 response. Proceed.

23 Q. Mr. Waterhouse, again, I represent
24 the advisors, HCMFA and NexPoint Advisors.

25 Do you understand that?

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2 A. Yes.

3 Q. You and I have never met or talked
4 before today, have we?

5 A. No, I have -- I have heard your
6 voice on calls before.

7 Q. Okay.

8 MR. RUKAVINA: Madam Court Reporter,
9 I will use a few exhibits today. My
10 associate, Mr. Nguyen, will find some way
11 to get them to you. I don't know how to do
12 that, but it looks like you guys do.

13 I am going to use numbers as well.
14 But to differentiate them from Mr. Morris
15 we're going to mark mine with the prefix A
16 for advisors.

17 Do you understand?

18 COURT REPORTER: Yes.

19 MR. RUKAVINA: Okay. Perfect.

20 Q. Okay. So, Mr. Waterhouse, let's
21 start with those two HCMFA notes that you were
22 asked about, one for 5 million and one for
23 2.4 million.

24 Do you recall those notes?

25 A. Yes.

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2 Q. Were you ever the CFO of HCMFA?

3 A. I don't recall.

4 Q. So to the best of your recollection,
5 you were still an officer of HCMFA in 2019,
6 just that your title was treasurer?

7 MR. MORRIS: Object to the form of
8 the question. There is no leading here.
9 He works for your client.

10 MS. DANDENEAU: That is not -- that
11 is not true.

12 MR. MORRIS: He's the treasurer --
13 he is the treasurer of your client. I
14 don't -- I'm going to object every time you
15 try to lead, so...

16 MR. RUKAVINA: Totally fine to
17 object.

18 MR. MORRIS: Okay.

19 Q. Please answer my question,
20 Mr. Waterhouse.

21 A. I'm sorry, could you repeat? There
22 was...

23 Q. Yes. You were -- you testified
24 earlier that in 2019 you were an officer of
25 HCMFA; correct?

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2 A. Yes, I testified that I was the
3 treasurer and I didn't know if that incumbency
4 certificate, you know, was one that appointed
5 me as a treasurer, but yes.

6 Q. I'm just trying to confirm that
7 sitting here today, to the best of your
8 recollection, at that time you were -- your
9 title was treasurer. It was not chief
10 financial officer.

11 A. I don't recall that being my title.

12 Q. Okay. And in May of 2019, however,
13 I think you testified you were the chief
14 financial officer of the debtor; correct?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes, I was -- yes.

18 Q. Okay. As such, in May of 2019, did
19 you have the authority, to your understanding,
20 to unilaterally loan \$5 million or \$2.4 million
21 to anyone on behalf of the debtor?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Sorry, can you repeat that?

25 Q. Yes. So in your capacity as the

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2 chief financial officer of the debtor, Highland
3 Capital Management, L.P., in May of 2019, did
4 you believe that you unilaterally, just Frank
5 Waterhouse, had the authority to loan on behalf
6 of the debtor to anyone \$5 million and
7 \$2.4 million?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. No.

11 Q. Is it because loans of that amount
12 would have had to be approved by someone else?

13 A. Yes.

14 Q. Who in '20 -- in May of 2019, if
15 Highland wanted to loan 5 million or
16 \$2.4 million to someone, what would have been
17 the internal approval procedure?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. If -- if we had loans of that nature
21 that needed to be made due to their size, we
22 would have gotten approval from the -- the
23 president of Highland.

24 Q. And who that was individual?

25 A. It was James Dondero.

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2 Q. Okay. Now, I'm going to ask you a
3 similar question but for a different entity.

4 In May of 2019, as the treasurer of
5 HCMFA, did you believe that you unilaterally
6 had the ability to cause HCMFA to become the
7 borrower of a \$5 million loan and a
8 \$2.4 million loan?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. No.

12 Q. What would -- what would the
13 approval have taken place -- strike that.

14 What would the approval process have
15 been like in May of 2019 at HCMFA for HCMFA to
16 take out a \$7.4 million loan?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. The process would have been similar
20 to what we just discussed on -- for Highland to
21 make a loan to others. So, again, you know,
22 we -- we would have -- either myself or someone
23 on the team would have discussed this with
24 the -- the president and owner of -- of HCMFA.

25 Q. And who was that individual?

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2 A. That was James -- Jim Dondero.

3 Q. So do I understand that in May of
4 2019, on behalf of both the lender, Highland,
5 and the borrower, HCMFA, Mr. Dondero would have
6 had to approve \$7.4 million in loans?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Yes.

10 Q. You mentioned when Mr. Morris was
11 asking you the NAV error, N-A-V error, with
12 respect to TerreStar, without writing us a
13 novel, unless you feel like you have to, can
14 you summarize what that NAV error was? What
15 happened?

16 A. There was a -- in the Highland
17 Global Allocation Fund, it owned at the time an
18 equity interest in a company called TerreStar.
19 And TerreStar is -- at the time was a private
20 company, and it may still be today. Again, I'm
21 putting myself back then as a private company.

22 We had -- sorry, I don't mean we --
23 the fund and the advisor used Houlihan Lokey
24 to -- to value that investment. And during
25 that time there was some trades that were

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2 executed at market levels that were much lower
3 than the Houlihan Lokey model.

4 And based on information and
5 discussions with the portfolio managers and,
6 you know, principals that were very familiar
7 with TerreStar, it was determined that those
8 trades were non-orderly and they were not
9 considered in the valuation as consulted with
10 Houlihan Lokey and PricewaterhouseCoopers at
11 the time.

12 Subsequent to a -- I can't remember
13 the exact circumstances of why the SEC got
14 involved. I think it was due to this -- this
15 investment became a material position in the
16 fund. It triggered an SEC, kind of, inquiry.
17 And as part of that inquiry, they questioned
18 the valuation methodology. "They" meaning the
19 SEC.

20 And at the culmination of that
21 process -- this is all summarized -- the value
22 that was -- that ultimately had to be used in
23 the fund's NAV was different than -- materially
24 different than what the original valuation at
25 Houlihan Lokey provided.

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2 And given that there was this fund
3 was, as we discussed -- I don't know if we
4 discussed it, but it was an open-ended fund
5 that was going -- that was converting to a
6 close-end fund.

7 Due to the fact that it was an
8 open-ended fund, you had to recalculate NAV and
9 see what the impact was on people -- on
10 investors coming in and out of the fund and if
11 there is a detrimental impact and to calculate
12 what that -- what that impact was and if there
13 was any amounts owed to the fund pursuant to
14 the error.

15 Q. Were you personally involved
16 internally at either Highland or HCMFA with
17 these investigations and discussions with the
18 SEC?

19 A. I was.

20 Q. Which other key people or senior
21 people at Highland were involved, to your
22 recollection?

23 A. Myself, Thomas Surgent, David Klos,
24 Lauren Thedford, Jason Post.

25 Q. Mr. Dondero, was he --

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2 A. I believe Cliff Stoops. I'm trying
3 to think. And maybe that is -- that is -- that
4 is -- that is all kind I can recall at the
5 moment.

6 Q. Do you recall whether it was
7 determined that the fund suffered losses as a
8 result of this error?

9 A. The -- the fund -- the -- the --
10 because the open-ended nature of the fund,
11 there were losses that were attributable to
12 investors. Meaning they -- they would have
13 redeemed and got a less money or -- or they
14 subscribed in and maybe because they didn't get
15 enough shares and then they later sold and then
16 they were harmed in that fashion.

17 And there is -- there is -- there
18 were very -- there were very detailed
19 calculations and, you know, all these different
20 scenarios that we had to -- I'm sorry, I keep
21 saying "we" -- that the individuals involved
22 had to calculate and quantify.

23 Q. Well, do you recall whether HCMFA
24 admitted certain fault and liability for this
25 error?

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2 A. I don't recall specifically.

3 Q. Do you recall whether HCMFA caused
4 any funds to be paid to the investors and the
5 fund the subject of the NAV error?

6 A. Yes.

7 Q. Do you recall the approximate amount
8 of funds, moneys paid to the investors and the
9 fund?

10 A. It was -- it was approximately
11 \$7 million.

12 Q. If I was to suggest 7.8 million,
13 would that ring more true or are you sticking
14 with your original answer?

15 A. It was -- it was approximately 7 --
16 7 to \$8 million. Again, I don't remember the
17 exact number, but it was in that ballpark.

18 Q. So regardless of whether HCMFA
19 accepted fault or liability, it caused some
20 \$7 million or more to be paid out to affected
21 investors in the fund?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. And I want to make sure I'm
25 understanding your question because there is a

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2 lot of different entities that are going on to
3 my head.

4 I think what you are saying is based
5 on this error, shareholders were harmed by this
6 approximately \$7.8 million -- by approximately
7 \$7.8 million. Is that what you are asking?

8 Q. Yes, sir.

9 A. Yes, that was -- again, I don't have
10 the exact numbers. If I take -- it was -- it
11 was in that ballpark, and there is a detail
12 calculation and write-up that could, that --
13 that exists someplace.

14 Q. Now, at that time, at the time that
15 the NAV error occurred, was there a contract in
16 place between HCMFA and the debtor pursuant to
17 which the debtor was providing services to
18 HCMFA?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Was that contract generally called a
23 shared services agreement?

24 A. It was generally called that, but
25 there were -- there were -- I mean, it -- it --

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2 it depends on who you talk to, but yes,
3 generally, there were -- there are multiple
4 agreements.

5 Q. Pursuant to one or more of those
6 agreements, was the debtor providing certain
7 services to HCMFA?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes.

11 Q. And can you at a very high level
12 summarize in 2018 and 2019 what those services
13 were?

14 A. Yes, there was a -- yes.

15 Q. Okay. Please -- please go -- go
16 through a short summary.

17 A. There was a -- a cost reimbursement
18 agreement between Highland Capital Management
19 Fund Advisors and Highland Capital Management,
20 L.P. That agreement was for what we referred
21 to as front office services, so investment
22 management, things of that nature.

23 There was I think what most people
24 refer to as the shared services agreement that
25 was -- that agreement was between Highland

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2 Capital Management Fund Advisors and Highland
3 Capital Management for back office services.

4 Q. And can you summarize what you mean
5 by back office services?

6 A. Those services were for accounting,
7 finance, tax, valuation, HR, IT, you know,
8 legal compliance, things of -- things of those
9 nature -- or things of that nature, excuse me.

10 Q. So in the spring of 2019, do you
11 recall whether HCMFA took the position that it
12 was actually Highland that caused the NAV error
13 to occur pursuant to the valuation services
14 that Highland was providing?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I do not recall.

18 Q. Did you ever have any discussions
19 with anyone, Jim Dondero or anyone in the first
20 half of 2019 as to whether Highland, the
21 debtor, that is, had any liability to HCMFA
22 related to the NAV error?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I do not recall.

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2 Q. And then you mentioned that the fund
3 was being closed and some compensation related
4 to that. Can you -- can you elaborate? What
5 were you referring to?

6 A. Right. So the advisor, pursuant to
7 board approval, put a proposal in front of the
8 shareholders of the Highland Global Allocation
9 Fund to convert it from an open-ended fund to a
10 closed-end fund.

11 So an open-ended fund, when
12 shareholders subscribe to the fund or redeem
13 into the fund, they do it at NAV.

14 When it is -- when you have a
15 closed-end fund, closed-end funds are -- are
16 publicly-traded, like on the New York Stock
17 Exchange, exchanges like that, and -- and
18 shareholders or investors, they're not --
19 they're -- they're not subscribing and
20 redeeming with the fund. They are like shares
21 of Apple.

22 Those shares of the Highland Global
23 Allocation Fund trade on an exchange, and that
24 is how you, you know, that is how, you know,
25 you become an equity owner in the fund or you

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2 sell your shares and you are no longer an
3 equity owner.

4 As part of that proposal, the
5 advisor told shareholders if you -- if you vote
6 for this proposal to -- to convert it from an
7 open-ended fund to a closed-end fund, we will
8 pay you some amounts of money. I forgot -- a
9 certain number of points. I think it was
10 like -- it was like two to three points or
11 something -- something like that.

12 Q. Okay. You mentioned when Mr. Morris
13 was asking you, going back to those two
14 promissory notes, you will recall the 5 million
15 and 2.4 million, you mentioned something to the
16 effect that Mr. Dondero told -- told you to pay
17 some moneys out of Highland. Do you remember
18 that discussion with Mr. Morris?

19 A. I do.

20 Q. So, to the best of your
21 recollection, did you have a discussion with
22 Mr. Dondero about making some payments in May
23 of 2019 out of Highland?

24 A. I recall, as I testified earlier,
25 that I had a conversation with Mr. Dondero

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2 for -- for these amounts attributable to -- it
3 was either the error -- you know, the error,
4 and in that conversation he said, go get the
5 money from Highland. I believe that is what I
6 testified earlier, and that -- that is my
7 recollection.

8 Q. Do you recall if that was an
9 in-person meeting or some other mode for the
10 meeting?

11 A. I -- I -- I recall that being
12 in-person.

13 Q. Do you recall if anyone else was
14 present, or was it just you and Mr. Dondero?

15 A. I recall just he and I.

16 Q. And the moneys that he told you to
17 find from -- or get from Highland, was that in
18 the amount of \$5 million and \$2.4 million?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I believe so, but I would have to go
22 back and look and see when those moneys were
23 actually paid into the -- into the fund and,
24 you know, when those transfers were done. If
25 they were all done around that same time, then

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2 yes, I would say it was -- it was all related
3 to that.

4 Q. Did Mr. Dondero tell you that those
5 funds would be a loan from Highland to HCMFA?

6 A. I don't recall.

7 MR. MORRIS: Objection to the form
8 of the question.

9 Q. Now, and forgive me, I'm probably
10 the only non-American born here, but I speak
11 reasonably well in English. I don't recall,
12 does that mean you don't remember or does that
13 mean it didn't happen?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it means I don't -- I don't
17 remember.

18 Q. Did Mr. Dondero tell you to have
19 those two promissory notes prepared?

20 A. I don't recall.

21 Q. When you -- again, when you say, I
22 don't recall today, that means that sitting
23 here today, you just don't remember one way or
24 the other. Is that accurate?

25 A. Yes.

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2 Q. Is it possible that you, having
3 heard what Mr. Dondero said and seeing funds
4 being transferred, assumed that that would be a
5 loan without him actually telling you that
6 would be a loan?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Sorry, I want to make sure -- did I
10 ask the amounts that were transferred that I --
11 that -- that I assumed that that was a loan?

12 Q. Well, let me -- let me take -- let
13 me try again.

14 So you have established already that
15 there were quite a number of promissory notes
16 back and forth -- I'm sorry, quite a number of
17 promissory notes with affiliated companies and
18 individuals owing Highland money; right?

19 A. Yes.

20 Q. And you have established that there
21 were many transactions and transfers going back
22 and forth over the years; right?

23 MS. DANDENEAU: Objection to form.

24 A. In -- yes, in my capacity as CFO and
25 my employment, yes, that is -- yes.

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2 Q. And that's part of the reason why
3 you just can't remember some of the details
4 today because this -- this happened years ago,
5 and there were a number of transactions. Is
6 that accurate?

7 MS. DANDENEAU: Objection to the
8 form.

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I mean, I deal with thousands of --
12 of -- of -- of transactions, you know, whether
13 it has -- the processing of transactions, you
14 know, if it has got, you know, more -- more
15 zeros, you know, behind it than others.

16 When you look at thousands of
17 transactions over the years for funds and
18 advisors and -- and, you know, financial
19 statements, I mean, it is -- it is very hard
20 going back in -- in -- in my -- you know,
21 14-ish year career at -- at Highland to
22 remember a lot of those details, especially
23 when I don't have any records or books or
24 anything like that, and -- and going back many
25 years.

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2 Q. And that is fine. That -- that --
3 that is why I asked the question.

4 Is it possible in May of 2019 when
5 Mr. Dondero told you to transfer the funds from
6 Highland, you just assumed on your own that
7 those would be loans without him actually
8 telling you that those would be loans?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I don't know.

12 Q. I'm sorry, you --

13 A. I said I don't know.

14 Q. Okay. Well, as the -- as the CFO
15 for Highland, if you saw \$7.4 million going
16 out, you would feel some responsibility to
17 account for that, wouldn't you?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. Yes.

21 Q. Is it fair to say that those would
22 be in the range large enough to rise up to your
23 level?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. If -- I don't know if I understand
3 your question. Those amounts would arise to my
4 level where I would be involved or...

5 Q. You would want to know what a
6 transfer for that amount, \$7.4 million, was all
7 about, as the CFO of Highland, wouldn't you?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, I make it -- I mean, I -- I
11 review all sorts of payments, I mean, even
12 smaller dollar payments on a periodic basis,
13 you know, to -- to -- to understand and to make
14 sure that we are paying things in a -- you
15 know, in -- in -- in an informed way. And, you
16 know -- and we're -- and we're paying things
17 pursuant to vendor contracts and things like
18 that.

19 Q. So as part of that, is it possible
20 that seeing \$7.4 million go out you would have
21 promissory notes made in order to keep a paper
22 trail, assuming that those were loans, when
23 perhaps they were never intended to be loans by
24 Mr. Dondero?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. I don't know. As I testified
4 earlier, I had conversations with Mr. Dondero
5 about -- about the -- the -- the moneys that
6 were needed for the NAV error. And I recall
7 him saying go get it from Highland -- or get it
8 from Highland.

9 Q. Well, why did you sign those
10 promissory notes and why didn't you have him
11 sign them?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. I don't know.

15 Q. You mentioned earlier that you
16 typically don't sign promissory notes. Am I
17 remembering your testimony correctly?

18 I mean, promissory notes on behalf
19 of the entities. Not yourself, obviously.

20 A. Yes, that is what I said earlier.

21 Q. Do you recall any other promissory
22 notes in the million-plus range that you had
23 ever signed before on behalf of any entity?

24 A. There is -- there has been a lot of
25 transactions over the years. I don't -- I

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2 don't -- I don't recall generally. I don't --
3 I don't recall.

4 Q. So -- but to the best of your
5 recollection, it was on your initiative,
6 following your discussion with Mr. Dondero,
7 that you had someone draft those two promissory
8 notes; is that correct?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes, we would have -- the team, as I
12 stated earlier, we don't draft promissory
13 notes. "The team" meaning the accounting and
14 finance team.

15 So the team would have worked with
16 the legal group at Highland to draft any notes.

17 Q. Do you believe or do you have any
18 recollection as to whether you would have done
19 that pursuant to an email or telephone call or
20 in-person meeting?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Are you asking if I would have -- if
24 those notes would have been drafted pursuant to
25 an email or phone call?

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2 Q. Strike that.

3 Do you recall whether you sent an
4 email to anyone asking them to draft those two
5 promissory notes?

6 A. I don't recall because, again,
7 once -- I would have instructed -- likely
8 instructed the team to -- to work with the
9 legal group to draft these documents.

10 I -- I -- I -- yeah, I didn't -- I
11 mean, that is more an operational-type
12 procedure. So, you know, a manager or a
13 controller or working with legal. You know,
14 they -- they can certainly handle that task to
15 get that -- you know, to request that from
16 legal.

17 Q. And who on your team do you think
18 you would have asked to do that?

19 MR. MORRIS: Objection --

20 Q. Who would have been the logical
21 person or people, if you don't remember their
22 name today?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. It -- it -- there is only two

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2 managers of the group. That would have been
3 Dave Klos or Kristin Hendrix.

4 Dave was the -- one of his duties
5 was managing the valuation team, and so he was
6 intimately involved with this process. So, you
7 know...

8 Q. Okay.

9 A. I don't recall specifically but, I
10 mean, my general -- you know, I -- I -- I
11 likely would have talked to Dave first about it
12 versus someone like Kristin who hadn't been
13 intimately involved.

14 Q. And -- and do you have a view as to
15 whether it is most likely that you would have
16 done that by email or in-person or how would
17 you believe you would have communicated that to
18 Mr. Klos?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I likely would have done that in
22 person. Again, if things of this nature
23 that -- again, you have to put ourselves back
24 to, we have been working on this very stressful
25 project for many, many months. And once the

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2 go-ahead was to -- you know, we see the light
3 at the end of the tunnel with wrapping this up
4 and making shareholders whole -- sorry to say
5 "we" -- you know, the -- so the folks that are
6 involved in it.

7 I like to talk to people
8 face-to-face and -- and -- and go to -- and go
9 to their desk, because that shows if I'm going
10 to their desk that -- that is something that I
11 want done, you know.

12 Q. And do you remember, Mr. Waterhouse,
13 getting those two promissory notes in paper
14 format or by email before they were executed?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall.

18 Q. For whatever was the ordinary course
19 back then in May 2019, would you expect to have
20 received them only on paper or would you have
21 expected to have received them in Word document
22 or PDF document by email?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I -- I didn't sign -- I signed very

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2 few documents via email. I can't say that it
3 never happened, but people either stopped by my
4 office and physically walked in documents for
5 signature that we discussed face-to-face.

6 Or documents were -- if -- if --
7 if -- if -- let's say I wasn't there or I
8 wasn't available, documents were dropped off.
9 I had -- I had some in- and outboxes in front
10 of my -- my office there at the Crescent.

11 Documents would be dropped off for
12 signature. There would be a cover sheet that
13 would be -- have been applied to those
14 documents detailing, you know, who dropped it
15 off, the purpose, why, what time.

16 And then, you know, as I stated, I
17 don't draft documents and I always go to the
18 legal group and the compliance group to make
19 sure that they're in the loop. And there is
20 a -- a box or section that says, Has legal
21 reviewed or approved, or something to that
22 nature.

23 Again, I don't -- I don't have
24 access to that cover sheet anymore, but it
25 was -- it was something to that effect.

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2 And my assistant, you know, if she
3 was there, she would review that -- you know,
4 whatever was being dropped off. And if that
5 has legal, you know, reviewed or -- reviewed or
6 approved it, if that wasn't -- if that stuff
7 hadn't been done, it was like she would just
8 tell them like, go -- go -- go to the legal
9 group, because --

10 Q. Let me -- let me pause --

11 MS. DANDENEAU: Let him finish.

12 MR. MORRIS: Thank you. Go ahead.

13 A. I take -- go to the legal group
14 because that -- that was my -- you know, I
15 didn't -- I didn't review anything that -- that
16 they weren't -- you know, or there wasn't some
17 representation made to me that they had
18 reviewed, approved in some capacity.

19 Again, my -- my -- my goal, as CFO,
20 is to provide transparency and make sure that
21 groups like compliance and other things -- and
22 the other group in legal are -- are in -- you
23 know, their -- they're made aware of
24 transactions of -- you know, that are crossing
25 my desk.

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2 Because I'm not in every
3 conversation. They're not in every
4 conversation -- meaning legal compliance -- and
5 I just want to make sure that -- that everyone
6 is in sync to, you know, to -- to the extent
7 possible.

8 Q. So if we summarize, you don't
9 specifically remember signing these two notes,
10 but most likely it would have been that they
11 would have presented -- been presented to you
12 physically on paper?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. They would -- they would have been
16 presented physically on paper most likely or
17 someone would have left it. But, I mean,
18 again, I don't -- I don't recall.

19 Q. I understand. Understand.
20 When you signed -- when you signed
21 documents, when you personally signed
22 documents, did you typically use a ink pen or
23 did you use a stamp?

24 A. No, I -- I -- I use a -- an -- an
25 ink pen.

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2 Q. Do you know -- was there a file at
3 Highland kept anywhere with ink-signed
4 originals of a promissory notes in general or
5 these two promissory notes specifically?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Sorry, I just want to make sure I
9 understand your question. Are you saying is
10 there a file somewhere that has ink-signed
11 originals of these two promissory notes?

12 Q. Yes.

13 A. I would -- I would assume they're
14 some place. I mean --

15 Q. Well, was there a -- was there a
16 place where Highland generally kept originals
17 of promissory notes owed to it?

18 A. I wouldn't -- no.

19 MR. RUKAVINA: Mr. Nguyen, would you
20 please pull up my A7, alpha 7.

21 Q. These are the two promissory notes,
22 Mr. Waterhouse.

23 (Exhibit A7 marked.)

24 Q. And please -- Mr. Waterhouse, please
25 command my associate to scroll down as you need

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2 to, but I want you to take a very close look at
3 your two signatures here and tell me whether
4 you believe, in fact, that you ink signed them
5 or whether you --

6 MS. DANDENEAU: Mr. Rukavina,
7 Mr. Waterhouse has the copies.

8 MR. RUKAVINA: Perfect. Then you
9 can take this down, Mr. Nguyen.

10 A. These -- these -- these signatures
11 are identical, now that I stare at them, and I
12 mean, they are so close -- I mean, they're
13 identical that, I mean, even with my chicken
14 scratch signature, I don't know if I can -- you
15 know, I do this 100 times, could I do that
16 as -- as precisely as I see between the two
17 notes.

18 Q. Well, that is why I ask.
19 Mr. Waterhouse, now that you have examined
20 them, does it seem like it is more likely that
21 you actually electronically signed these?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Is -- I don't -- I don't recall
25 specifically. As I said before, my assistant

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2 did have a -- an electronic signature, and that
3 was used from time to time. It wasn't as
4 common practice back in 2019. It definitely
5 was more common practice when we had to work
6 from home and remotely for COVID because it
7 that made it almost impossible to, right,
8 provide wet signatures since we're all working
9 from home remotely.

10 Q. Well, going just for these two
11 promissory notes, Mr. Waterhouse, in light of
12 your inability to remember any details, are you
13 sure you actually signed either or both of
14 those notes?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall specifically
17 signing -- actually physically signing these
18 notes. As I said before, I don't recall doing
19 that. This -- this looks like my signature,
20 but yet these two signatures are identical.

21 Q. So you don't recall physically
22 signing them, and I take it you don't recall
23 electronically signing them either?

24 A. I don't recall. You know, Highland
25 has all my emails. If that occurred, you know,

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2 you know, I don't have any of these records is
3 what I'm saying. I don't have any of those
4 records.

5 Q. That is why I'm asking you these
6 questions in great detail because I don't have
7 those emails. I'm trying to -- I'm hoping that
8 you will give me some names or some details so
9 I can go look for more emails, but again, you
10 don't remember any -- any individual, other
11 than Mr. Dondero that we've discussed, you
12 don't remember any individual with whom you
13 discussed these promissory notes prior to their
14 execution?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall discussing it with
18 anybody else.

19 Q. Okay.

20 A. I mean, prior --

21 Q. I understand.

22 A. You know, there was no one else --
23 there was no one else in that meeting that I
24 recall with Mr. Dondero.

25 Q. Now, when you established that by

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2 May of 2019 --

3 A. And -- and from what I recall, and
4 the reason why I was by myself is -- is, you
5 know, I don't -- I don't want to speculate, I'm
6 sorry.

7 Q. Okay. We have established that by
8 May of 2019, in your view, the liabilities of
9 HCMFA exceeded its assets; correct?

10 A. Yeah. I mean, again, I don't have
11 financial statements in front of me, but I
12 think, if I recall, we'd have to go through the
13 testimony with Mr. Morris, I believe that was
14 the case.

15 Q. In fact, you will recall that in
16 April of 2019, Mr. Dondero signed a document
17 that extended the demand feature of two prior
18 notes to May 31, 2019. Do you recall that?

19 MS. DEITSCH-PEREZ: I think you
20 might -- maybe have the court reporter read
21 that back. You might have misspoke.

22 (Record read.)

23 MR. RUKAVINA: And I did misspeak.

24 Q. I meant to say to May 31, 2021. Do
25 you recall that, sir?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Yes.

5 MR. RUKAVINA: And, Mr. Nguyen, just
6 so that the record is clear, will you please
7 pull up my Exhibit Alpha 10, A10.

8 (Exhibit A10 marked.)

9 Q. You don't have this one in front of
10 you, Mr. Waterhouse? This is the one that
11 Mr. Morris used earlier. Do you see that
12 document, sir?

13 A. Yes, I do.

14 Q. And this is what you were testifying
15 about before when Mr. Morris was asking you.
16 Do you remember that?

17 A. Yes.

18 Q. So here is my question for you,
19 Mr. Waterhouse: As the chief financial officer
20 of Highland, was it prudent for Highland less
21 than three weeks later to be lending
22 \$7.2 million to an insolvent entity that
23 couldn't even then pay its debts back to
24 Highland?

25 MS. DANDENEAU: Objection to form.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Sorry, I just want to make sure --
5 are you asking me, did you say, was it prudent
6 for Highland to loan \$7.4 million to HCMFA a
7 few weeks after this document was executed?

8 Q. Yes, and at a time when HCMFA's
9 liabilities exceeded its assets.

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't -- it is odd. I don't know.

13 MR. RUKAVINA: You can take this
14 exhibit down, Mr. Nguyen.

15 Q. Do you recall asking anyone,
16 Mr. Dondero or -- or anyone outside as to
17 whether Highland ought to be lending
18 \$7.4 million to HCMF regarding HCMF's
19 creditworthiness?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I don't recall.

23 Q. Did you receive personally any of
24 that \$7.4 million?

25 A. No.

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2 Q. Did you even --

3 MR. MORRIS: I didn't hear that
4 question, sir.

5 MR. RUKAVINA: The one that he
6 answered, John, or my new one?

7 MR. MORRIS: No, no, your question,
8 Davor.

9 MR. RUKAVINA: I had asked him
10 whether he received any of the
11 \$7.4 million. He said no.

12 MR. MORRIS: Yeah. I thought there
13 was a question after that. Maybe I was
14 mistaken. I apologize.

15 MR. RUKAVINA: I had started a new
16 question, so here, let me start the new
17 question again.

18 Q. Did you personally receive any
19 direct benefit from those two notes for
20 \$7.4 million?

21 A. No.

22 Q. Did you ever personally consider
23 yourself obligated to repay either or both of
24 those notes?

25 A. No.

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2 MR. RUKAVINA: Pull up those notes
3 again, Mr. Nguyen.

4 Q. You can have them in front of you,
5 Exhibit 7, Mr. Waterhouse, whatever is easier
6 for you. If you go to your signature page, my
7 question to you is, why did you not include
8 your title as treasurer by your name, Frank
9 Waterhouse?

10 MS. DANDENEAU: Objection to form.

11 A. I didn't -- I didn't draft this
12 document.

13 Q. So you relied on whoever drafted it
14 to draft it correctly?

15 A. Yes.

16 Q. Okay. But back then when you signed
17 this, did it ever cross your mind that you were
18 the maker on these notes?

19 A. No.

20 Q. Back then when you signed this
21 document, did it ever cross your mind that you
22 could be a co-obligor on these notes?

23 A. No. I didn't receive \$7.4 million,
24 I mean...

25 Q. But can you say that HCMFA received

1 WATERHOUSE - 10-19-21

2 \$7.4 million?

3 A. I would have to go back and look and
4 check in, you know, the -- the financial
5 records and the bank statements.

6 MR. RUKAVINA: You can take this
7 exhibit down, Mr. Nguyen.

8 Q. Mr. Waterhouse, I'm not trying to be
9 a smart-ass, but if the law says that because
10 of the way that you signed this promissory
11 note, if that is what the law says, that that
12 made you personally -- personally liable, then
13 you would agree with me that that was never
14 your intent?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. That was never -- I wouldn't sign a
18 note and not get consideration in return.

19 Q. So putting all other issues aside,
20 if the law -- if the law says that you were
21 liable for those notes because of how you
22 signed them, then would you agree with me that
23 these notes are a mistake?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 MS. DANDENEAU: Objection to the
3 form.

4 A. Yes.

5 Q. So do you agree with me that it's
6 odd -- I think that is the word you used --
7 that Highland would be loaning \$7.4 million a
8 few weeks after that extension to an entity
9 whose liabilities exceeded its assets, and you
10 would agree with me that it was never your
11 intention to be in any way liable for these two
12 promissory notes; correct?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. Sorry, you -- you asked a lot there.

16 MR. RUKAVINA: I will strike it and
17 I will move on.

18 Let's go to -- pull up Exhibit 9,
19 please Mr. Nguyen -- Alpha 9, I'm sorry, Alpha
20 9, A9.

21 (Exhibit A9 marked.)

22 Q. Sir, take a moment to look at this,
23 but this is an email, and you will see attached
24 July 31, 2020 affiliate notes.

25 Do you see that attachment?

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2 A. Yes.

3 Q. Okay. And do you see an entry for
4 Highland Capital Management Fund Advisors?

5 MR. MORRIS: I'm sorry, hold on.
6 Where are you looking?

7 MR. RUKAVINA: Last page, John.

8 MR. MORRIS: Is it the page on the
9 screen?

10 MR. RUKAVINA: Oh, I'm sorry.
11 Mr. Nguyen just did it. Yes, the last page
12 there.

13 MR. MORRIS: Thank you.

14 Q. Do you see an entry there for HCMFA?

15 A. Yes.

16 Q. About \$10.5 million.

17 Do you see that?

18 A. I do.

19 Q. And, now, do you have any
20 explanation for why if HCMFA owed \$7.4 million,
21 plus the 5.3 million that had been extended,
22 why that amount was only 10.5 million?

23 A. I don't know. Okay.

24 MR. RUKAVINA: Close this one and
25 pull up, Mr. Nguyen, the schedules,

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2 schedule of assets. What exhibit is this
3 of ours, Mr. Nguyen?

4 MR. NGUYEN: This is All.

5 MR. RUKAVINA: Oh, this will be All.
6 (Exhibit All marked.)

7 Q. You don't have this in front of you,
8 Mr. Waterhouse?

9 A. Okay.

10 Q. This is what Mr. Morris used
11 earlier. Do you remember looking at this with
12 Mr. Morris?

13 A. Yes.

14 MR. RUKAVINA: You might have to
15 zoom in a little. Okay.

16 Q. Now, I see Affiliate Note A, B, and
17 C.

18 Do you have any recollection as to
19 why the names of the affiliates are omitted?

20 A. I don't. I testified earlier that,
21 you know, the team worked with DSI in providing
22 these. I -- I don't -- I don't know.

23 Q. Can we deduce -- is it logical to
24 deduce that Affiliate Note A would be NexPoint
25 given its size of \$24.5 million?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. I mean, it -- it is a -- it is -- it
5 is approximate.

6 Q. Well, can we -- can we deduce -- or,
7 I'm sorry, strike that.

8 Can you, sitting here today,
9 logically conclude that Affiliate Note B or C
10 represents HCMFA?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. I don't know. I don't know. I
14 can't.

15 Q. Okay. As of the petition date, we
16 have established that HCMFA, under promissory
17 notes, owed \$7.4 million and \$5.3 million to
18 the debtor; correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that
23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. It would be \$12.7 million. Is that
3 generally correct?

4 A. Sorry, the amounts were 7.4, 5.3.

5 Q. Yes.

6 A. Okay. Yeah, that -- that -- I can
7 do that math, yes.

8 Q. Do you have any explanation or any
9 understanding of why there is no similar entry
10 listed here on the schedule of assets filed
11 with the bankruptcy court?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. We have to look at
15 the supporting schedules, like I talked about
16 other -- presumably there is -- there is a
17 build to the schedule that would provide the
18 detail.

19 Q. Well, that was going to be my next
20 question. You anticipated it.

21 MR. RUKAVINA: You can -- you can
22 take this down, Mr. Nguyen.

23 Q. Do you believe that whenever you and
24 your team provided the underlying data to the
25 financial advisor that the actual names of the

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2 affiliates for Affiliate Note A, B, and C would
3 have been listed there?

4 A. Are you asking we provided the names
5 to the financial advisor? I don't -- I don't
6 understand who the financial advisor is.

7 Q. I'm sorry, DSI.

8 Let me ask the question this way,
9 Mr. Waterhouse.

10 Whenever you provided information
11 about the affiliate notes to DSI, do you
12 believe that you would have included the actual
13 names of the affiliates, you or your team, or
14 that you would have done the Affiliate Note A,
15 Note B, Note C?

16 MR. MORRIS: Objection to the form
17 of the question.

18 MS. DANDENEAU: Objection to the
19 form.

20 A. We -- like I testified earlier, when
21 we were -- we gave everything to -- to DSI. We
22 were giving all of our records, all of our
23 files, everything to DSI. We weren't redacting
24 information or saying, hey, here is a note,
25 here is Affiliate Note A or B.

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2 I mean, it was -- our job and our
3 focus -- and I testified in court back in 2019;
4 right -- was -- was to be transparent and, you
5 know, get DSI up to speed on -- on the matters
6 at Highland. So I can't see us redacting at
7 that point.

8 MR. RUKAVINA: Mr. Nguyen, will you
9 please pull up Mr. Morris' Exhibit 36.
10 Just the very first page, the very top
11 email. You might zoom in a little bit.

12 Q. Now, you recall being asked about
13 this by Mr. Morris?

14 A. Yes, I do.

15 Q. And you wrote: The HCMFA note is a
16 demand note.

17 You wrote that; right?

18 A. Yes.

19 Q. And, in fact, weren't there by that
20 point in time several notes?

21 A. Yes, there were. Again, I don't --
22 I don't remember everything specifically. I
23 mean --

24 Q. I understand. I understand.

25 So this is an example where -- where

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2 you might have made a mistake by referring to a
3 singular instead of a plural; right?

4 A. Yes.

5 Q. Okay. And you -- you wrote -- a
6 couple of sentences later, you wrote: There
7 was an agreement between HCMLP and HCMFA the
8 earliest they could demand is May 2021.

9 You wrote that; right?

10 A. Yes.

11 Q. But I think you -- you agreed with
12 Mr. Morris that that can't possibly apply to
13 the May 2019 notes, can it?

14 MR. MORRIS: Objection to the form
15 of the question. That is not what he
16 testified to.

17 Q. Let me ask -- let me ask a different
18 question.

19 Sitting here today -- or if you can
20 answer me from your memory on October 6,
21 2020 -- did the April acknowledgment that
22 extended the maturity date apply to the
23 May 2019 notes also?

24 A. I don't recall specifically.

25 Q. Well, you recall that the notes that

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2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on
5 your experience, that had they intended to have
6 a different or a set maturity date, you would
7 have instructed that that set maturity date be
8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Sorry, just want to make sure I
12 understand. You are saying that -- that the
13 \$5 million note, the \$2.4 million note, if
14 those were supposed to be a term note, that I
15 would have made sure that those were a term
16 note?

17 Q. I'm saying -- I'm saying,
18 Mr. Waterhouse, that on May the 2nd and May the
19 3rd, 2019, if you intended that those two
20 promissory notes could not be called until May
21 2021, would you have included such language in
22 those two promissory notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I guess -- I'm sorry, I don't recall

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2 putting language in those May notes. I don't
3 remember what language you are referring to.

4 Q. Well, let's read this again.

5 There was an agreement between HCMLP
6 and HCMFA the earliest they could demand is May
7 2021.

8 Do you recall that agreement?

9 A. Yes, that was the agreement we
10 looked at earlier; correct?

11 Q. Okay. Yes.

12 Do you -- do you understand now that
13 that agreement that we looked at earlier also
14 applied to the May 2019 notes that you signed?

15 A. I don't -- I don't know.

16 Q. But as of October 6, 2020, you're
17 writing that there is one demand note and
18 you're categorizing that demand note as not
19 being demandable on May 2021; correct?

20 A. Yes.

21 Q. And you know now that you made at
22 least one mistake in this email; correct?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. Yes.

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2 MR. RUKAVINA: You can pull this
3 down, Mr. Nguyen.

4 Q. So, Mr. Waterhouse, you don't
5 remember Mr. Dondero telling you to make these
6 loans or not. HCMLP was loaning \$7.4 million
7 to someone that their assets were less than
8 their liabilities.

9 We don't see on the July list of
10 notes, where there is \$12.7 million of notes,
11 we don't see that on the bankruptcy schedules,
12 and we have this Exhibit 36 where you are
13 confused.

14 Are you prepared to tell me, sir,
15 today that you might have made a mistake in
16 executing those two promissory notes?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. I -- I don't know.

20 Q. And if it turns out that you're
21 personally liable for those promissory notes,
22 it would certainly be a mistake, wouldn't it?

23 MS. DANDENEAU: Objection to the
24 form.

25 MR. MORRIS: Join.

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he
4 never told you to make these loans, would you
5 disagree with his testimony?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Like I testified earlier with my
9 conversation with Mr. Dondero, all I recall is
10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that
12 he, in consultation with other senior personnel
13 at Highland, decided that Highland needed to
14 pay HCMFA \$7.4 million as compensation for the
15 NAV error and not a loan, would you have any
16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. If that was -- if that was his
20 intent, yes, it would -- I would --

21 Q. Do you have any reason to disagree
22 with him?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. If that was his intent, I don't

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2 know. I don't know how I disagree with that.

3 Q. And just to confirm, you don't
4 remember ever asking Mr. Dondero whether you
5 should have two promissory notes prepared?

6 A. No.

7 Q. And you don't remember discussing
8 with Mr. Dondero what the terms of those two
9 promissory notes should be?

10 A. I don't recall -- I testified all I
11 recall is he said, get the money from Highland.
12 I don't -- the -- the terms of the note, I
13 don't recall ever having a discussion around
14 the terms of the note, but since I don't draft
15 the notes, that -- there could have been a
16 conversation with other people later.

17 Q. Do you have any memory of whether
18 after the notes were drafted, but before you
19 signed them, that you communicated with
20 Mr. Dondero in any way to just confirm or -- or
21 get his blessing or ratification to signing
22 those notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Again, the only thing you remember,
3 sitting here today, was Mr. Dondero said, get
4 the money from Highland, and that is it, that
5 is all you remember?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. I testified to that several times.
9 This was over two years ago. A lot has
10 happened. That is all I recall.

11 Q. And help me here. I'm not very
12 technologically astute. When you -- and I -- I
13 recognize that you do it rarely, but when you
14 sign a document electronically, do you believe
15 that there is an electronic record of you
16 having authorized or signed a document
17 electronically?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. I -- I don't know the tech answer to
21 that, but, you know, since I don't have -- I
22 don't ever attach my signature block
23 electronically, my assistant would have done
24 that, and if that is done over email like we
25 did several times -- you know, multiple,

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2 multiple times over COVID, she would attach my
3 signature block and then email it out to
4 whatever party.

5 Q. What was your assistant's name in
6 May 2019?

7 A. It was Naomi Chisum.

8 Q. Is she the only one? I'm sorry, was
9 she your only assistant that would have maybe
10 facilitated logistically something like you
11 just described?

12 A. You know, she was out on maternity
13 leave at some point. I don't -- I don't recall
14 those dates where she was out for maternity
15 leave. There was -- there were folks backing
16 her up. I don't recall specifically who
17 those -- who those, you know, administrative
18 assistants were, and I don't recall
19 specifically if she was out during this time on
20 maternity leave.

21 I do know that that she was out for
22 a period of time, or who knows, or she could
23 have been on vacation that day or, you know, I
24 don't know.

25 Q. Switching gears now, the two

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2 complaints that have been filed that is against
3 HCMFA and NexPoint, did you see any drafts of
4 those complaints before they were filed?

5 MR. MORRIS: Objection to the form
6 of the question, and to the extent that you
7 had any communications with counsel or you
8 were shown drafts of the complaints by
9 counsel while you were employed by
10 Highland, I direct you not to answer.

11 A. I -- I reviewed documents yesterday
12 with counsel here. I believe that is the first
13 time I have ever seen those.

14 Q. Okay. Did you ever discuss with
15 Mr. Seery these two lawsuits before or after
16 they were filed?

17 A. I don't recall.

18 Q. Were you ever interviewed by legal
19 counsel, to your knowledge, about these
20 promissory notes before the complaints were
21 filed? Without going into what was said, were
22 you ever interviewed by legal counsel?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Obviously with COVID, it changed,
3 but -- but before COVID, did you used to meet
4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID -- so
6 we're talking kind of late March, early April,
7 right, there was about -- I don't remember the
8 specific date when the board for Highland was
9 appointed. I believe it was around February of
10 2020, so maybe there was a month-and-a-half,
11 two-month window where we were meeting
12 in-person or, you know, like we were actually
13 in the office, excuse me, we were in the
14 office.

15 And, you know, when they were first
16 appointed, the board members and Mr. Seery
17 were -- were definitely down here more
18 in-person.

19 Q. Did you ever see Mr. Seery taking
20 written notes of -- of his meetings with you or
21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video
24 conference with Mr. Seery, seeing him take
25 notes, written notes?

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2 A. The Zoom calls we had, I don't
3 recall having seen video or, you know, or if it
4 was on Zoom, I just remember it being -- well,
5 no, you know what, there were some -- you know,
6 I take that back.

7 So there were -- there were some
8 times that I did remember seeing Mr. Seery
9 on -- on some of the Zoom calls.

10 Q. Well, let me --

11 A. I don't -- sorry, I'm thinking. I'm
12 thinking -- I'm going back. I'm trying to
13 process this.

14 Q. I can make it much quicker,
15 Mr. Waterhouse. I have heard -- I have heard
16 that Mr. Seery is a copious note taker.

17 Do you have any knowledge about
18 that?

19 A. No.

20 Q. Okay. Switching gears yet again,
21 and this will be last theme. Do you need a
22 restroom break, or are you good to go for
23 another half an hour?

24 MS. DEITSCH-PEREZ: I need a
25 restroom break.

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2 MR. RUKAVINA: Can we make it five
3 minutes?

4 THE WITNESS: Five minutes would be
5 great.

6 VIDEOGRAPHER: We're going off the
7 record at 5:53 p.m.

8 (Recess taken 5:53 p.m. to 5:59 p.m.)

9 VIDEOGRAPHER: We are back on the
10 record at 5:59 p.m.

11 Q. Mr. Waterhouse, I had asked you
12 earlier about contracts between HCMFA and the
13 debtor, and now I'm going to talk about
14 contracts between the debtor and NexPoint
15 Advisors. Okay?

16 A. Okay.

17 Q. Now, were there contracts similar to
18 the ones with HCMFA that NexPoint had in the
19 nature of employee reimbursement and shared
20 services?

21 A. Yes, they -- NexPoint Advisors and
22 Highland Capital Management Fund Advisors had
23 cost reimbursement and shared services
24 agreements with Highland Capital Management,
25 L.P.

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2 Q. And was that shared services
3 agreement, to the best of your understanding,
4 in place as of December 31, 2020?

5 A. It was -- it was terminated at some
6 point, and I remember the contracts had
7 different termination dates, but I think the --
8 the date of termination was January 31st of
9 2021, after the termination was put in.

10 So yeah, it would be in place at the
11 end of the year of December -- it would be in
12 place at December 31st, 2020.

13 Q. And pursuant to that agreement as of
14 December 31st, 2020, was the debtor providing
15 what you would describe as back office services
16 to NexPoint?

17 A. Yes.

18 Q. Would those have included accounting
19 services?

20 A. Yes.

21 Q. And as part of those accounting
22 services, would the debtor have assisted
23 NexPoint with paying its bills?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes.

3 Q. So let's break that up. You were a
4 treasurer of NexPoint as well in December of
5 2020?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes.

9 Q. Okay. And in December of 2020, did
10 NexPoint have its own bank accounts?

11 A. Yes.

12 Q. And did it use those bank accounts
13 to pay various of its obligations?

14 A. Yes.

15 Q. Did employees of the debtor have the
16 ability to cause transfers to be made from
17 those bank accounts on behalf of NexPoint?

18 A. Yes.

19 Q. And is that one of services that the
20 debtor provided NexPoint, basically ensuring
21 that accounts payable and other obligations
22 would be paid?

23 A. Yes.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. You answered yes?

3 A. Yes.

4 Q. And the payments, though, whose
5 funds would they be made from?

6 A. From the bank account of NexPoint
7 Advisors. If they were NexPoint advisor
8 obligations, it would be made from NexPoint
9 Advisors' bank account.

10 Q. So let's pull up Exhibit Alpha 1.
11 You should have that -- it is my Tab 1 or my
12 Exhibit 1.

13 (Exhibit A1 marked.)

14 Q. So this is a -- this is a series of
15 emails, Mr. Waterhouse. Let's look at the
16 first page here, November 25, 2020, between
17 Kristin Hendrix and yourself.

18 Do you see that, sir?

19 A. I do.

20 Q. And do you see where Ms. Hendrix
21 writes: NPA.

22 Do you know what NPA stood for?

23 A. Yes.

24 Q. And what does it stand for?

25 A. NexPoint Advisors.

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2 Q. And was that how you-all internally
3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her
6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what --

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is -- what is Ms. Hendrix
14 here on November 25 asking of you?

15 A. She is asking me -- so she -- these
16 are -- these are payments -- typically we would
17 do an accounts payable run every week at the
18 end of every Friday. But looking at this date,
19 it is Wednesday, November 25th, which means, to
20 me, it is likely Thanksgiving weekend.

21 So this is the day before
22 Thanksgiving, so this is the last kind of --
23 kind of day before the holidays and vacation
24 and things of that nature. So it is
25 effectively the Friday of that week.

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2 So she is -- she is putting in all
3 the payments for the week because we batch
4 payments weekly. And these are the payments
5 that go out that week, and she is informing me
6 of the payments and -- you know, again, at the
7 bottom of the email, she is asking for my okay
8 to -- to release these payments in the wire
9 system.

10 Q. So these would be accounts payable
11 of NexPoint?

12 A. I mean, it would be accounts payable
13 for all of these entities listed on this email.

14 Q. And who was Ms. Hendrix employed by
15 in November and December of 2020?

16 A. Highland Capital Management.

17 Q. Okay. So -- so part of the services
18 that NexPoint had contracted with was for
19 Highland to ensure that NexPoint timely paid
20 its accounts payable; is that accurate?

21 MR. MORRIS: Objection to the form
22 of the question. You have got to be
23 kidding me.

24 Q. Is that accurate?

25 A. Yes.

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2 Q. And did NexPoint rely on employees
3 of the debtor to ensure that NexPoint's
4 accounts payable were timely paid?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes.

8 MR. RUKAVINA: Let's flip to the
9 next page, Mr. Nguyen, if you will please
10 scroll to the next page.

11 Q. So this is an email similar to the
12 prior one, November 30th.

13 Do you see where it says, NPA HCMFA,
14 USD \$325,000 one-day loan?

15 Do you see that, sir?

16 A. I do.

17 Q. Do you have any memory of what that
18 was?

19 A. I don't recall what that -- what
20 that payment was for.

21 Q. Did it sometimes occur that one
22 advisor would, on very short-terms, make loans
23 to another advisor?

24 A. Yes. This -- this -- this occurred
25 from -- from -- from time to time. It actually

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2 looking at -- I'm -- I'm looking at the date of
3 this email. It is November 30th. It is the
4 last day of the month.

5 HCMFA has obligations it needs to
6 pay to its broker-dealer, which is HCFD. And
7 it likely was short funds to make those
8 obligations under that -- under its agreement,
9 and so it provided a one-day loan because on
10 the next business day on 12/1 -- or the next
11 business day in December, it would receive
12 management fees from the underlying funds that
13 it managed and it would be able to pay back
14 that loan to NexPoint Advisors.

15 Q. So -- so here Ms. Hendrix was
16 seeking your approval to transfer \$325,000 from
17 NexPoint to HCMFA for a one-day loan; is that
18 correct?

19 A. That is correct.

20 Q. Let's flip to the next page, sir.

21 MR. RUKAVINA: And, Mr. Nguyen, if
22 you will please scroll down.

23 Q. Now we have as an entry for
24 \$325,000, 11/30 loan payment.

25 Do you see that, sir?

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2 A. Yes.

3 Q. And that is probably the loan that
4 was approved on the prior page?

5 A. Yes, most likely.

6 Q. So is it also true, sir, that in
7 addition to accounts payable debtor employees
8 would be assisting NexPoint with respect to
9 paying back its debt?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I mean, yes, for loans of this
13 nature, yes.

14 Q. Well, what about long term loans?
15 Was it reasonable for NexPoint to expect debtor
16 employees to ensure that NexPoint timely paid
17 its obligations under long-term notes?

18 MR. MORRIS: Objection to the form
19 of the question.

20 MS. DANDENEAU: Objection to form.

21 A. I mean, that is one of the things
22 that the Highland personnel did provide to the
23 advisors. Yes, we would -- we would -- over
24 the years, yes, we -- we -- we -- we did do
25 that generally. Again, I don't remember

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2 specifically but, yes, generally we -- you
3 know, we did do that.

4 Q. So do you recall -- and we can pull
5 it up, if need be -- that under the NexPoint
6 note that Mr. Morris asked you about earlier,
7 the one for more than \$30 million, that
8 NexPoint was obligated to make an annual
9 payment of principal and interest?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yes, it was -- yes, it -- it was an
13 amortizing note. It was -- you know, from what
14 we reviewed earlier, it was payable by
15 December 31st of each year. So -- but are --
16 are you asking me --

17 Q. I'm just asking you, sir, if you
18 recall the note.

19 A. Yes, the \$30 million note, yes, we
20 reviewed it earlier, yes.

21 Q. And do you recall Mr. Morris had you
22 go through the fact that NexPoint had made
23 payments in years prior to 2020 on that note?

24 A. I do.

25 Q. And do you believe that employees of

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2 the debtor would have played any role in
3 NexPoint having made those prior payments?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. Yes.

7 Q. And what role in years prior to 2020
8 would employees of the debtor have had with
9 respect to NexPoint making that annual payment?

10 A. We -- we -- we would have -- I keep
11 saying "we." The team would have calculated
12 any amounts due under that loan and other
13 loans, as -- as standard course.

14 We would -- since we provided
15 treasury services to the advisors, we would
16 inform the -- the -- the -- we informed
17 Mr. Dondero of any cash obligations that are
18 forthcoming, whether we do cash projections.

19 If, you know, any of these payments
20 would have -- or, you know, the sum total of
21 all of these payments, including any note
22 payments, if there were any cash shortfalls, we
23 would have informed Mr. Dondero of any cash
24 shortfalls. We could adequately plan, you
25 know, in instances like that.

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2 Or, sorry, we -- I say "we" -- I
3 keep saying "we" -- I keep wearing my -- again,
4 my -- my treasurer hat.

5 But, yes, it is to -- it is to
6 inform Mr. Dondero of the obligations of the
7 advisors in terms of cash and obligations that
8 are -- are upcoming and that -- and that are --
9 are scheduled to be paid.

10 Q. And would those obligations that are
11 upcoming and scheduled to be paid prior to 2020
12 have incurred the annual payment on that
13 NexPoint \$30 million note?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Davor, I think
16 you misspoke. You might want to just
17 repeat the question.

18 Q. Okay. Let me repeat the question,
19 sir.

20 Prior to 2020, those services that
21 you just described, would that -- on behalf of
22 the debtor, would that have included NexPoint's
23 payments on the \$30 million note?

24 A. Yes.

25 Q. So someone at the debtor in treasury

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2 or accounting would have sent some schedule or
3 a reminder that a payment would be coming due
4 in the future. Is that generally the practice?

5 A. Yes, we would -- you know, again, I
6 didn't -- I didn't micromanage the teams, but
7 we had a -- a corporate accounting calendar
8 that we use as kind of a tickler file to keep
9 track of payments.

10 I actually, you know, don't know how
11 actively they're using that in -- in prior to
12 2020, but it was actively used at some point.

13 We did look at NexPoint cash
14 periodically and cash for the other advisors as
15 well and payments. You know, we -- payments
16 like this would have appeared in our cash
17 projections, in the advisor's cash projections.

18 And, again, as like I said earlier,
19 they would have appeared there, so there would
20 be time to plan for making any of these
21 payments.

22 Q. And based on your experience, would
23 it have been reasonable for NexPoint to rely on
24 the debtors' employees to inform NexPoint of an
25 upcoming payment due on the \$30 million

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2 promissory note?

3 MR. MORRIS: Objection to form of
4 the question.

5 MS. DANDENEAU: Objection to form.

6 A. Yes. Yes, they did. I mean, but I
7 mean, but I don't think these -- these notes
8 were any secret to anybody.

9 Q. I understand, and I'm not suggesting
10 otherwise.

11 MR. RUKAVINA: Please pull up Alpha
12 2, Mr. Nguyen.

13 (Exhibit A2 marked.)

14 Q. Now, this document is similar to the
15 ones we've seen before as of December 31, 2020,
16 and I don't see under NTA anything there for
17 paying the promissory note to Highland.

18 Do you see anything like that?

19 A. I do not.

20 MR. RUKAVINA: You can pull that --
21 that exhibit down, Mr. Nguyen.

22 Q. You are aware, of course, by now
23 that, in fact, NexPoint failed to make the
24 payment due December 31, 2020, are you not?

25 A. I am aware, and yes, I do understand

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2 it.

3 Q. Were you aware that Highland
4 accelerated that \$30 million promissory note?

5 A. I am aware.

6 Q. Were you aware of that acceleration
7 at the time that it occurred?

8 A. I don't remember specifically.

9 Q. Do you recall whether anyone asked
10 you -- prior to the acceleration, anyone asked
11 you at Highland, what Highland should do with
12 respect to the missed payment?

13 A. Did anyone ask me what Highland
14 should do about the missed payment?

15 Q. Yes, before acceleration.

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. I mean, what -- what I recall is
19 there was the -- sorry, are you asking me --

20 MS. DANDENEAU: Why don't you just
21 repeat the question, Mr. Rukavina.

22 Q. Let me try again, Mr. Waterhouse,
23 let me try again.

24 I am saying you're the CFO of
25 someone, in this case, Highland, and the

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2 borrower failed to make the required payment.

3 Are you with me so far?

4 A. I am.

5 Q. Did anyone then ask you, what should
6 we do with respect to our rights against the
7 borrower that missed the payment?

8 A. Not that I recall.

9 Q. Did you play a role in the decision
10 to accelerate that \$30 million promissory note?

11 A. I did not.

12 Q. Do you recall whether Mr. Seery ever
13 asked you before the acceleration as to whether
14 he should accelerate the note?

15 A. I don't recall.

16 Q. And you don't recall when you
17 learned of the acceleration itself?

18 MR. MORRIS: Objection to the form
19 of that question.

20 A. It was -- it was sometime in
21 early -- in early 2021. I don't remember
22 specifically.

23 Q. But do you recall whether it was
24 after the acceleration had already been
25 transmitted?

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2 MS. DANDENEAU: Objection to the
3 form of the question.

4 A. I don't recall.

5 Q. Do you recall in early to mid
6 January of 2021, after the default, discussing
7 the default with Mr. Dondero?

8 A. I do recall discussing with
9 Mr. Dondero after December 31, 2020?

10 Q. Yes, the fact of the default.

11 A. I don't recall.

12 MR. RUKAVINA: Let's pull up my
13 Exhibit 6, Alpha 6.

14 (Exhibit A6 marked.)

15 MR. RUKAVINA: And, Mr. Nguyen, if
16 you will please scroll down.

17 Q. This email chain begins with you
18 writing to Ms. Hendrix on January the 12th:
19 NexPoint note to HCMLP.

20 Do you see that, sir?

21 A. I do.

22 Q. Were you discussing this same
23 \$30 million note we're talking about right now
24 with Ms. Hendrix?

25 A. Yes.

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2 Q. Okay. Do you recall what prompted
3 you to send that email to her?

4 A. Yes, I had -- I had a conversation
5 with Jim.

6 Q. Okay. And what -- what did you
7 discuss with Jim that led to this email chain?

8 A. He -- he called me and he said he
9 wanted to make payment on the NexPoint note,
10 and I didn't -- I didn't know the -- the amount
11 offhand, so I reached out to Kristin and got
12 the details and relayed that to him.

13 Q. And you see you sent that email to
14 her at 11:15 a.m. Does that help you remember
15 when you had this discussion with Mr. Dondero?
16 In other words, was it that morning or the day
17 before, or can you -- can you --

18 A. No, it was -- it was that morning.

19 Q. And do you recall how you had that
20 conversation with him?

21 MR. MORRIS: Objection to the form
22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he -- he called me. I was at
25 home. We were working from home here in

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2 December of 2020. He called me from home. He
3 said he was in court. He wanted to -- he asked
4 about, you know, making payment on the note and
5 the amount, and so I didn't have those numbers
6 in front of me, so I said I would get back to
7 him. I wanted all the details, so here is
8 this -- so I reached out to Kristin.

9 Q. And then she gave you that
10 \$1,406,000 figure?

11 MR. RUKAVINA: Mr. Nguyen, if you
12 will scroll up, please.

13 A. Yes. Yeah, she -- the \$1,406,112.

14 Q. And do you recall whether you
15 conveyed that amount to Mr. Dondero?

16 A. Yes. I -- I called him back and
17 gave him -- gave him this amount.

18 Q. Are you aware of whether NexPoint,
19 in fact, then made that 1 million 406 and
20 change payment?

21 A. Yes, they did.

22 Q. Did you discuss with Mr. Dondero at
23 that time, either the first conference or the
24 second conference that day -- strike that.

25 When you conveyed the number to

1 WATERHOUSE - 10-19-21

2 Mr. Dondero, was -- was it also on January
3 12th?

4 A. Sorry, when I conveyed the
5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that -- it was --

8 Q. So you had --

9 A. It was that point.

10 Q. Well, to the best of your
11 recollection, you had a conference with
12 Mr. Dondero by the telephone in the morning,
13 and then another conference with him by
14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember -- yeah, it
16 was either that morning or it could have been,
17 you know, early afternoon, but again, I
18 remember calling him back, relaying this
19 information to him, and he said, okay, pay --
20 you know, make -- make this payment.

21 Q. And during either of those two
22 calls, did you tell Mr. Dondero anything to the
23 effect that making those -- I'm sorry, making
24 that payment would not de-accelerate the
25 promissory note?

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2 A. No.

3 Q. Did you tell him anything to the
4 effect that making that payment would not cure
5 the default?

6 A. No.

7 Q. Did you discuss that in any way with
8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have
11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. He -- he -- he didn't go into
15 specifics.

16 Q. Did he say anything to you to the
17 effect that if NexPoint makes that payment,
18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one
23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't
25 recall, you mean you don't remember right now

1 WATERHOUSE - 10-19-21

2 either way; correct?

3 A. Yeah, I don't remember. I don't
4 remember us discussing that.

5 Q. Now -- and we're almost done, I
6 promise. I'm just going to -- I don't know how
7 to ask this question, so I'm just going to try
8 to do my best.

9 Prior to the default on December 31,
10 2020, did Mr. Seery ever tell you any words to
11 the effect that you or someone at Highland
12 should ensure that NexPoint doesn't make its
13 payment?

14 A. No.

15 Q. Did you have any hint or any belief
16 that anyone at NexPoint -- I'm sorry, strike
17 that.

18 Did you have any reason to believe
19 that anyone with Highland was actively trying
20 to get NexPoint to make that default by not
21 paying on December 31?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Are you asking, did any Highland
25 employees actively work to make -- to

1 WATERHOUSE - 10-19-21

2 somehow --

3 Q. Yes. Let me take a step back. Let
4 me take a step back.

5 So you are aware now that as a
6 result of that default, what was still some
7 25-year note was accelerated and became
8 immediately due. You are aware of that now;
9 right?

10 A. Yes.

11 Q. And can you see how someone at
12 Highland might actually have been pleased with
13 that development?

14 MR. MORRIS: Objection to the form.

15 Q. Not that they were --- not that they
16 were pleased, but you can see how someone at
17 Highland might have been pleased with that
18 development?

19 MR. MORRIS: Objection to the form
20 of the question.

21 MS. DANDENEAU: Object to form.

22 A. I don't know how they would have
23 reacted to that.

24 Q. Okay. But you're not -- you're not
25 aware of any instructions or any actions being

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2 given or taken at Highland by Mr. Seery, the
3 independent board, DSI, that -- that would have
4 basically led Highland to ensure that NexPoint
5 would fail to make that payment?

6 A. I'm not aware.

7 Q. In other words, there wasn't a trick
8 or a settlement; right?

9 MS. DEITSCH-PEREZ: Objection to
10 form.

11 MS. DANDENEAU: Object to form.

12 MR. MORRIS: Object to form.

13 A. I'm not aware.

14 Look, I'm not aware. I'm not in
15 every conversation. I mean, and I'm just --
16 again, I'm sitting at home. It is the end of
17 the year. Again, I'm not aware.

18 Q. That is a perfectly legitimate
19 answer. I don't know why -- why you think
20 otherwise.

21 Okay. Just give me one second to
22 compose my thoughts.

23 MS. DEITSCH-PEREZ: While you're
24 taking your one second, why don't we take
25 three minutes. I will be right back.

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2 VIDEOGRAPHER: Do we want to go off
3 the record?

4 MR. RUKAVINA: Yes.

5 VIDEOGRAPHER: All right. We're
6 going off the record at 6:27 p.m.

7 (Recess taken 6:27 p.m. to 6:30 p.m.)

8 VIDEOGRAPHER: We are back on the
9 record at 6:30 p.m.

10 MR. HORN: Is Deb back?

11 MS. DANDENEAU: Are you asking about
12 me? I'm here.

13 MR. HORN: Oh, okay. I don't see
14 you, sorry.

15 Q. Actually, yeah, Mr. Waterhouse, so
16 when you had --

17 MS. DANDENEAU: Are you asking about
18 Deb Dandeneau or Deborah? I mean, there
19 are a lot -- as we talked about, a lot of
20 Debs. I'm here.

21 MS. DEITSCH-PEREZ: I'm here.

22 MR. HORN: Yes, I was asking about
23 DDP.

24 MS. DEITSCH-PEREZ: Oh, DDP is here.

25 MR. HORN: Okay. Here we go. I'm

1 WATERHOUSE - 10-19-21

2 going back on mute.

3 MS. DANDENEAU: Get the right
4 nomenclature.

5 Q. Mr. Waterhouse, on January 12th,
6 2021, when you had those talks with Mr. Dondero
7 about the \$1.4 million payment, did you have a
8 communication or a conversation with Mr. Seery
9 about that payment after January 12th, 2021?

10 A. I don't recall.

11 Q. Well, in response to Mr. Dondero
12 reaching out to you, do you recall on that day,
13 January 12th, talking to Mr. Seery or anyone at
14 Highland other than the email chain we just saw
15 about Mr. Dondero's call with you?

16 A. Did I talk to -- I spoke with
17 Kristin -- I don't know if I spoke to her. I
18 likely spoke to Kristin Hendrix because we had
19 to get the wire on NexPoint's behalf to make
20 the payment to Highland.

21 Q. So it is true, then, that -- that
22 employees of the debtor did actually cause that
23 payment to be made when it was made after
24 January 12th?

25 A. Yes, I mean, we -- we -- as I

1 WATERHOUSE - 10-19-21
2 testified earlier, we provided that accounting
3 finance treasury function as -- under the
4 shared services agreement. And so once I
5 got the -- I talked to Jim, got the approval to
6 make this payment, we have to then make the
7 payment, or the team does, and so the payment
8 was made.

9 Q. Okay. But -- okay. And -- and
10 sitting here right now, after Jim called you,
11 you don't remember talking to anyone other than
12 the -- the couple of people you mentioned,
13 talking to anyone about something to the effect
14 that, hey, Jim wants to make this payment now?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't -- I don't recall.

18 Q. And does that include legal counsel?
19 Without going into any detail, on
20 January 12th or before that payment was made,
21 did you consult with legal counsel about
22 anything having to do with the \$1.4 million
23 payment?

24 A. I don't recall.

25 Q. Okay. Thank you, sir, for your

1 WATERHOUSE - 10-19-21

2 time.

3 MR. RUKAVINA: Pass the witness.

4 MR. MORRIS: I just have a few
5 questions, if I may.

6 MS. DEITSCH-PEREZ: Don't you go at
7 the end?

8 MR. MORRIS: Oh, I apologize. He is
9 your witness. I'm surprised you want to
10 ask him questions, but go right ahead.

11 MS. DEITSCH-PEREZ: Just have a
12 couple of things.

13 MR. RUKAVINA: And I will just
14 object to that, that he's our witness.
15 That's not --

16 MR. MORRIS: I'm not talking to you.
17 I'm not talking to you.

18 MS. DANDENEAU: Also, Mr. Morris, it
19 is -- it is --

20 MS. DEITSCH-PEREZ: He is not my
21 witness. He's been subpoenaed by you.
22 Okay?

23 That is no offense, Mr. Waterhouse,
24 I'm -- I'm not -- okay. Anyway.

25 EXAMINATION

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2 BY MS. DEITSCH-PEREZ:

3 Q. Good evening. I'm very sorry to be
4 going last and I know you have had a long and
5 taxing day, so I thank you for indulging me.

6 The kinds of services that you
7 describe that the -- that Highland provided for
8 NexPoint, did Highland also provide similar
9 services to that to HCRE and HCMS?

10 A. Yes.

11 MR. MORRIS: Objection to the form
12 of the question.

13 Q. What kind of services did Highland
14 provide to HCRE and HCMS?

15 MR. MORRIS: Objection to the form
16 of the question.

17 MS. DEITSCH-PEREZ: What is your
18 objection, John?

19 MR. MORRIS: It is vague and
20 ambiguous. Unlike the advisors and
21 NexPoint, they actually had shared services
22 agreements.

23 MS. DEITSCH-PEREZ: I got -- I
24 understand your objection. That is fine.

25 Q. Let's take them one at a time.

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2 What kinds of services did Highland
3 provide to HCRE?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. HCMS, Highland employees provided
7 accounting services, treasury management
8 services, potentially legal services. I
9 don't -- but I wouldn't have been directly
10 involved in that. But as far as the teams that
11 I manage, it was accounting, treasury, things
12 of that nature.

13 Q. Okay. And that was for HCM, LLP --

14 A. And -- and, sorry, it would also be
15 any asset valuation if needed as well.

16 Q. Okay. We went back and forth on
17 each other and I apologize, so just to clarify.

18 You were talking about the services
19 that Highland Capital Management provided to
20 HCMS; is that right?

21 A. HCMS. So, again, yes. And
22 accounting, treasury, valuation, and also tax
23 services too.

24 Q. Okay.

25 A. Tax services. Look, I'm expanding

1 WATERHOUSE - 10-19-21

2 this, their HR services as well.

3 Q. Okay. And did that include bill
4 paying?

5 MR. MORRIS: Objection to the form
6 of the question.

7 Q. Did the services that HCM provided
8 to HCMS include bill paying?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes.

12 Q. And did the services that HCMLP
13 provided to HCMS include scheduling upcoming
14 bills?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. And did HCMLP regularly pay -- cause
19 to be paid the payments on loans HCMS had from
20 HCMLP?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Yes.

24 Q. Typically -- if there is a
25 typically, how far in advance of due dates did

1 WATERHOUSE - 10-19-21

2 HCMLP cause HCMS to pay its bills?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I mean, it -- it -- it depend -- it
6 depended on the nature of the payment and the
7 vendor, but, you know, if there were -- if
8 there were larger scheduled payments, you know,
9 I would like to give at least 30 days notice.

10 And that is -- that is kind of my
11 rule of thumb so no one is surprised.

12 Q. Okay. And was it generally HCMLP's
13 practice to timely pay HCMS' bills?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it -- it -- that depended on
17 the nature of the payment.

18 Q. Okay. And can you explain what you
19 mean by that?

20 A. Yeah, I mean if -- if it was -- I
21 mean -- if there was some professional fees
22 that weren't -- you know, they were due but
23 they weren't urgent, those fees may not be paid
24 as timely as others that have a due date or --
25 or things like that.

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2 Q. Okay. Are loan payments the kinds
3 of thing that HCMLP would pay on time because
4 of potential consequences of not paying on
5 time?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes. As I testified earlier, we
9 would want to give, you know, notice on -- on
10 -- on larger payments and -- and things of that
11 nature so we didn't miss due dates.

12 Q. Okay. And over the course of time,
13 did HCMLP generally pay HCMS' loan payments in
14 a timely fashion?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I can't remember specifically, but
18 generally, yes.

19 Q. Okay. Now, did HCMLP provide
20 similar services to HCRE that you have
21 described it provided to HCMS?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, but I don't think it -- it
25 provided -- I don't think it provided HR

1 WATERHOUSE - 10-19-21

2 services.

3 Q. Can you describe the accounting and
4 treasury services that HCMLP provided for HCRE?

5 A. Yeah, it -- it would provide
6 bookkeeping services on a -- on a periodic
7 basis. It would make payments, you know, as
8 needed.

9 Q. Okay. So did it provide --

10 A. And -- and I believe it -- it -- it
11 provided tax services as well.

12 Q. Okay. And so did it provide the
13 same kind of bill -- did HCMLP provide the same
14 kind of bill-paying services for HCRE that it
15 provided for HCMS and NexPoint?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Yes.

19 Q. And over the course of time, did
20 HCMLP generally cause to be made the loan
21 payments that HCRE owed to HCMLP?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes.

25 Q. Did HCMLP make loan payment -- the

1 WATERHOUSE - 10-19-21

2 loan payment that was due from HCMS to HCMLP in
3 December of 2020?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I don't believe that payment --
7 payment was made.

8 Q. Okay. And when HCMLP caused HCMS in
9 the past to make loan payments, whose money did
10 it use to make those payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. It was the -- the money in HCMS's
14 operating account would be made to that --
15 those moneys would be used to make payment to
16 Highland Capital Management.

17 Q. Okay. And Highland -- is it correct
18 that Highland Capital Management personnel had
19 the access to HCMS's accounts to be able to
20 cause such payments to be made?

21 A. Yes, Highland personnel had access
22 to those accounts.

23 Q. Okay. And so now for HCRE, whose
24 money was used when HCMLP caused HCRE
25 payments -- loan payments to Highland to be

1 WATERHOUSE - 10-19-21

2 made?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. It was -- it was cash in HCRE's bank
6 account that would be used to make payments to
7 Highland Capital Management.

8 Q. Okay. And so did Highland Capital
9 Management have access to HCRE's funds in order
10 to be able to make such payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Personnel at Highland Capital
14 Management had access to HCRE's bank account to
15 effectuate the payments.

16 Q. Okay. And was the payment due from
17 HCRE to HCMLP due in December of 2020 made?

18 A. It --

19 Q. In December of 2020.

20 A. It was not.

21 Q. Okay. And was there money in HCRE's
22 account that would have enabled the payment to
23 be made had HCM personnel attempted to make the
24 payment?

25 MR. MORRIS: Objection to the form

1 WATERHOUSE - 10-19-21

2 of the question.

3 A. I -- I don't recall.

4 Q. Do you have any reason to believe
5 that either HCRE or HCMS simply didn't have the
6 funds on hand to make the December 2020
7 payments?

8 A. I don't know.

9 Q. I guess I'm asking, do you have any
10 reason to believe that they didn't have the
11 funds?

12 A. We managed cash for so many
13 different entities and funds, and I don't
14 recall, you know, where the cash position was
15 for HCRE and HCMS at 12/31/2020.

16 Q. Okay.

17 A. I just don't recall, and I don't --
18 and I don't remember what the loan payment
19 obligations were from HCRE to Highland, and
20 from HCMS to Highland. I don't recall. I
21 don't recall, I mean...

22 Q. Let me come at it a different way.
23 Were the -- were the payments that would
24 otherwise have been due in December of 2020
25 made in January of 2021 for HCMS and HCRE?

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2 A. I believe the HCRE payment was made
3 in January of 2021. I don't recall any
4 payments being made from HCMS to Highland.

5 Q. If it -- how is it the HCRE payment
6 came to be made? Why did you make it -- why
7 did HCM make the payment in January of 2021?

8 A. Jim -- Jim called me and instructed
9 me to -- to make the payment on behalf of HCRE,
10 Jim Dondero -- Jim Dondero.

11 Q. Did he seem upset that -- that the
12 payment had not been made?

13 A. Yeah. On the note that was, you
14 know, that was the term note, yes, he -- he was
15 displeased that the -- that the payment had not
16 been made by year-end.

17 Q. Okay. And did you make the -- cause
18 the payment to be made as -- as requested?

19 A. Yes.

20 Q. And did anyone else from HCM
21 participate with you in causing the payment to
22 be made to -- on the HCRE loan?

23 A. Yes. It would have been Kristin
24 Hendrix. I -- again, I don't -- as I testified
25 earlier, I'm not an officer of HCRE. I don't

1 WATERHOUSE - 10-19-21

2 believe I'm an authorized signer. So I
3 can't -- other personnel have to make payment
4 from HCRE to -- to -- to -- to Highland.

5 Q. Okay. And in the conversation
6 that -- that you had with Mr. Dondero when he
7 requested the payment to be made, did you say
8 to him words to the effect, Jim, this loan is
9 going to stay in default, what are you making
10 the payment for, anything like that?

11 A. No.

12 Q. In fact, did you have the impression
13 from him that he thought that the loan would
14 be -- the default would be cured by making the
15 payment?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Did I get the impression from Jim
19 Dondero that the loan would be cured if the
20 payment from HCRE --

21 Q. Yeah, if that is what he thought.

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. I didn't get any impression from him
25 on that at the time.

1 WATERHOUSE - 10-19-21

2 Q. Do you know whether there was an
3 HCMS term loan that had a payment due in
4 December of 2020?

5 A. I don't recall.

6 Q. Okay. And so the reason you don't
7 recall whether or not there was a payment in
8 January of 2021 is because you just don't
9 remember whether there was such a loan at all?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't remember. There is -- there
13 is so many notes, and I mean, demands, and I
14 don't -- I don't remember. It's a lot to keep
15 track in your head.

16 Q. I understand, and -- and I hear your
17 frustration when you have explained that the
18 debtor has your documents and you don't, and so
19 I fully appreciate it, and this is no knock on
20 you. It's a knock on somebody else on this
21 call.

22 MR. MORRIS: I move to strike. That
23 was pretty obnoxious, but go ahead.

24 Q. Okay. But so, Mr. Waterhouse, if --
25 if a payment on the HCMS loan was made in

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2 January of 2021, do you think it was part of
3 the same conversation where Jim Dondero said,
4 hey, why didn't that get paid, please make
5 that -- get that payment done?

6 MR. MORRIS: I object to the form of
7 the question.

8 A. Yes. Likely it would have been -- I
9 mean, again, I don't recall a payment being
10 made, but, you know, again, I don't remember
11 everything.

12 Q. Okay. Did -- at the time you were
13 communicating with Kristin Hendrix about the
14 payment being made, whichever payments were
15 made in January, did she say anything to you
16 about the payments not curing the loan
17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to
20 take you back to very early in the deposition
21 when Mr. Morris was asking you about the --
22 the -- the -- the agreement with respect to
23 the -- the forgiveness element of the loans, so
24 that is just to orient you.

25 Do you remember that there was a

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2 time that you and Mr. Dondero were
3 communicating about potential means of
4 resolving the Highland bankruptcy by what was
5 colloquially referred to as a pot plan?

6 A. Yes.

7 Q. Okay. And can you tell me generally
8 when that was?

9 A. Like mid -- mid 2020, sometime in
10 2020, mid 2020.

11 Q. Okay. And did the process of trying
12 to figure out what the numbers should be
13 involve looking at what one should pay for the
14 Highland assets?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. Okay. And did there come a time
19 when you were proposing some potential numbers
20 and Mr. Dondero said something to you like,
21 well, why are you including payment for the
22 related party notes, those, you know, were
23 likely to be forgiven as part of my deferred
24 executive compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we did have that conversation.

4 Q. Okay. Was that conversation in
5 connection with trying to figure out the right
6 numbers for a pot plan?

7 A. Yeah. I mean, it was -- it was -- I
8 mean, Jim -- Jim would ask for, you know,
9 most -- most recent asset values, you know, for
10 Highland, and -- and myself and the team
11 provided those to him, so it was in that
12 context.

13 Q. Okay. And does that refresh your
14 recollection that these communications were in
15 2020 rather than 2021?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. The -- the -- the executive
19 compensation discussions were definitely in
20 2020.

21 Q. Okay. Now, did you ever make
22 proposals that took into account Jim's comment
23 that the notes were likely to end up forgiven
24 as part of his compensation?

25 MR. MORRIS: Objection to the form

1 WATERHOUSE - 10-19-21

2 of the question.

3 A. Yes, we -- the team and myself put
4 together, you know, asset summaries of Highland
5 at various times for all the assets of
6 Highland, and not including the notes.

7 Q. Okay. And were those presentations
8 communicated to -- to Mr. Seery?

9 A. No. Well, look, I didn't tell -- I
10 didn't tell Mr. Seery. I don't know what
11 Mr. Dondero did with the information.

12 Q. Okay.

13 A. I did not have conversations with
14 Mr. Seery.

15 Q. Okay. Do you know who saw the
16 presentations that you put together that didn't
17 include the value of the related party notes?

18 A. We're talking presentations -- these
19 are -- these are Excel spreadsheets?

20 Q. Uh-huh.

21 A. I don't know who -- these were given
22 to -- to Jim Dondero. I don't know what was
23 done with them after that.

24 Q. Okay. You also mentioned earlier
25 that sometime during your tenure at Highland

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2 you knew of the practice of giving forgivable
3 loans to executives.

4 MR. MORRIS: Objection to the form
5 of the question.

6 Q. Can you -- can you tell me what you
7 recall about that practice?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, so there were -- there were --
11 during my tenure at Highland, there were loans
12 or -- given to employees that were later
13 forgiven at a future date and time.

14 Q. Okay. And when the loans were
15 given, did the notes, to your recollection, say
16 anything about the potential forgiveness term?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. When you say "did the notes," did
20 the promissory notes detail the forgiveness?

21 Q. Yes.

22 A. Not that I recall.

23 Q. And until such time as whatever was
24 to trigger the forgiveness occurred, were the
25 notes bona fide notes as far as you were

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2 concerned?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. Yes, similar to -- yes.

6 Q. Okay. You were going to say similar
7 to what?

8 A. Mr. Morris earlier today showed
9 notes of the financial statements about various
10 affiliate loans. I -- I -- I do recall these
11 notes because I -- at that time personally
12 worked on the -- the financial statements of
13 Highland. That was, you know, in my role as a
14 corporate accountant.

15 And there were -- those loans
16 were -- to the partners were detailed in the
17 notes to the financial statements, similar to
18 what we went through earlier today in the prior
19 testimony about what we saw with Highland
20 and -- and -- and the -- and HCMFA.

21 Q. Is it fair to say that on Highland's
22 balance sheet there were any number of assets
23 that the value of which could be affected by
24 subsequent events?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes. I mean, yes, that -- there
4 are. And that is -- yes.

5 Q. Okay. And is it typical accounting
6 practice that until there is some certainty
7 about those potential future events, that asset
8 value listed on -- on the books doesn't take
9 into account those potential future events?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yeah, if those -- yes. If -- if
13 those future events, you know, at the time of
14 issuance are not known or knowable, like I
15 discussed earlier with, like, market practice,
16 asset dislocation, or, you know, I mean, things
17 like that, you -- I mean, it -- it could affect
18 its fair value --

19 Q. Okay.

20 A. -- in the future.

21 Q. And am I correct you wouldn't feel
22 compelled to footnote in every possible change
23 in -- in an asset when those possibilities are
24 still remote?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. The accounting standard is you have
4 to estimate to the best -- you know, to -- to
5 the best of your ability, the fair value of an
6 asset as of the balance sheet date under --
7 under GAAP.

8 Q. Did -- strike that.

9 Okay. Give me a minute. I'm
10 close -- I'm close to done. Let me just go off
11 and look at my notes for a second. So take two
12 minutes.

13 VIDEOGRAPHER: We're going off the
14 record at 7:02 p.m.

15 (Recess taken 7:02 p.m. to 7:03 p.m.)

16 VIDEOGRAPHER: We are back on the
17 record at 7:03 p.m.

18 Q. Mr. Waterhouse, is it generally your
19 understanding that people you work with now
20 have been asking the debtor for full and
21 unfettered access to their own former files?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, I am -- I am generally aware.

25 Q. Okay. And do you think you could

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2 have been better prepared for this deposition
3 if the debtor had complied with those requests?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I -- I -- I most certainly -- yes.
7 I mean, again, these are multiple years,
8 multiple years ago, lots and lots of
9 transactions.

10 You know, we asked about NAV errors
11 and, you know, things like that and these
12 are -- it would make this process a lot more --
13 a lot easier and if we had -- if we had access
14 to that.

15 Q. Okay. And has the debtor -- is the
16 debtor suing you right now?

17 A. Yes.

18 Q. And is the debtor trying to renege
19 on deals that it had previously made with you?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. Sorry, I need to -- it is my
23 understanding that the litigation trust is
24 suing me. And not being a lawyer, I don't
25 know -- is that the debtor?

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2 Is that -- I don't know the
3 relationship. So, again, I'm not the lawyers.
4 I've said many times. But my understanding is
5 the litigation trust is suing me. I could be
6 wrong there. I don't know.

7 Q. Okay. I understand.

8 Someone with some connection to the
9 Highland debtor has brought a claim against
10 you; is that fair?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Yes.

14 Q. Okay. And is there also some motion
15 practice in the bankruptcy where the debtor or
16 someone associated with the debtor is
17 attempting to undo something that was
18 previously resolved with you?

19 A. Yes.

20 Q. And so in one action somebody is
21 associated with the debtors trying to --
22 threatening you with trying to take money from
23 you, and then in the other -- and trying to --
24 and in the other they are threatening not to
25 pay you things that had previously been agreed;

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2 is that correct?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I want to be -- yes, I -- there
6 is -- I'm being sued, again, on -- on something
7 that was agreed to with Mr. Seery and myself.
8 I don't -- I don't -- I don't own that claim.

9 Q. Okay.

10 A. To be transparent, I don't own that
11 claim. So it is not my personal property.

12 Q. Okay.

13 A. And -- and being the nonlawyer, I
14 don't know how I can get sued for something
15 that I don't owe or, like, I don't own
16 anything. I'm not the lawyer. But, I mean, if
17 that is -- if I'm understanding the facts
18 correctly.

19 Q. Okay. And the lawsuit that was
20 filed that names you, that was just filed
21 this -- this past week; is that right?

22 MS. DANDENEAU: Ms. Deitsch-Perez, I
23 do want to interrupt at this point because
24 just as I told Mr. Morris, that this is a
25 deposition about the noticed litigation.

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2 I really don't want to go -- go
3 afield --

4 MS. DEITSCH-PEREZ: Yeah.

5 MS. DANDENEAU: -- and open up a
6 whole new line of inquiry about the lawsuit
7 or the -- the motion and the bankruptcy
8 court. We will be here all night.

9 MS. DEITSCH-PEREZ: And I
10 understand.

11 Q. My -- my point is: Do you feel
12 like -- like there is some effort by these
13 parties related to the debtor to intimidate
14 you -- not that you -- I'm not saying you are
15 or you aren't.

16 But do you feel like there is some
17 effort to intimidate you and maybe an effort to
18 deter you from being as prepared as you might
19 be in this deposition?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I was -- I was surprised by the
23 lawsuit, by me being named, because, again, I
24 don't own the asset and things like that.
25 Yeah, I just -- I want to move forward with my

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2 life at Skyview.

3 MS. DEITSCH-PEREZ: Thank you.

4 THE WITNESS: Thank you.

5 FURTHER EXAMINATION

6 BY MR. MORRIS:

7 Q. If I may, I just have a few
8 questions.

9 Mr. Waterhouse, we saw a number of
10 documents that Mr. Rukavina put up on the
11 screen where Ms. Hendrix would send you a
12 schedule of payments that were due on behalf of
13 certain Highland affiliates.

14 Do you remember that?

15 A. Yes.

16 Q. And in each instance she asked for
17 your approval to make the payments; is that
18 right?

19 A. Yes, she did.

20 Q. And was that the -- was that the
21 practice in the second half of 2020 whereby
22 Ms. Hendrix would prepare a list of payments
23 that were due on behalf of Highland associates
24 and ask for approval?

25 A. Yes.

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2 Q. And I think you said that there was
3 a -- a --

4 A. It was -- I think I testified to
5 this earlier when we talked about procedures
6 and policy, you know, again, I want to be
7 informed of -- of -- of -- of -- of any
8 payments that are going out. I want to be made
9 aware of these payments, and that was just a
10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting
16 group would prepare a calendar that would set
17 forth all of the payments that were anticipated
18 in the -- in the three weeks ahead; is that
19 right?

20 A. I -- like I testified earlier, we
21 had a corporate calendar that was set up, you
22 know, to -- to provide reminders or, you know,
23 of anything of any nature, whether it is
24 payments or -- or financial statements or, you
25 know, whatever it is, you know, to meet

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2 deadlines.

3 I don't know how, as I testified
4 earlier, how much they were using that
5 calendar.

6 Q. Okay. But -- but you did get notice
7 and a request to approve the payments that were
8 coming due on behalf of Highland's affiliates.
9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you
12 know, as we saw with these emails, generally, I
13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the
15 payment -- do you know why there was no payment
16 made by NexPoint at the end of 2020?

17 A. Yes. There was -- there was -- we
18 talked about these agreements between the
19 advisors and Highland, the shared services and
20 the cost reimbursement agreement.

21 And in late 2020, there were
22 overpayments, large overpayments that had been
23 made over the years on these agreements, and it
24 was my understanding that the advisors were --
25 were talking with -- like Jim Seery and others

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2 to offset any obligations that the advisors
3 owed to Highland as offset to the overpayments
4 on these agreements.

5 Q. Okay. Did you participate in any of
6 those conversations?

7 A. I did not.

8 Q. Okay. Do you know -- do you recall
9 that the -- at the end of November, the debtor
10 did notice to the advisors of their intent to
11 terminate the shared services agreements?

12 A. Like I testified earlier, there
13 was -- the agreements weren't identical, from
14 what I recall, and there is one that had a
15 longer notice period, which I think had a
16 60-day notice period. I don't recall which one
17 that was, so not all of them were -- notice
18 hadn't been given as of November 30th, for all
19 of the agreements.

20 Q. Upon the receipt of the -- the
21 termination notices that you recall, do you
22 know if the advisors decided at that point not
23 to make any further payments of any kind to
24 Highland?

25 MR. RUKAVINA: Objection, form.

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2 A. No. The advisors -- the advisors
3 had stopped making payments prior to that
4 notice.

5 Q. Okay. And how do you know that the
6 advisors stopped making -- making payments
7 prior to the notice?

8 A. I had -- I had a conversation
9 with -- with Jim Dondero.

10 Q. And did Mr. Dondero tell you that
11 the advisors would no longer make payments to
12 Highland?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes, he -- he -- again, he said
16 they -- they -- the advisors have overpaid on
17 these agreements, to not make any future
18 payments, and that there needs to be offsets,
19 and they're working on getting offsets to these
20 overpayment.

21 Q. Do you know if anybody ever
22 instructed Highland's employees to make the
23 payment that was due by NexPoint at the end of
24 the year?

25 A. Did anyone instruct Highland's

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2 employees to make that payment?

3 Q. Correct.

4 A. Anyone -- not that I'm aware.

5 Q. Were any of Highland's employees
6 authorized to make the payments on behalf of
7 its affiliates -- withdrawn.

8 Was any of Highland's employees
9 authorized to effectuate the payment on behalf
10 of NexPoint that was due at the end of the year
11 without getting approval from either you or
12 Mr. Dondero?

13 A. They had the -- they had the ability
14 to make the payment, but they didn't -- you
15 know, that -- that payment needed to be
16 approved.

17 Q. Okay. And it needed to be approved
18 by you or Mr. Dondero; is that right?

19 A. I mean, I'm not going to make the
20 unilateral decision.

21 Q. Is that a decision that you
22 understood had to be made by Mr. Dondero?

23 A. Yes. Sitting back in December of
24 2020, the -- that -- there was this off --
25 offset negotiation that -- that was happening,

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2 so I mean, until those negotiations were
3 resolved, you know, there wasn't any
4 payments -- there weren't any payments.

5 Q. And -- and there were no payments
6 until the negotiations were resolved because
7 that was the directive that you received from
8 Mr. Dondero; correct?

9 A. I don't think he said -- I mean, I
10 think -- yeah, I mean -- I'm trying to recall
11 the conversation. It was -- you know, there
12 is -- there is these negotiations. There's --
13 there needs to be these offsets. They're
14 talking with the debtor. So, you know, until
15 this is resolved, right, I mean, depending on
16 how, whatever that resolution was, were we to
17 take any action.

18 Q. Okay. How about with respect to
19 HCMS, did HCMS have a term payment due at the
20 end of the year?

21 A. Again, I don't -- I don't recall.

22 Q. Okay. You discussed briefly two
23 payments that were made in January of 2021, one
24 on behalf of NexPoint, and one on behalf of
25 HCMS. Do I have that right?

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2 A. No. The two payments I recall were
3 NexPoint and HCRE.

4 Q. Okay. And those two payments --
5 thank you for the correction. And those two
6 payments were made because Mr. Dondero
7 authorized those payments to be made; correct?

8 A. Yes.

9 Q. And they hadn't been made before
10 that because Mr. Dondero had not authorized
11 them to be made?

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. Yes, because of these negotiations.

15 Q. Okay. Just a couple of more
16 questions.

17 Did anybody, to the best of your
18 knowledge, on behalf of HCMFA, ever tell the
19 SEC that HCMLP was responsible for the mistakes
20 that were made on the TerreStar valuation?

21 A. Did anyone from Highland on HCMFA's
22 behalf tell the SEC that Highland -- that
23 Highland was responsible for there -- I just
24 want to make sure --

25 Q. It was a little bit different, so

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2 let me try again.

3 A. These are very long questions, John.

4 I'm not trying to be --

5 Q. That is good. Do you know whether
6 anybody -- do you know whether anybody on
7 behalf of HCMS -- HCMFA ever told the SEC that
8 Highland was the responsible party for the
9 TerreStar valuation error?

10 A. Not that I'm aware.

11 Q. Okay. Did anybody on behalf of
12 the -- on behalf of HCMFA ever tell the retail
13 board that Highland was responsible for the
14 TerreStar valuation error?

15 A. Not that I'm aware.

16 Q. Do you know if HCMFA made an
17 insurance claim with respect to the damages
18 that were incurred in relation to the TerreStar
19 valuation error?

20 A. Yes.

21 Q. And do you know why they made that
22 insurance claim?

23 A. Because there was an error. I
24 mean --

25 Q. Was the insured's claim made -- was

1 WATERHOUSE - 10-19-21

2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the
5 petition date -- withdrawn.

6 You were asked a couple of questions
7 where -- where you said that Mr. Dondero told
8 you that he was ascribing zero value to the
9 notes as part of a pot plan because he believed
10 that the notes were part of executive
11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that
17 before the time that Mr. Dondero told you that
18 in the conversation about the pot plan?

19 A. Had I heard that prior to my
20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context
24 of his formulation of the settlement proposal;
25 is that right?

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2 A. I mean, generally, yes. You know,
3 we were asked to provide asset values, right,
4 and he was having settlement discussions.
5 Again, I don't know who those went to
6 ultimately. I don't recall.

7 MR. MORRIS: I have no further
8 questions. Thank you very much for your
9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay
11 on about your email when --

12 MR. RUKAVINA: Hold on, I'm not
13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor
15 still has questions. Sorry. I was going
16 to say both John and Davor, could you stay
17 on afterwards just to talk about the
18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now
22 testifying about a discussion you had with
23 Mr. Dondero where he said something like no
24 more payments.

25 Do you remember that testimony?

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2 A. Yes.

3 Q. Okay. And was that late November or
4 early December of 2020?

5 A. It was, I would say, first or second
6 week of November.

7 Q. Okay. Do you recall whether --
8 whenever you had that discussion, whether
9 Mr. Dondero had already been fired by the
10 debtor?

11 A. Yes, I -- I believe he was not an
12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this
14 with Mr. Dondero and he said no more payments,
15 you were discussing the two shared services
16 agreements and employee reimbursement
17 agreements we testified -- you testified about
18 before; is that correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. That is correct.

22 Q. And had your office or you -- and we
23 will talk at a future deposition about the
24 administrative claim.

25 But had -- by that time that you

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2 talked to Mr. Dondero, had your office or you
3 done any estimate of what the alleged
4 overpayments were?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes, we had -- there was a -- there
8 was a detailed analysis that was put together
9 by David Klos at the time.

10 Q. And do you recall just generally
11 what the total amount for both advisors of the
12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I -- I remember it was an
18 eight-figure number. I don't remember
19 specifically.

20 Q. Okay. And did you convey that
21 number to Mr. Dondero when you had that
22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

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2 Q. Is it fair to say he was upset?

3 A. Yes.

4 Q. Did Mr. Dondero ever expressly tell
5 you to not have NexPoint make the required
6 December 31, 2020, payment?

7 A. Yes, I recall him saying don't make
8 the payment because it was being negotiated, as
9 I discussed with Mr. Morris, this offset
10 concept. So there were obligations due by the
11 advisors to Highland, they should be offset
12 that -- you know, those obligations should be
13 offset by this -- by this overpayment.

14 Q. And when did he tell you that?

15 A. I would say -- I would say around --
16 probably December -- December-ish.

17 Q. Early December, late December?

18 A. I don't recall with as much
19 specificity as -- as -- as -- as stopping the
20 shared services payments, because we had
21 actually made one shared services payment in
22 November. So that is why I need to remember
23 that one more clearly. I don't remember where
24 exactly in December that conversation occurred.

25 Q. Did Mr. Dondero expressly use the

1 WATERHOUSE - 10-19-21

2 word "NexPoint" when he was saying don't make
3 these payments?

4 MR. MORRIS: Objection to the form
5 of the question, asked and answered.

6 A. Yeah, we were -- we were discussing
7 advisor obligations. So it was -- you know, it
8 was just obligations from the advisors.

9 And -- and he specifically talked
10 about the NexPoint payment as well.

11 Q. Okay. And it is your testimony that
12 he expressly told you not to make that NexPoint
13 December 31 payment?

14 MR. MORRIS: Objection, asked and
15 answered twice.

16 A. Yes, he -- he did, during that
17 conversation.

18 Q. And did you ever follow up with him
19 after that about whether NexPoint should or
20 shouldn't make that payment?

21 A. I did not.

22 Q. Did you ever, on or about
23 December 31, 2020, remind him and say, hey,
24 this payment is due, what shall I -- what
25 should I do?

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2 A. I did not.

3 Q. So sitting here today, you -- you
4 remember distinctly that Dondero in December of
5 2020 expressly told you not to have NexPoint
6 make that payment?

7 MR. MORRIS: Objection, asked and
8 answered three times.

9 A. Yes.

10 Q. Can you say categorically it wasn't
11 just some general discussion where he told you
12 not to make payments?

13 MR. MORRIS: Objection, asked and
14 answer four times.

15 MR. HORN: Four times now. Go for
16 five.

17 A. Yes.

18 Q. Did you tell Mr. Seery that?

19 A. I don't believe I did. I don't
20 recall.

21 Q. And was this an in-person discussion
22 or telephone or email? Do you remember?

23 A. This was a phone -- a phone
24 conversation.

25 Q. Okay. Would you have a record of --

1 WATERHOUSE - 10-19-21

2 on your cell phone of when that conversation
3 might have taken place?

4 I'm sorry, strike that.

5 Was that by cell phone?

6 A. I believe -- yes, because we -- I
7 was at home. I mean, I don't have a landline.
8 All I have is my cell phone.

9 Q. Do you know whether your cell phone
10 still has records of conversations from
11 December 2020 on it?

12 A. My call log doesn't go back that
13 far.

14 Q. Okay. Thank you.

15 MR. RUKAVINA: I will pass the
16 witness.

17 MS. DEITSCH-PEREZ: Just a couple
18 quick questions.

19 FURTHER EXAMINATION

20 BY MS. DEITSCH-PEREZ:

21 Q. With respect to HCRE and HCMS, am I
22 correct there was -- there was no direction not
23 to pay those loan payments?

24 MR. MORRIS: Objection to the form
25 of the question.

1 WATERHOUSE - 10-19-21

2 A. Yes, I don't recall having
3 conversations about, you know, those -- those
4 entities.

5 Q. And, in fact, what was the tone that
6 Mr. Dondero had when he talked to you about the
7 fact that HCRE and HCMS payments hadn't been
8 made when he found out that they hadn't been
9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was -- it was -- it was -- it
14 was very negative. I mean, I think he cursed
15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that
17 consistent with the fact that he was surprised
18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

1 WATERHOUSE - 10-19-21

2 Thank you, Mr. Waterhouse. We appreciate
3 your time. I am logging off the discussion
4 and I will talk to y'all tomorrow.

5 MR. MORRIS: Super.

6 VIDEOGRAPHER: If there are no
7 further questions, this ends the
8 deposition -- excuse me. This ends the
9 deposition, and we are going off the record
10 at 7:30 p.m.

11 (Deposition concluded at 7:30 p.m.)

12

13

14 _____
FRANK WATERHOUSE

15

16 Subscribed and sworn to before me

17 this day of 2021.

18

19 -----

20

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 C E R T I F I C A T E

3

4 I, SUSAN S. KLINGER, a certified shorthand
5 reporter within and for the State of Texas, do
6 hereby certify:

7 That FRANK WATERHOUSE, the witness whose
8 deposition is hereinbefore set forth, was duly
9 sworn by me and that such deposition is a true
10 record of the testimony given by such witness.

11 I further certify that I am not related to
12 any of the parties to this action by blood or
13 marriage; and that I am in no way interested in
14 the outcome of this matter.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this 19th of October, 2021.

17



18

19 Susan S. Klinger, RMR-CRR, CSR

20 Texas CSR# 6531

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 NAME OF CASE: In re: Highland Capital

3 DATE OF DEPOSITION: October 19, 2021

4 NAME OF WITNESS: Frank Waterhouse

5 Reason Codes:

- 6 1. To clarify the record.
- 7 2. To conform to the facts.
- 8 3. To correct transcription errors.

9 Page____ Line____ Reason_____

10 From_____ to_____

11 Page____ Line____ Reason_____

12 From_____ to_____

13 Page____ Line____ Reason_____

14 From_____ to_____

15 Page____ Line____ Reason_____

16 From_____ to_____

17 Page____ Line____ Reason_____

18 From_____ to_____

19 Page____ Line____ Reason_____

20 From_____ to_____

21 Page____ Line____ Reason_____

22 From_____ to_____

23 Page____ Line____ Reason_____

24 From_____ to_____

25

EXHIBIT 81

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 Michael P. Aigen
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 Telephone: (214) 560-2201
 Facsimile: (214) 560-2203

Counsel for Defendant HCRE Partners, LLC

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03007-sgj
HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§ § § § § § §	
Defendants.	§	

**DEFENDANT HCRE PARTNERS, LLC’S MOTION TO EXTEND EXPERT
 DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW, HCRE Partners, LLC (“HCRE”), one of the Defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as Plaintiff (the “Debtor”), and files this, its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”). HCRE respectfully shows as follows:

I. RELIEF REQUESTED

1. On October 29, 2021, NexPoint Advisors, L.P. (“NexPoint”) filed its *Motion to Extend Expert Disclosure and Discovery Deadlines* with several exhibits attached (the “NexPoint Motion”) in Case No. 19-34054-sgj11, Adversary Proceeding No. 21-03005-sgj, collectively attached hereto as “Exhibit A.”¹ HCRE and HCMS incorporate the context of the NexPoint Motion as if fully set forth herein.

2. As described in the NexPoint Motion, in the NexPoint, HCMS and HCRE Notes cases there is a similar issue regarding whether the Debtor, Highland Capital Management, as the servicer for NexPoint, HCMS and HCRE, failed to make term loan payments at the end of 2020, enabling the Debtor to contend that the term loans were accelerated. As described in the Rukavina Declaration annexed to the NexPoint Motion, unexpected testimony just last week gave rise to the need to investigate whether expert testimony on the duties of a servicer like Highland Capital Management would be useful.

3. As a result of the timing, it was not possible to retain an expert who could provide a report by the existing deadline, today. HCRE and HCMS therefore seek an extension of time to potentially obtain an expert report from Mr. Steven Pully. HCRE and HCMS would act expeditiously to minimize any impact on the schedule.

4. For generally the same reasons set forth in the NexPoint Motion, HCRE requests this Court grant it the same relief requested by NexPoint.

¹ *Motion to Extend Expert Disclosure and Discovery Deadlines*, Case 21-03005-sgj [Doc 86]; *Declaration of Davor Rukavina*, Case 21-03005-sgj [Doc 86-1]; *Exhibit A*, Case 21-03005-sgj [Doc 86-2]; *Exhibit B*, Case 21-03005-sgj [Doc 86-3]; *Exhibit C*, Case 21-03005-sgj [Doc 86-4].

II. PRAYER

WHEREFORE, PREMISES CONSIDERED, HCRE respectfully requests this Court enter an order (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting HCRE such other and further relief as may be proper.

RESPECTUFLY SUBMITTED this 29th day of October, 2021.

STINSON LLP

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

Texas State Bar No. 24036072

Michael P. Aigen

Texas State Bar No. 24012196

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**ATTORNEYS FOR DEFENDANT
HCRE PARTNERS, LLC**

CERTIFICATE OF CONFERENCE

Counsel for NexPoint requested counsel for the Debtor to agree to the extension and within minutes, the Debtor declined. For that reason, counsel for HCRE and HCMS concluded further conferencing would be futile.

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

Case 21-03007-sj Doc 86-1 Filed 10/29/21 Entered 10/29/21 21:58:57 Page 1 of 446

Exhibit A

Davor Rukavina
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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND
 EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”), respectfully stating as follows:

I. RELIEF REQUESTED

1. By this Motion, NexPoint requests that the Court extend the deadline, in its *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [docket no. 70] (the “Scheduling Order”), for the designation of experts and service of expert reports, through December 13, 2021, with a corresponding extension of expert discovery. Specifically, NexPoint finds it appropriate and advisable to designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement (defined below) with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment. This request is necessitated by recent deposition testimony of key individuals on October 19 and 21, 2021, prior to which NexPoint did not know or reasonably believe that expert testimony on the duties of care would be advisable.

II. PROCEDURAL BACKGROUND

2. The Debtor initiated this Adversary Proceeding with the filing of its original complaint against NexPoint on January 22, 2021.

3. By this Adversary Proceeding, the Debtor seeks to collect on a promissory note issued by NexPoint to the Debtor on May 31, 2017 in the original principal amount of \$30,746,812.33 (the “Note”). The Note is a 30-year note and provides for an annual payment of principal and interest. After prior payments, the Debtor asserts that \$23,071,195.03 remains due and owing on the Note.

4. NexPoint has asserted various defenses and affirmative defenses to the Debtor’s allegations and causes of action. This Motion concerns one such affirmative defense only, to the effect that the Debtor, through its employees, caused the alleged underlying default.

5. On July 28, 2021, the District Court entered an order adopting this Court’s report and recommendation and ordering that the reference for this Adversary Proceeding will be withdrawn once this Court certifies this Adversary Proceeding as being trial ready. As part of the same, the District Court necessarily agreed and ordered that NexPoint has a right to a trial by jury of this Adversary Proceeding.

III. FACTS

6. This Motion is supported by the Declaration of Davor Rukavina, attached hereto as incorporated herein (the “Declaration”).

7. The Debtor alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated, and the Debtor demanded full and immediate payment.

8. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Shared Services Agreement”) between the Debtor and NexPoint dated January 1, 2018. The Agreement was in place as of December 31, 2020, although the Debtor terminated it later, in 2021. Under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Shared Services Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. Indeed, Waterhouse (defined below) testified that it was “reasonable for NexPoint to rely on the debtors’ employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note.” *See Declaration at Exhibit C, 337:22-338:8.*

9. NexPoint asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor's negligence, the Note would remain in place. NexPoint has always asserted this as an affirmative defense. *See* Docket No. 6. NexPoint's defense, however, was based on its belief that the Debtor and its employees, including Waterhouse, did nothing to facilitate or ensure the payment, as opposed to a conscious decision not to make the payment.

10. On October 19, 2021, the Debtor deposed Frank Waterhouse ("Waterhouse"), as did NexPoint, in connection with this Adversary Proceeding. Waterhouse was the Debtor's chief financial officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020. To be clear, Waterhouse was the Debtor's employee, although he provided services to NexPoint as well pursuant to the Shared Services Agreement. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note.

11. This changed the potential facts as NexPoint understood them to be from ones where the Debtor simply failed utterly to facilitate the payment, as it has always done, to one where the Debtor intentionally, allegedly upon the instructions of Dondero, decided not to facilitate the payment. Assuming the Dondero instruction to be true, this raises the question of whether the Debtor thereafter had any affirmative duty with respect to the alleged instruction.

12. NexPoint did not know that Waterhouse would provide this testimony. NexPoint understood that Dondero instructed Waterhouse to make no further payments on the Shared Services Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars

on the Shared Services Agreement. But NexPoint did not understand that Waterhouse would testify that Dondero instructed him also not to pay the Note.

13. If Dondero told Waterhouse in early December, 2020 not to pay on the Note, then the question becomes whether Waterhouse or the Debtor thereafter “put their heads in the sand” in violation of any affirmative duty or obligation they may have had regarding the matter, such as: to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint and the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision. After all, the Debtor was responsible to facilitate the payment, the Debtor had various duties under the Shared Services Agreement, and it was in the Debtor’s interest that NexPoint would default, thus creating a conflict of interest.

14. Accordingly, on October 19, 2021, when NexPoint deposed James Seery, NexPoint asked Mr. Seery about section 6.01 of the Shared Services Agreement, labeled “standard of care,” which provides that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims.” Mr. Seery testified that he did not believe that this provision of the Shared Services Agreement obligated the Debtor or Waterhouse to do anything further after Dondero allegedly instructed Waterhouse not to pay on the Note.

15. At that time, NexPoint determined that it was appropriate, and would assist the finder of fact, to retain an expert on the “standard of care” provided for in the Shared Services Agreement. This is especially important because this will be a jury trial in the District Court. NexPoint did not believe that it would need to retain such an expert, and it had no reasonable grounds to suspect that it would need such an expert, prior to these depositions.

16. NexPoint moved as promptly as it could thereafter. NexPoint decided to retain an expert on October 22, 2021 and began searching for one on that day. NexPoint located a potential expert, Steven J. Pully, on October 26, 2021, and after conflicts were cleared and terms agreed to, Mr. Pully agreed to serve as NexPoint's expert on October 28, 2021. NexPoint files this motion just one day later, and less than two weeks after Waterhouse's deposition triggered the issue.

17. It goes without saying that neither Pully nor any reasonable expert can possibly review the issues, formulate an opinion, and prepare a report one day after they are retained. Among other things, Pully needs to review all underlying documents and deposition transcripts, some of which have yet to be returned by the court reporters. Accordingly, NexPoint believes that approximately six (6) weeks will be sufficient for Pully to prepare a report. NexPoint submits that the Debtor should have a period of time to then designate a potential rebuttal expert, and a period of time for expert discovery. Such a procedure would be fair for all involved and would constitute a minimal delay to what has already been a rapidly advanced case.

IV. ARGUMENT AND AUTHORITIES

18. It is appropriate for an expert to consider the issue of Waterhouse's and the Debtor's duties under the Shared Services Agreement—*i.e.*, “duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims,”—as issues such as “prudent person” and “like capacity and familiar with like aims” are appropriate for expert analysis and will assist the finder of fact, especially a jury.

19. Rule 16(b) provides that a deadline in a scheduling order may be modified “for good cause,” although there is some uncertainty as to whether this standard applies only after a deadline has passed (which is not the case here). *See* Fed. R. Civ. P. 16(b)(4); *Marathon Fin. Ins.*

Inc. RRG v. Ford Motor Co., 591 F.3d 458, 470 (5th Cir. 2009) (“Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order's deadline to amend has expired”).

20. When the issue concerns an “untimely submission of expert reports,” the Fifth Circuit has specified the following for factors as guiding the decision: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). Again, this test applies to a deadline which has already expired. Logically, therefore, a lesser standard should apply when a party seeks relief prior to the expiration of a deadline, as NexPoint does here.

21. Applying these or any factors:

- (i) this Adversary Proceeding is only some nine (9) months old and the parties have moved very quickly, with all discovery almost over;
- (ii) if this Motion is granted, all discovery in this Adversary Proceeding will have been completed by the end of 2021, still less than one (1) year after filing;
- (iii) the reason for the need to extend the deadline is the most logical reason that most frequently appears—that discovery has necessitated some previously unexpected action—which is one of the purposes of discovery;
- (iv) NexPoint’s failure to previously designate an expert was due solely to not having the benefit of Waterhouse’s and Seery’s recent deposition testimony, and is not the result of any delay or lack of diligence, as evidenced by the fact that NexPoint did already and timely designate two other experts on other issues (*i.e.* NexPoint did not sit on its responsibility to consider retaining experts);
- (v) the matter is important because the duties of care as specified in the Shared Services Agreement are terms of art necessitating an expert analysis, especially before a jury, and the matter goes to the heart of NexPoint’s affirmative defense, and is necessitated by Waterhouse’s testimony and not any prior action or inaction of NexPoint;
- (vi) there is no prejudice to the Debtor, which will have sufficient time to retain a rebuttal expert and take expert discovery (*i.e.* no witnesses or documents have been lost); and

- (vii) a continuance is easily available to avoid any prejudice to the Debtor—indeed, there is no need for a continuance even as the Adversary Proceeding has yet to be certified as trial ready and it is likely that the District Court will not schedule the Adversary Proceeding for trial for some time.

22. NexPoint submits that this Motion cannot come as a surprise to the Debtor. NexPoint has asserted its affirmative defense since the beginning. The only difference now is that, instead of a wholesale disregard of any duty to facilitate the Note payment, the issue has evolved to whether the Debtor or Waterhouse had any affirmative duty to act after the alleged instruction from Dondero. As it can be presumed that Waterhouse previously informed the Debtor or its counsel of this alleged instruction (as he apparently informed other employees at the Debtor), the Debtor likely knew what Waterhouse’s testimony would be well before NexPoint learned of that testimony. It is reasonable to conclude that the Debtor knew or should have known that the “standard of care” under the Shared Services Agreement would then become a material issue.

23. Accordingly, “good cause” to amend the Scheduling Order exists, if that higher standard even applies, and approving such amendment will not prejudice the Debtor and will instead serve the interests of justice.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, NexPoint respectfully requests that the Court enter an order: (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting NexPoint such other and further relief as may be proper.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on October 28, 2021, he conferred with counsel for the Debtor, John Morris, and the Debtor opposes the relief requested herein.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served on the following recipients via the Court's CM/ECF system:

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/s/ Davor Rukavina

Davor Rukavina

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

DECLARATION OF DAVOR RUKAVINA

STATE OF TEXAS
COUNTY OF DALLAS

I, Davor Rukavina, hereby state and testify to the following as being true and correct and under penalty of perjury pursuant to the laws of the United States of America:

1. My name is Davor Rukavina. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to execute this Declaration.
2. I am an attorney duly licensed to practice law in the State of Texas. I am a shareholder at Munsch Hardt Kopf & Harr, P.C. I am the lead attorney for NexPoint Advisors, L.P. ("NexPoint"), one of the defendants in this Adversary Proceeding.
3. At issue in this Adversary Proceeding is a 30-year promissory note executed by NexPoint in the original principal amount of \$30,746,812.33 (the "Note"), although the Note had been paid down significantly by the time of the filing of this Adversary Proceeding.

4. Highland Capital Management, L.P. (the “Debtor”) alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated and the Debtor demanded full and immediate payment.

5. The parties agreed by written stipulation that they would disclose experts and produce expert reports on or before October 29, 2021, and the Court’s scheduling order so requires. NexPoint requests an extension of this deadline. The following is the reason why.

6. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Agreement”) between the Debtor and NexPoint dated January 1, 2018, a copy of which is attached hereto as Exhibit “A.” The Agreement was in place as of December 31, 2020, although the Debtor terminated it later in 2021. NexPoint alleges that, under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. NexPoint therefore asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor’s negligence, the Note would remain in place.

7. The foregoing has always been an affirmative defense of NexPoint in this Adversary Proceeding, including in its amended answer filed on September 1, 2021, a copy of which is attached hereto as Exhibit “B.”

8. On October 19, 2021, the Debtor deposed Frank Waterhouse (“Waterhouse”), as did I, in connection with this Adversary Proceeding. Waterhouse was the Debtor’s chief financial

officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020.

9. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero (“Dondero”), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note. A copy of this deposition transcript is attached as Exhibit “C.”

10. This testimony was not expected by me or by NexPoint. I had understood that Dondero instructed Waterhouse to make no further payments on the Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars on the Agreement and because that was what Dondero and Waterhouse had been discussing. I had not understood that Waterhouse would testify that Dondero instructed him to also not pay the Note specifically.

11. Prior to that deposition, I had never spoken to Waterhouse. Waterhouse presently serves as an officer of NexPoint; however, and unlike every other case I have been involved with, I have not been permitted to discuss with Waterhouse litigation matters. This is because Waterhouse is in litigation with the Debtor on other matters and has separate and independent counsel, Debra Dandeneau and Frances Smith, who would not permit me to speak directly to Waterhouse, which I understood to be a logical and appropriate instruction to protect their client. I did discuss with Ms. Dandeneau what Waterhouse may know about the litigation between the Debtor and my clients, but that primarily focused on defenses that another client of mine, Highland Capital Management Fund Advisors, L.P., has. And I did discuss with Ms. Dandeneau that Dondero told Waterhouse to not make payments, but I understood that to be limited to the Agreement and to not include the Note, since the topic under discussion (as it was told to me)

between Dondero and Waterhouse was the Agreement and overpayments on the Agreement, and not the Note.

12. In sum, prior to October 19, 2021, I did not know that Waterhouse would testify that Dondero told him to not pay on the Note, and I had no reasonable reason to suspect the same. My surprise is evident from the transcript of that deposition, where I asked Waterhouse multiple times whether he was sure that Dondero told him this—so much so that opposing counsel objected multiple times as “asked and answered,” and even objected as having been asked and answered “four time.” Exhibit “C” at 390-392.

13. Assuming that Waterhouse’s testimony on this issue will be accepted by a trier of fact, the question is whether, from NexPoint’s perspective, Waterhouse had no further duties to review, confirm, investigate, or to discuss the issue with Dondero. In that respect, section 6.01 of the Agreement, labeled “standard of care,” states that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

14. I deposed Jim Seery on October 21, 2021, and asked him various questions about this provision of the Agreement. Mr. Seery testified to the effect that he did not believe that the Agreement obligated the Debtor or Waterhouse to do anything further after Dondero told Waterhouse to not pay the Note (again, assuming that this was true). I do not have a copy of Mr. Seer’s deposition yet.

15. With Mr. Seery testifying that he did not believe that the Agreement required the Debtor or Waterhouse to do anything further if Dondero in fact gave the instruction Waterhouse testified that he did, NexPoint concluded that it needed to retain an expert to review whether the “standard of care” specified in the Agreement compelled the Debtor or Waterhouse to do anything

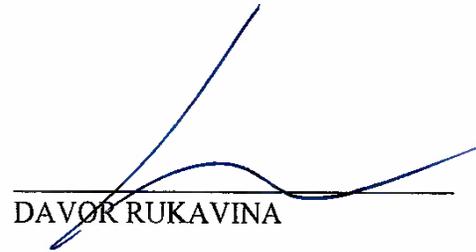
further after Dondero gave the alleged instruction, such as checking with him to see if they understood him correctly, advising him of the potential serious consequences of a default, trying to dissuade him, or at least asking him once again prior to December 31, 2020 whether the payment should be made.

16. On October 22, 2021, I began searching for a potential expert. On October 26, 2021, I contacted Steven J. Pully about the potential engagement. After clearing conflicts and coming to an agreement, Mr. Pully agreed to the engagement on October 28, 2021. The engagement letter has yet to be finalized and executed, but I have every confidence that it will and the urgency of the matter necessitates this Declaration at this time. I have been extremely diligent in searching for an finding an expert once NexPoint determined that the retention of an expert was appropriate, which did not occur until the Seery deposition on October 21, 2021.

17. Even though NexPoint has retained Mr. Pully as of October 28, 2021, it is not possible for Mr. Pully to formulate an opinion and prepare a report by October 29, 2021. Among other things, various deposition transcripts of important witnesses have yet to be received and reviewed by Mr. Pully, and Mr. Pully has yet to review the underlying documents. Assuming no undue delays with respect to deposition transcripts, Mr. Pully should be able to prepare a report by December 13, 2021.

18. NexPoint therefore seeks an extension of the expert designation and report deadline through December 13, 2021, in order that justice may be done and not for delay or any improper purpose, NexPoint not having designated an expert before due solely to the lack of knowledge that Waterhouse would testify as he did on October 19, 2021 and that Mr. Seery would testify as to his view that the Agreement did not require Waterhouse to do anything thereafter.

I hereby swear under oath and penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



DAVOR RUKAVINA

AMENDED AND RESTATED SHARED SERVICES AGREEMENT

This Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated effective as of January 1, 2018, is entered into by and between NexPoint Advisors, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

RECITALS

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Parties entered into that certain Shared Services Agreement, dated effective as of January 1, 2013 (the "Original Agreement");

WHEREAS, the Parties desire to amend and restate the Original Agreement and the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company, in each case, on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company; and

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee"), if any, is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree, and the Original Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

Exhibit A

“Affiliate” shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term “control” means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

“Applicable Asset Criteria and Concentrations” means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

“Applicable Law” shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

“Client or Account” shall mean any fund, client or account advised by the Management Company, as applicable.

“Covered Person” shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

“Governmental Authority” shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission, corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

“Indebtedness” shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers’ acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) all capital lease obligations; (e) all indebtedness guaranteed by such Person or any of its subsidiaries; and (f) all indebtedness guaranteed by such Person or any of its subsidiaries.

“Operating Guidelines” means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a Client or Account.

“Portfolio” means the portfolio of securities and other assets, including without limitation, financial instruments, equity investments, collateral loan obligations, debt securities, preferred return notes and other similar obligations held directly or indirectly by, or on behalf of, Clients and Accounts from time to time;

“Securities Act” shall mean the Securities Act of 1933, as amended.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) “or” is not exclusive (unless preceded by “either”) and “include” and “including” are not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) “writing”, “written” and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) “hereof”, “herein”, “hereunder” and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and if applicable, to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.01 and subject to Section 2.04 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, investment research, trade desk services,

including trade execution and settlement, finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, expense reimbursement, vendor management, and information technology (including, without limitation, general support and maintenance (OMS, development, support), telecom (cellphones, telephones and broadband) and WSO);

(b) *Legal/Compliance/Risk Analysis.* Assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis;

(c) *Tax.* Assistance and advice with respect to tax audit support, tax planning and tax preparation and filing.

(d) *Management of Clients and Accounts.* Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any Client or Account from time to time.

(e) *Valuation.* Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(f) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a Client or Account managed by the Management Company, transactions involving the Management Company or a Client or Account managed by the Management Company, and any other rights and obligations of the Management Company or a Client or Account managed by the Management Company;

(g) *Marketing.* Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified Clients or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(h) *Reporting.* Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any Client or Account, including reports relating to (i) credit facility reporting and purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(i) *Administrative Services.* The provision of office space, information technology services and equipment, infrastructure, rent and parking and other related services requested or utilized by the Management Company from time to time;

(j) *Shared Employees.* To the extent applicable, the provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing; and

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any Client or Account or similar securitization, (c) the substantive investment management decisions with respect to any Client or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee, if any, shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. To the extent applicable, the Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees, if any, shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any Client or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a Client or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a Client or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.02 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the

Shared Employees, if any, with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a Client or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company

and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive a flat fee of \$168,000 per month (the "Staff and Services Fee"), payable monthly in advance on the first business day of each month.

Section 3.02 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.03 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms

of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance: Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records: Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its

rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Client or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such information as is routinely disclosed to the trustee, custodian or collateral administrator of any Client or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such Client or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the Clients or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Clients or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless it is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a “Disabling Conduct”) on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement. The exculpations set forth in this Section 6.02 shall exculpate any Covered Person regardless of such Covered Person’s sole, comparative, joint, concurrent, or subsequent negligence.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, causes of action (including, but not limited to, strict liability, negligence, statutory violation, regulatory violation, breach of contract, and all other torts and claims arising under common law), demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated (“Claims”), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or

arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons. Any Covered Person shall be indemnified under the terms of this Section 6.03 regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder shall be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the Clients or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has

substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, Client or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

- (a) If to the Management Company:

NexPoint Advisors, L.P.
200 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed as of the date hereof by its duly authorized representative.

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its
General Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

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

By: Strand Advisors, Inc., its General
Partner

By: 

Name: Frank Waterhouse
Title: Treasurer

Davor Rukavina, Esq.
 Texas Bar No. 24030781
 Julian P. Vasek, Esq.
 Texas Bar No. 24070790
 MUNSCH HARDT KOPF & HARR, P.C.
 500 N. Akard Street, Suite 3800
 Dallas, Texas 75202-2790
 Telephone: (214) 855-7500
 Facsimile: (214) 978-4375

Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

Exhibit B

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 note expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF
(Against NexPoint)
(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF
(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

1 WATERHOUSE - 10-19-21

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

5 IN RE:

6 HIGHLAND CAPITAL Chapter 11
7 MANAGEMENT, L.P., CASE NO.
8 19-34054-SGI11

9 Debtor.

10 HIGHLAND CAPITAL MANAGEMENT, L.P.,

11 Plaintiff,

12 vs. Adversary
13 Proceeding No.
14 21-03000-SGI

15 HIGHLAND CAPITAL MANAGEMENT
16 FUND ADVISORS, L.P.; NEXPOINT
17 ADVISORS, L.P.; HIGHLAND
18 INCOME FUND; NEXPOINT
19 STRATEGIC OPPORTUNITIES FUND;
20 NEXPOINT CAPITAL, INC.; and
21 CLO HOLDCO, LTD.,

22 Defendants.

23 REMOTE VIDEOTAPED DEPOSITION OF

24 FRANK WATERHOUSE

25 October 19, 2021

Reported by: Susan S. Klinger, RMR-CRR, CSR

Job No: 201195

1 WATERHOUSE - 10-19-21

2

3

4 October 19, 2021

5 9:30 a.m.

6

7

8

9 Remote Deposition of FRANK WATERHOUSE,

10 held before Susan S. Klinger, a Registered

11 Merit Reporter and Certified Realtime Reporter

12 of the State of Texas.

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24

25

1 WATERHOUSE - 10-19-21

2 A P P E A R A N C E S:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital
5 Management:

6 John Morris, Esq.

7 Hayley Winograd, Esq.

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18 Highland Capital Management Fund Advisors,
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21 An Nguyen, Esq.

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25

1 WATERHOUSE - 10-19-21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,
3 and HCMS:

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6 STINSON

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14 New Orleans, Louisiana 70130

15

16 Attorneys for Marc Kirschner as the trustee for
17 the litigation SunTrust:

18 Deborah Newman, Esq.

19 QUINN EMANUEL URQUHART & SULLIVAN

20 51 Madison Avenue

21 New York, New York 10010

22

23 Also Present:

24 Ms. La Asia Canty

25

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3

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2 P R O C E E D I N G S

3 VIDEOGRAPHER: Good morning,
4 Counselors. My name is Scott Hatch. I'm a
5 certified legal videographer in association
6 with TSG Reporting, Inc.

7 Due to the severity of COVID-19 and
8 following the practice of social
9 distancing, I will not be in the same room
10 with the witness. Instead, I will record
11 this videotaped deposition remotely. The
12 reporter, Susan Klinger, also will not be
13 in the same room and will swear the witness
14 remotely.

15 Do all parties stipulate to the
16 validity of this video recording and remote
17 swearing, and that it will be admissible in
18 the courtroom as if it had been taken
19 following Rule 30 of the Federal Rules of
20 Civil Procedures and the state's rules
21 where this case is pending?

22 MR. HORN: Yes.

23 MS. DANDENEAU: Yes.

24 MR. MORRIS: Yes. John Morris. I
25 would just try to do a negative notice

1 WATERHOUSE - 10-19-21
2 here, as we did yesterday. If anybody has
3 a problem with what was just stated, can
4 you state your objection now?

5 Okay. No response, so everybody
6 accepts the stipulation and the instruction
7 that was just given.

8 VIDEOGRAPHER: Thank you. This is
9 the start of media labeled Number 1 of the
10 video recorded deposition of Frank
11 Waterhouse In Re: Highland Capital
12 Management, L.P., in the United States
13 Bankruptcy Court for the Northern District
14 of Texas, Dallas Division, Case Number
15 21-03000-SGI.

16 This deposition is being held via
17 video conference with participants
18 appearing remotely due to COVID-19
19 restrictions on Tuesday, October 19th, 2021
20 at approximately 9:32 a.m. My name is
21 Scott Hatch, legal video specialist with
22 TSG Reporting, Inc. headquartered at 228
23 East 45th Street, New York, New York. The
24 court reporter is Susan Klinger in
25 association with TSG Reporting.

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2 Counsel, please introduce
3 yourselves.

4 MR. MORRIS: John Morris, Pachulski
5 Stang Ziehl & Jones for the reorganized
6 Highland Capital Management, L.P., the
7 plaintiff in these actions.

8 MS. DANDENEAU: Deborah Dandeneau
9 from Baker McKenzie. My partner, Michelle
10 Hartmann, is also in the room with me,
11 representing Frank Waterhouse individually.

12 MS. DEITSCH-PEREZ: Deborah
13 Deitsch-Perez from Stinson, LLP,
14 representing Jim Dondero, Nancy Dondero,
15 HCRA, and HCMS.

16 MR. HORN: Warren Horn with Heller,
17 Draper & Horn in New Orleans representing
18 Dugaboy Investment Trust.

19 MR. RUKAVINA: Davor Rukavina with
20 Munsch Hardt Kopf & Harr in Dallas
21 representing NexPoint Advisors, LP and
22 Highland Capital Management Fund Advisors,
23 L.P.

24 MR. AIGEN: Michael Aigen from
25 Stinson, and I represent the same parties

1 WATERHOUSE - 10-19-21

2 as Deborah Deitsch-Perez.

3 MS. NEWMAN: This is Deborah Newman
4 from Quinn Emanuel. We represent the
5 litigation -- Marc Kirschner as the trustee
6 for the litigation SunTrust.

7 MR. MORRIS: I think that is
8 everybody.

9 VIDEOGRAPHER: Thank you. Will the
10 court reporter please swear in the witness.

11 FRANK WATERHOUSE,
12 having been first duly sworn, testified as
13 follows:

14 EXAMINATION

15 BY MR. MORRIS:

16 Q. Please state your name for the
17 record.

18 A. My name is Frank Waterhouse.

19 Q. Good morning, Mr. Waterhouse. I'm
20 John Morris, as you know, from Pachulski Stang
21 Ziehl & Jones. You understand that my firm and
22 I represent Highland Capital Management, L.P. ;
23 is that right?

24 A. Yes.

25 Q. Okay. And do you understand that

1 WATERHOUSE - 10-19-21

2 we're here today for your deposition in your
3 individual capacity?

4 A. Yes.

5 Q. Did you review and -- did you
6 receive and review a subpoena that Highland
7 Capital Management, L.P., served upon you?

8 A. Yes.

9 Q. You have been deposed before; right?

10 A. Yes.

11 Q. How many times have you been
12 deposed?

13 A. About three or four times.

14 Q. Okay. And I defended you in one
15 deposition; isn't that right?

16 A. That is correct.

17 Q. So the general ground rules for this
18 deposition are largely the same as the
19 depositions you have given before. And that is
20 I will ask you a series of questions, and it is
21 important that you allow me to finish my
22 question before you begin your answer; is that
23 fair?

24 A. Yes.

25 Q. And it is important that I allow you

1 WATERHOUSE - 10-19-21

2 to finish your answers before I begin a
3 question, but if I fail to do that, will you
4 let me know?

5 A. I can certainly do that.

6 Q. Okay. Do you understand that this
7 deposition is being videotaped?

8 A. Yes.

9 Q. You understand that I may seek to
10 use portions of the videotape in a court of
11 law?

12 A. I did not know that, until you just
13 said that.

14 Q. Okay. And you are aware of that now
15 before the deposition begins substantively; is
16 that right?

17 A. Yes.

18 Q. So unlike I think the other
19 depositions that you have given, this one is
20 being given remotely. So that presents some
21 unique challenges, at least as compared to a
22 deposition that is taken in-person.

23 From time to time we're going to put
24 documents up on the screen, Mr. Waterhouse.

25 And it is important that I give you the

1 WATERHOUSE - 10-19-21
2 opportunity to review any portion of the
3 document that you think you need in order to
4 fully and completely answer the question.

5 So I would ask you to let me know if
6 there is a portion of a document that you need
7 to see in order to fully and completely answer
8 the question. Can you do that for me?

9 A. Yes.

10 MS. DANDENEAU: Mr. Morris, I would
11 just note that we do have hard copies of
12 the documents that you sent, so if you can
13 just refer to the exhibit number as
14 reflected in the documents that you sent,
15 Mr. Waterhouse will be able to look at the
16 hard copies of those documents.

17 MR. MORRIS: I appreciate that,
18 and -- and I will encourage him to do so.
19 There will be other documents that we did
20 not send to you that we'll be using today
21 though.

22 Q. Okay. With that as background, if
23 there is anything that I ask you, sir, that you
24 don't understand, will you let me know?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Are you currently employed?

3 A. Yes.

4 Q. By whom?

5 A. The Skyview Group.

6 Q. When did you become employed by the
7 Skyview Group?

8 A. I believe March 1st of 2021.

9 Q. Do you have a title at Skyview?

10 A. Yes.

11 Q. What is your title?

12 A. My title is chief financial officer.

13 Q. Do you report to anybody in your
14 role as CFO?

15 A. I don't, no.

16 Q. No. Is there a president or a CEO
17 of Skyview?

18 A. Yes.

19 Q. Who is that?

20 A. That is Scott Ellington.

21 Q. But you don't report to
22 Mr. Ellington; is that right?

23 A. I don't think so.

24 Q. Does Skyview Group --

25 MS. DANDENEAU: Excuse me, we --

1 WATERHOUSE - 10-19-21

2 A. I -- I -- I might. I just -- I
3 don't recall.

4 Q. Okay. Does Skyview Group provide
5 any services to any entity directly or
6 indirectly owned or controlled by Jim Dondero?

7 A. Yes.

8 Q. Can you name -- is that pursuant to
9 written contracts?

10 A. Yes.

11 Q. And do you know how many contracts
12 exist?

13 A. Approximately six or so.

14 Q. And is the Skyview Group made up of
15 individuals who were formerly employees of
16 Highland Capital Management, L.P.?

17 A. No.

18 Q. Do you know how many -- how many --
19 how many employees does Skyview have?

20 A. Approximately 35.

21 Q. And can you tell me how many of
22 those 35 are former officers, directors, or
23 employees of Highland Capital Management, L.P.?

24 A. I don't know the exact number.

25 Q. Is it more than 20?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Is it more than 30?

4 A. I don't know.

5 Q. Can you tell me what portion of
6 Skyview -- Skyview's revenue is derived from
7 entities that are directly or indirectly owned
8 or controlled by Jim Dondero?

9 MS. DANDENEAU: Mr. Morris, I mean,
10 you called Mr. Waterhouse here individually
11 for purposes of his testimony in connection
12 with the noticed litigation. I have given
13 you some leeway to ask him some background
14 information about Skyview Group, but this
15 is not a substitute for a deposition in
16 connection with any other pending disputes
17 that exist. And -- and we agreed to accept
18 the subpoena on the basis of he -- this is
19 testimony that he is giving in connection
20 with the noticed litigation.

21 I really think that you are now
22 going a little bit far afield from the
23 purpose of this deposition.

24 MR. MORRIS: Okay. It is -- I'm not
25 intending to use these -- the answers to

1 WATERHOUSE - 10-19-21

2 these questions for any purpose other than
3 this litigation. I think you understand
4 fully why I'm asking the questions, and I
5 just have a couple more, if you will bear
6 with me.

7 MS. DANDENEAU: Okay.

8 MS. DEITSCH-PEREZ: Can we have an
9 agreement that an objection by one is an
10 objection for any other party here?

11 MR. MORRIS: Sure. I would -- I
12 would encourage that, sure.

13 MS. DEITSCH-PEREZ: Thank you.

14 MR. MORRIS: It can't be sustained
15 or overruled more than one time, so...

16 Q. Mr. Waterhouse, can you answer my
17 question, please.

18 MS. DANDENEAU: Do you want to
19 repeat it, Mr. Morris, for his benefit?

20 MR. MORRIS: Sure.

21 Q. Can you -- can you tell me the
22 approximate portion of Skyview's revenue that
23 is derived from entities that are directly or
24 indirectly owned or controlled by Mr. Dondero?

25 A. I don't know the exact number.

1 WATERHOUSE - 10-19-21

2 Q. Is it more than 75 percent?

3 A. Yes.

4 Q. Is it more than 90 percent?

5 A. I don't know.

6 Q. Okay. Can I refer to Highland

7 Capital Management, L.P., as Highland?

8 A. Yes.

9 Q. All right. And you previously
10 served as Highland's CFO; correct?

11 A. Yes.

12 Q. When did you join Highland?

13 A. I don't recall the exact date.

14 Q. Can you tell me what year?

15 A. 2006.

16 Q. When did you -- in what year did you
17 become Highland's CFO?

18 A. I don't recall the exact date.

19 Q. I'm not asking you for the exact
20 date. I'm asking you if you recall the year in
21 which you were appointed CFO.

22 A. I don't recall the exact year.

23 Q. Can you tell me which years it is
24 possible that you were appointed to CFO of
25 Highland?

1 WATERHOUSE - 10-19-21

2 A. 2011 or 2012.

3 Q. Did you serve as Highland's CFO on a
4 continuous basis from in or around 2011 or 2012
5 until early 2021?

6 A. Yes.

7 Q. During that entire time you reported
8 directly to Jim Dondero; correct?

9 A. I -- I don't know.

10 Q. Is there anybody else you reported
11 to -- withdrawn.

12 Did you report to Mr. Dondero for
13 some portion of the time that you served as
14 CFO?

15 A. Yes.

16 Q. Is there a portion of time that you
17 don't recall who you reported to?

18 A. Yes.

19 Q. What portion of time do you have in
20 your mind when you can't recall who you
21 reported to?

22 A. From the 2011 to -- for
23 approximately a year or two.

24 Q. Okay. So is it fair to say that you
25 reported to Mr. Dondero in your capacity as CFO

1 WATERHOUSE - 10-19-21

2 from at least 2014 until the time you left
3 Highland?

4 MS. DANDENEAU: Objection to form.

5 A. I don't want to speculate the exact
6 or what year that changed or -- so I would like
7 to stick with my testimony.

8 Q. Can you recall when you began
9 reporting to Mr. Dondero?

10 A. I don't recall.

11 Q. Can you -- can you give me an
12 estimate of what year you think you might have
13 began reporting to Mr. Dondero?

14 A. I will go back to my prior
15 testimony.

16 Q. Okay. There is no -- you have no
17 ability to tell me when you began reporting to
18 Mr. Dondero.

19 Do I have that right?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall.

22 Q. Okay. Do you recall who you might
23 have reported to before you began reporting to
24 Mr. Dondero?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Who might you have reported to in
3 your capacity as CFO before you started
4 reporting to Mr. Dondero?

5 A. That would have been Patrick Boyce.

6 Q. Are you aware that Highland filed
7 for bankruptcy on October 19th, 2019?

8 A. Yes.

9 Q. And we refer to that as the petition
10 date?

11 A. Yes.

12 Q. Okay. Do you hold any professional
13 licenses, sir?

14 A. Yes.

15 Q. Can you tell me what professional
16 licenses you hold?

17 A. I'm a certified public accountant.

18 Q. Okay. Anything else?

19 A. No.

20 Q. Do you have any other professional
21 licenses or certificates?

22 A. When you say "professional license,"
23 that is not education?

24 Q. Tell me -- sure. Anything other
25 than a driver's license.

1 WATERHOUSE - 10-19-21

2 Do you have any other license or
3 certificate or certification?

4 A. Are you asking, like, where I went
5 to school and the --

6 Q. I am not. I am not. I didn't say
7 education. I didn't ask about degrees.

8 Do you know what a license is?

9 A. Well, yeah, I mean, a license is
10 something you get after you receive a certain
11 level of proficiency.

12 Q. Do you have any licenses or
13 certifications other than your CPA?

14 MS. DANDENEAU: Objection, form.

15 I assume you mean professional
16 licenses, Mr. Morris; correct?

17 Q. Can you answer my question, sir?

18 A. Mr. Morris, I'm thinking. I
19 don't -- I don't think I have any others.

20 Q. Are you familiar with an entity
21 called Highland Capital Management Fund
22 Advisors?

23 A. Yes.

24 Q. Were you ever -- can we refer to
25 that entity as HCMFA?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Were you ever employed by HCMFA?

4 A. Not that I recall.

5 Q. Were you ever -- did you ever hold
6 the title of an officer or director of HCMFA?

7 A. Yes.

8 Q. What title did you hold?

9 A. Treasurer.

10 Q. When did you become the treasurer of
11 HCMFA?

12 A. I don't recall.

13 Q. Can you tell me the year?

14 A. I don't -- I don't know the year.

15 Q. Can you approximate the year in
16 which you became the treasurer of HCMFA?

17 A. I don't know.

18 Q. Can you tell me if it was before or
19 after 2016?

20 A. I don't recall.

21 Q. Are you still the -- do you know if
22 you're still the treasurer of HCMFA today?

23 A. Today, I am the acting treasurer for
24 HCMFA.

25 Q. Is there a distinction between

1 WATERHOUSE - 10-19-21

2 treasurer and acting treasurer?

3 A. I said "acting treasurer" as I am an
4 employee of Skyview, as you previously
5 stated -- or asked.

6 Q. But you are the treasurer of HCMFA
7 today; correct?

8 A. I am -- I am the acting treasurer
9 for HCMFA.

10 Q. How did you become the treasurer of
11 HCMFA?

12 A. Are you asking how I became the
13 treasurer of HCMFA today?

14 Q. How did you become appointed to
15 serve as the treasurer of HCMFA?

16 A. Well, in -- in -- in what time
17 capacity?

18 Q. The first time that you were
19 appointed.

20 A. First time. I believe I was asked
21 to serve as treasurer for HCMFA the first time.

22 Q. By who? Who asked you to do that?

23 A. I don't recall.

24 Q. Is there anything that would refresh
25 your recollection as to who appointed you as

1 WATERHOUSE - 10-19-21

2 the treasurer of CF- -- HCMFA for the first
3 time?

4 A. I don't -- I mean, there would be
5 some documents, some legal documents. I don't
6 know where those are.

7 Q. How many times have you been
8 appointed the treasurer of HCMFA?

9 A. I don't know.

10 Q. Was it more than once?

11 A. I don't know.

12 Q. Can you tell me any period of time
13 since 2016 that you did not hold the title of
14 treasurer of HCMFA?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall.

17 Q. What are your duties and
18 responsibilities as the treasurer of HCMFA?

19 A. My duties are to do the best job
20 that I can as the -- as an accountant and
21 finance guy.

22 Q. What specific duties and
23 responsibilities do you have as the treasurer
24 of HCMFA?

25 A. My duties are to do the best job

1 WATERHOUSE - 10-19-21

2 that I can as the accounting and finance person
3 for HCMFA.

4 Q. As the accounting and finance person
5 for HCMFA, do you have any particular areas of
6 responsibility?

7 A. Yeah, it is to manage the accounting
8 and finance function for HCMFA.

9 Q. Would that include -- do you have
10 responsibility for overseeing HCMFA's annual
11 audit?

12 A. Can I please elaborate on my prior
13 question?

14 Q. Of course. You -- you are giving
15 answers. I'm asking questions.

16 A. Okay. Yes, so the -- it -- like I
17 said, it is to manage the accounting finance
18 aspect, but I am, as we discussed, the
19 treasurer. That is -- being treasurer is what
20 gives me that -- that management function.

21 Q. Does anybody report to you in your
22 capacity as treasurer of HCMFA?

23 A. I don't believe so.

24 Q. Does HCMFA have a chief financial
25 officer?

1 WATERHOUSE - 10-19-21

2 A. I don't -- I don't know.

3 Q. You don't know?

4 You're the treasurer of HCMFA but
5 you don't know if HCMFA has a chief financial
6 officer.

7 Do I have that right?

8 A. That's right.

9 Q. Okay. Have you heard of a company
10 called NexPoint Advisors?

11 A. Yes.

12 Q. We will refer to that as NexPoint.
13 Okay?

14 A. Okay.

15 Q. Were you ever employed by NexPoint?

16 A. I don't recall.

17 Q. Did you ever hold any title with
18 respect to the entity known as NexPoint?

19 A. Yes.

20 Q. What titles have you held in
21 relation to NexPoint?

22 A. Treasurer. I think it was only
23 treasurer.

24 Q. Can you tell me the approximate year
25 you became the treasurer of NexPoint?

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2 A. I don't know.

3 Q. Are you still the treasurer of
4 NexPoint today?

5 A. I am the acting treasurer for
6 NexPoint.

7 Q. When did your title change from
8 treasurer to acting treasurer?

9 A. I don't know.

10 Q. Did your duties and responsibilities
11 change at all when your title was changed from
12 treasurer to acting treasurer?

13 A. I don't -- I don't believe so.

14 Q. Why did --

15 A. I still manage the finance and
16 accounting function for NexPoint.

17 Q. Why did your title change from
18 treasurer to acting treasurer?

19 A. I don't -- I'm using the term
20 "acting treasurer" as I'm a Skyview employee.
21 I don't -- I don't know -- again, I am a -- as
22 I am the Skyview employee.

23 Q. Okay.

24 A. And we -- we provide officer
25 services.

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2 Q. And you serve as an officer of
3 HCMFA; correct?

4 A. I think we went over that with my
5 testimony. Yes, I'm the acting treasurer for
6 HCMFA.

7 Q. And you are an officer of NexPoint;
8 correct?

9 A. I think -- I am the acting treasurer
10 for NexPoint Advisors.

11 Q. And -- and who appointed you acting
12 treasurer of NexPoint Advisors?

13 A. I don't recall specifically.

14 Q. Do you have any recollection of who
15 might have appointed you the treasurer of
16 NexPoint?

17 A. I mean, it -- it -- I don't recall
18 exactly who it was.

19 Q. Who were the possibilities?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 Q. You can answer.

23 A. Someone in the legal group for
24 NexPoint. The other officers as well.

25 Q. Have you heard of a company called

1 WATERHOUSE - 10-19-21

2 Highland Capital Management Services, Inc.?

3 A. Yes.

4 Q. We will refer to that as HCMS.

5 Okay?

6 A. HCMS. Okay.

7 Q. Were you ever employed by HCMS?

8 A. No.

9 Q. Have you ever held any titles in
10 relation to HCMF -- I apologize -- HCMS?

11 A. Yes.

12 Q. What titles have you held in
13 relation to HCMS?

14 A. Treasurer and acting treasurer.

15 Q. When did you first become treasurer
16 or acting treasurer of HCMS?

17 A. I don't recall the exact dates.

18 Q. Can you recall -- can you
19 approximate the year that you became the
20 treasurer of HCMS?

21 A. I don't -- I don't know.

22 Q. Are you still the treasurer of HCMS
23 today?

24 A. I am the acting treasurer for HCMS.

25 Q. And are your duties and

1 WATERHOUSE - 10-19-21

2 responsibilities as the acting treasurer for
3 HCMS and the acting treasurer for NexPoint the
4 same as your duties and responsibilities in
5 your role as the acting treasurer of HCMFA?

6 A. More or less.

7 Q. Have you ever heard of a company
8 called HCRE Partners, LLC?

9 A. Yes.

10 Q. And do you understand that that
11 entity is now known today as NexPoint Real
12 Estate Partners?

13 A. I did not know that.

14 Q. All right. Can we refer to HCRE
15 Partners as HCRE?

16 MS. DANDENEAU: Objection to form.

17 Did you mean NexPoint Real Estate
18 Partners, Mr. Morris?

19 MR. MORRIS: No.

20 MS. DANDENEAU: Oh.

21 MR. MORRIS: He said he wasn't
22 familiar that it was succeeded by that
23 entity. So --

24 MS. DANDENEAU: Okay.

25 MR. MORRIS: -- let's go with what

1 WATERHOUSE - 10-19-21

2 the witness knows.

3 Q. You're familiar with an entity
4 called HCRE Partners, LLC; correct?

5 A. Yes.

6 Q. Okay. So that is the entity that we
7 will refer to as HCRE. If you're aware of any
8 successor, that is great. If not, let's just
9 define it as such.

10 Have you ever been employed by HCRE
11 or any entity that you know to have succeeded
12 HCRE?

13 A. No.

14 Q. Did you ever serve as an officer or
15 director of HCRE or any successor?

16 A. Not that I recall.

17 Q. Okay. Can we refer to NexPoint and
18 HCMFA as the advisors?

19 A. Yes.

20 Q. In general, the advisors provided
21 investment advisory services to certain retail
22 funds; correct?

23 A. Yes.

24 Q. And we will refer to the retail
25 funds that are served by the advisors

1 WATERHOUSE - 10-19-21

2 collectively as the retail funds; is that okay?

3 A. Okay.

4 Q. Each of the retail funds is governed
5 by a board; correct?

6 A. Yes.

7 Q. And do you know the people who serve
8 on the boards of the retail funds?

9 MS. DANDENEAU: Objection to form.

10 A. I don't know all of them.

11 Q. Do you know whether the same people
12 serve on the board of each of the retail funds
13 as we've defined that term?

14 A. Which -- so when you say "retail
15 funds" -- again, I want to be -- what retail
16 funds are you referring to, because there are
17 -- there are several distinctions?

18 What retail funds are you using when
19 you refer to them?

20 Q. That is why -- that is why I tried
21 to define the terms. So let me do it again.

22 Retail funds for the purposes of
23 this deposition means any retail fund to which
24 either of the advisors provides advisory
25 services. Okay?

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2 A. Okay.

3 Q. Okay. So do you know whether the
4 same people serve on the board of each of the
5 retail funds?

6 A. I don't know.

7 Q. Were you ever employed by any of the
8 retail funds?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Okay. Do you have any title with
13 respect to any of the retail funds?

14 A. Yes.

15 Q. What titles do you hold --
16 withdrawn.

17 Do you have the same titles with
18 respect to all of the retail funds or do
19 they -- or just something else?

20 MS. DANDENEAU: Objection to form.

21 Q. Withdrawn.

22 Do you have the same title with
23 respect to each of the retail funds?

24 A. No.

25 Q. Tell me which title you have with

1 WATERHOUSE - 10-19-21

2 respect to each retail fund.

3 Actually, let's do it a different
4 way. I withdraw the question.

5 Can you give me one title you have
6 in relation to any retail fund?

7 A. Yes.

8 Q. What title -- what title can you
9 give me?

10 A. Principal executive officer.

11 Q. Do you serve as principal executive
12 officer for each of the retail funds?

13 A. No.

14 Q. Can you identify for me the retail
15 funds in which you serve as the principal
16 executive officer?

17 A. Yes. Highland Funds 1, Highland
18 Funds 2, Highland Income Fund, Highland Global
19 Allocation Fund.

20 Q. I'm sorry, you said "Global
21 Allocation Fund"?

22 A. Yes.

23 VIDEOGRAPHER: Excuse me,
24 Mr. Morris. This is the videographer. I'm
25 concerned about the lighting in the

1 WATERHOUSE - 10-19-21

2 witness' camera.

3 Do you want to go off the record and
4 make some adjustments?

5 MR. MORRIS: Sure, but just for this
6 purpose. I don't want to take a break. We
7 just started.

8 MS. DANDENEAU: Yeah, that is fine.
9 That is fine. We're going to put you on
10 mute.

11 MR. MORRIS: All right.

12 MS. DANDENEAU: I'm going to try to
13 open up some of the shades.

14 VIDEOGRAPHER: We're going off the
15 record at 10:08 a.m.

16 (Recess taken 10:08 a.m. to 10:11 a.m.)

17 VIDEOGRAPHER: We are back on the
18 record at 10:11 a.m.

19 Q. Mr. Waterhouse, when did you become
20 the principal executive officer of the four
21 retail funds that you just identified?

22 A. I don't recall.

23 Q. Do you recall the approximate year
24 that you became the principal executive officer
25 of the four funds?

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2 A. 2021.

3 Q. Did you ever hold any title with
4 respect to any of the four funds you have just
5 identified other than principal executive
6 officer?

7 A. I don't recall.

8 Q. Is it possible that you held a
9 position or a title with the four funds you
10 just identified prior to 2021?

11 A. Yes.

12 Q. But you don't recall if you did or
13 not; do I have that right?

14 A. No. You -- I thought you asked, did
15 I hold other titles.

16 Q. Did you hold any title at the four
17 retail funds for which you now serve as
18 principal executive officer at any time prior
19 to 2021?

20 A. Yes.

21 Q. What titles did you hold?

22 A. I don't recall all the titles.

23 Q. Do you recall any of the titles?

24 A. Yes.

25 Q. What titles do you recall holding at

1 WATERHOUSE - 10-19-21

2 those four retail funds before 2021?

3 A. Principal executive officer.

4 Q. Were you the principal executive
5 officer of the four retail funds that you have
6 identified?

7 A. Sorry, could you repeat the
8 question?

9 Q. Were you the principal executive
10 officer for each of the four retail funds that
11 you have identified?

12 A. Yes.

13 Q. When did you become the principal
14 executive -- withdrawn.

15 Can you give me the approximate year
16 that you became the principal executive officer
17 for each of the four retail funds you've
18 identified?

19 A. I don't recall.

20 Q. What are your duties and
21 responsibilities as the principal executive
22 officer of these four retail funds?

23 A. It is to manage the finance and
24 accounting positions.

25 Q. So at the same time you serve as the

1 WATERHOUSE - 10-19-21

2 treasurer of the advisors, you also serve as
3 the principal executive officer of these four
4 retail funds; correct?

5 A. Yes.

6 Q. Did you ever hold any title with
7 respect to any other retail fund?

8 A. Not that I recall.

9 Q. During the period that you served as
10 Highland's CFO, from time to time Highland
11 loaned money to certain of its officers and
12 employees; correct?

13 A. Yes.

14 Q. During the period that you served as
15 Highland's CFO, from time to time Highland
16 loaned money to certain --

17 A. Let me -- let me retract that,
18 sorry, that -- you asked during the time I was
19 CFO, Highland loaned moneys to employees. I
20 don't -- I don't recall that during my tenure
21 of CFO.

22 Q. You have no recollection during the
23 time that you were the CFO of Highland of
24 Highland ever loaning any money to any officer
25 or director of Highland?

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2 A. I don't recall during my tenure of
3 Highland or my -- as CFO of Highland -- yeah,
4 if there are any loans as CFO of Highland.

5 Q. I'm just talking about officers and
6 employees right now. You have no recollection
7 of Highland ever making a loan to any of its
8 officers or employees during the time that you
9 served as CFO. Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. So I thought you were saying
12 officers and employees as CFO, right, so there
13 were -- I mean, okay, yes.

14 Q. I would ask you to listen carefully
15 to my question. If I -- if I'm not clear, let
16 me know, but I'm really trying to be as clear
17 as I can.

18 A. I'm listening as carefully as I can,
19 and you are asking very specific questions in a
20 timeline. And I'm trying to answer your
21 questions as specifically as I can, and I
22 apologize if -- if I'm going back. I am -- you
23 are asking very specific questions. Thank you.

24 Q. During the period that you served as
25 Highland's CFO, from time to time Highland

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2 loaned money to certain corporate affiliates;
3 correct?

4 MS. DANDENEAU: Objection to form.

5 A. What are corporate affiliates?

6 Q. How about the ones that are in
7 Highland's audited financial statements under
8 the section entitled Loans to Affiliates. Why
9 don't we start with those. Do you have any
10 understanding of what the phrase "affiliates"
11 means?

12 MS. DANDENEAU: Objection to form.

13 A. I understand what affiliates are,
14 yet affiliates can have different meanings in
15 different contexts, so...

16 Q. Why don't you -- why don't you tell
17 me what your understanding of the term
18 "affiliate" is in relation to Highland Capital
19 Management, L.P.

20 A. Is that a -- it depends on the
21 context.

22 Q. How about the context of making
23 loans?

24 MS. DANDENEAU: Objection to form.

25 A. I didn't make the determination of

1 WATERHOUSE - 10-19-21

2 who an affiliate was or is at the time those --
3 I didn't -- that wasn't my job to make a
4 determination of who an affiliate is.

5 Q. All right. So as the CFO of
6 Highland, do you have any ability right now to
7 tell me which companies that were directly or
8 indirectly owned and/or controlled by
9 Mr. Dondero in whole or in part received loans
10 from Highland Capital Management, L.P.?

11 MS. DANDENEAU: Objection to form.

12 MS. DEITSCH-PEREZ: Objection, form.

13 A. Yes.

14 Q. Okay. Identify every entity that
15 you can think of that was directly or
16 indirectly owned and/or controlled by
17 Mr. Dondero in whole or in part that received a
18 loan from Highland Capital Management, L.P.

19 MR. RUKAVINA: Objection, legal
20 conclusion.

21 A. NexPoint Advisors, Highland Capital
22 Management Fund Advisors, HCM Services,
23 Dugaboy. Sorry, I don't think -- Dugaboy
24 doesn't fit that definition. You said owned
25 and controlled. I don't think that that

1 WATERHOUSE - 10-19-21

2 definition --

3 Q. I said owned and/or controlled.

4 A. I don't -- again, I'm not -- I'm not
5 the legal expert. I don't think it controls --
6 he controls Dugaboy, so again, I'm not the
7 legal person.

8 Q. I'm not asking you for a legal
9 conclusion, sir. I'm asking you for your
10 knowledge, okay, as the CFO -- the former CFO
11 of Highland Capital Management, other than
12 NexPoint, HCMFA, and HCMF -- HCMS, can you
13 think of any other entities that were owned
14 and/or controlled directly or indirectly in
15 whole or in part by Jim Dondero who received a
16 loan from Highland Capital Management, L.P.?

17 MS. DANDENEAU: Objection to form.

18 A. HCRE.

19 Q. Any others?

20 A. That is -- that is all I can think
21 of.

22 Q. And you're aware that from time to
23 time while you were the CFO, Highland loaned
24 money to Jim Dondero; correct?

25 A. Yes.

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2 Q. Okay. Can we refer to the four
3 entities that you just named and Mr. Dondero as
4 the affiliates?

5 A. So that would be Jim Dondero,
6 NexPoint Advisors, Highland Capital Management
7 Fund Advisors, and HCRE.

8 Q. And HCMS?

9 A. And HCMS, okay.

10 Q. And can we refer to the loans that
11 were given to each of those affiliates as the
12 affiliate loans?

13 A. Yes.

14 Q. And is it fair to say that each of
15 the affiliates were the borrowers under the
16 affiliate loans as we're defining the term?

17 MR. RUKAVINA: Objection, legal
18 conclusion.

19 A. The borrowers are whoever were on
20 the notes. I don't -- I don't know. I'm not
21 the legal person.

22 Q. But you --

23 A. I don't know.

24 Q. You do know, as Highland's former
25 CFO, that each of the affiliates that you have

1 WATERHOUSE - 10-19-21

2 identified tendered notes to Highland; correct?

3 MR. RUKAVINA: Hey, John, will you
4 just give me a running objection to legal
5 conclusion to HCM --

6 MR. MORRIS: No. No, if you want to
7 object --

8 MR. RUKAVINA: I will object every
9 time. Object to legal conclusion.

10 MR. MORRIS: That is fine.

11 A. Sorry, can you repeat the question?

12 Q. Are you aware that each of the --
13 that each of the affiliates, as we have defined
14 the term, gave to Highland a promissory note in
15 exchange for the loans?

16 MR. RUKAVINA: Objection to the
17 extent that calls for a legal conclusion.

18 A. I don't.

19 Q. No, you don't know that?

20 A. No, they didn't -- you said they
21 exchanged a promissory note for a loan. I
22 don't -- I don't understand that question, so I
23 said no.

24 Q. At the time of the bankruptcy
25 filing, did Highland have in its possession

1 WATERHOUSE - 10-19-21

2 promissory notes that were signed by each of
3 the affiliates?

4 A. Yes.

5 Q. To the best of your knowledge,
6 during the time that you served as Highland's
7 CFO, did Highland disclose to its outside
8 auditors all of the loans that were made to
9 affiliates?

10 MR. RUKAVINA: Objection, that calls
11 for a legal conclusion.

12 MS. DEITSCH-PEREZ: I also couldn't
13 hear you, John, because there was some
14 garbling on -- on the -- on the call.

15 MR. MORRIS: Folks, I've got to tell
16 you this is not going well, and I'm
17 reserving my right --

18 MS. DANDENEAU: John, it was just
19 the end of that question. It was just the
20 end of that question. I couldn't hear it
21 either. Sorry, if you could repeat it,
22 please.

23 MR. MORRIS: That is less than an
24 hour into this, but folks are trying to run
25 out the clock, and so I'm just going to

1 WATERHOUSE - 10-19-21

2 state that now.

3 MS. DANDENEAU: You know, and,
4 Mr. Morris, I really object to that. I
5 mean --

6 MR. MORRIS: Okay.

7 MS. DANDENEAU: -- Mr. Waterhouse
8 just told you he's trying to listen to your
9 questions and answer them carefully, and
10 you have no basis for saying that.

11 MR. MORRIS: Okay.

12 MS. DANDENEAU: This does not --
13 this is not an experienced witness, so he's
14 trying to do the best he can.

15 Q. Mr. Waterhouse, during the time that
16 you served as Highland's CFO, did Highland
17 disclose to its outside auditors all of the
18 loans that it made to each of the affiliates
19 that you have identified?

20 MR. RUKAVINA: Objection, legal
21 conclusion.

22 A. Yes.

23 Q. To the best of your knowledge, while
24 you were Highland's CFO, were all of the
25 affiliate loans described in Highland's audited

1 WATERHOUSE - 10-19-21

2 financial statements?

3 MR. RUKAVINA: Objection, legal
4 conclusion.

5 A. When an audit was performed, any
6 loans that were made by Highland to the
7 affiliates were disclosed to auditors.

8 Q. Are you aware of any loan that was
9 made to any affiliate that was not disclosed to
10 the auditors?

11 A. I'm not aware.

12 Q. To the best of your knowledge, did
13 each of the affiliates who were --
14 (inaudible) -- loaned from Highland execute a
15 promissory note in connection with that loan?

16 MR. RUKAVINA: Objection, legal
17 conclusion.

18 A. Sorry, you -- halfway through the
19 question it got muffled.

20 Can you repeat that again?

21 Q. To the best of your knowledge, did
22 every affiliate execute a promissory note in
23 connection with each loan that it obtained from
24 Highland?

25 MR. RUKAVINA: Objection, legal

1 WATERHOUSE - 10-19-21

2 conclusion.

3 A. Yes.

4 Q. You are not aware of any loan that
5 any affiliate ever obtained from Highland where
6 the affiliate did not give a promissory note in
7 return; is that fair?

8 A. Yes, I'm not aware.

9 Q. And to the best of your knowledge,
10 did Highland loan to each affiliate an amount
11 of money equal to the principal amount of each
12 promissory note?

13 MR. RUKAVINA: Objection, legal
14 conclusion.

15 A. Yes.

16 Q. During the time that you served as
17 CFO, did Highland ever loan money to
18 Mark Okada?

19 A. I -- I don't recall.

20 Q. Did you ever see any promissory
21 notes executed by Mark Okada?

22 A. I don't recall.

23 Q. Do you know if Highland ever forgave
24 any loan that it ever made to Mr. Okada?

25 A. I don't recall.

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2 Q. Do you recall if Mr. Okada paid back
3 all principal and interest due and owing under
4 any loan he obtained from Highland?

5 MS. DEITSCH-PEREZ: Objection to
6 form.

7 MS. DANDENEAU: Objection to form.

8 A. I don't recall.

9 Q. Do you recall whether -- during your
10 time as CFO, whether Highland ever loaned money
11 to Jim Dondero?

12 A. Yes.

13 Q. To the best of your knowledge, did
14 Mr. Dondero sign and deliver to Highland a
15 promissory note in connection with each loan
16 that he obtained from Highland?

17 A. If you are referring to the
18 promissory notes that, you know, part of
19 Highland's records, yes.

20 Q. Okay. You're not aware of any loan
21 that Mr. Dondero took from Highland that wasn't
22 backed up by -- by a promissory note with a
23 face -- with a principal amount equal to the
24 amount of the loan; correct?

25 A. Am I aware that Jim Dondero took a

1 WATERHOUSE - 10-19-21

2 loan?

3 Q. Without giving a -- let me ask a
4 better question. I'm sorry, Mr. Waterhouse.

5 Are you aware of any loan that
6 Mr. Dondero obtained from Highland where he
7 didn't give a promissory note in return?

8 A. I'm not aware.

9 Q. During the time that you served as
10 Highland's CFO, did Highland ever forgive any
11 loans, in whole or in part, that it made to
12 Mr. Dondero?

13 A. Not that I'm aware.

14 Q. At the time that you served as
15 Highland's CFO, did Highland ever forgive any
16 loan, in whole or in part, that it made to any
17 affiliate as we've defined the term today?

18 A. Not that I'm aware.

19 Q. During the time that you served as
20 Highland's CFO, did Highland ever forgive, in
21 whole or in part, any loan that it ever made to
22 any officer or employee?

23 A. Highland forgave loans to officers
24 and employees. It may not have been at the
25 time when my title was CFO.

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2 Q. Okay. And so I appreciate the
3 distinction.

4 Is it fair to say that, to the best
5 of your knowledge, Highland did not forgive a
6 loan that it made to an officer or employee
7 after 2013?

8 MS. DANDENEAU: Objection to form.

9 A. I don't recall.

10 Q. To the best of your knowledge, did
11 Highland disclose to its auditors every
12 instance where it forgave, in whole or in part,
13 a loan that it had made to one of its officers
14 or employees?

15 A. No.

16 Q. Can you think of -- can you -- can
17 you identify any loan to an officer or employee
18 that was forgiven by Highland, in whole or in
19 part, that was not disclosed to Highland's
20 outside auditors?

21 A. Look, I don't recall all of the
22 loans and the loan forgiveness. I just know as
23 part of the audit process there is a
24 materiality concept.

25 So if there were loans to employees

1 WATERHOUSE - 10-19-21
2 that were of -- you know, that were deemed
3 immaterial, those items may not have been
4 disclosed by the team to the auditors.

5 Q. I appreciate that.

6 Do you have an understanding as to
7 what the level of materiality was?

8 A. I don't recall.

9 Q. As the CFO of Highland, to the best
10 of your knowledge, did Highland disclose to its
11 outside auditors every loan that was forgiven,
12 in whole or in part, that was material as that
13 term was defined by the outside auditors?

14 A. Yes.

15 Q. And do you recall where -- do you
16 recall where the definition of materiality can
17 be found for -- for this particular purpose?

18 MS. DANDENEAU: Objection to form.

19 A. No. You -- I don't determine
20 materiality.

21 Q. Okay. I'm just asking you if you
22 can help me understand where it is, but I think
23 we will find it in a few minutes.

24 You are aware that Highland has
25 commenced lawsuits against each of the

1 WATERHOUSE - 10-19-21

2 affiliates, as we've defined the term, to
3 collect under certain promissory notes; is that
4 right?

5 A. Yes.

6 Q. And are you familiar with the notes
7 that are issue -- at issue in the lawsuits?

8 MS. DANDENEAU: Objection to form.

9 A. Generally familiar.

10 Q. Can we refer to the lawsuits that
11 Highland has commenced against the affiliates
12 collectively as the lawsuits?

13 A. Yes. And, again, the affiliates are
14 NexPoint, HCMFA, HCMS, and HCRE.

15 Q. And Mr. Dondero?

16 A. Okay. See, that is a new -- and now
17 Mr. Dondero is included in your affiliate
18 definition.

19 Q. I just --

20 A. I thought affiliates -- I thought
21 affiliates were just the four prior entities,
22 so I just want to be clear.

23 Q. I appreciate that. So let's --
24 let's keep them separate and let's refer to the
25 four corporate entities as the affiliates, and

1 WATERHOUSE - 10-19-21

2 Mr. Dondero we will call Mr. Dondero. Okay?

3 A. Okay. Thank you. As you can see,
4 Mr. Morris, there is a lot of entities -- a lot
5 here. I just want to be clear.

6 Q. Okay. Now, the affiliates of
7 Mr. Dondero signed promissory notes that are
8 not subject to the lawsuit.

9 Do you understand that?

10 MS. DANDENEAU: Objection to form.

11 A. The affiliates and Mr. Dondero
12 signed --

13 Q. You know what? I will skip it.
14 That is okay. Okay.

15 From time to time while you were
16 Highland's CFO, payments were applied against
17 principal and interests that were due under the
18 notes that were tendered by the affiliates and
19 Mr. Dondero; correct?

20 MR. RUKAVINA: Objection to the
21 extent that calls for a legal conclusion.

22 A. Yes.

23 Q. Did Highland have a process where --
24 whereby payments would be applied against
25 principal and interest against the notes that

1 WATERHOUSE - 10-19-21

2 were given by the affiliates and Mr. Dondero?

3 A. Yes.

4 Q. Can you describe the process for me?

5 A. The process, payment should be
6 applied as laid out in the -- in the promissory
7 note.

8 Q. From time to time were payments made
9 that were not required under the promissory
10 notes?

11 MS. DANDENEAU: Objection to form.

12 A. Yes.

13 Q. Who was responsible for deciding
14 when and how much the payments would be made
15 with respect to each of the notes that were
16 issued by the affiliates and Mr. Dondero?

17 A. Who was responsible for deciding how
18 much was paid prior to the due date?

19 Q. Yes.

20 A. I don't know.

21 Q. Did you approve of each payment that
22 was made against principal and interest on the
23 notes that were given by the affiliates and
24 Mr. Dondero?

25 MS. DANDENEAU: Objection to form.

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2 A. Did I approve the payments? I
3 approve -- I approve -- if there was cash -- if
4 there was cash being repaid on a note payment,
5 yes, I approved in the general sense of being
6 made aware of the payment and the amount.

7 Q. And are you the person who
8 authorized Highland's employees to effectuate
9 those payments?

10 A. Yes.

11 Q. When you gave the instruction to
12 effectuate the payment, did you obtain
13 Mr. Dondero's prior approval?

14 A. I mean, it -- I mean, it -- it
15 depends.

16 Q. Can you think of any instance where
17 you directed Highland's employees to make a
18 payment of principal or interest against any
19 note that was tendered by an affiliate or
20 Mr. Dondero that Mr. Dondero did not approve of
21 in advance?

22 A. I can't recall specifically.

23 Q. Can you identify -- withdrawn.

24 Did Mr. Dondero ever tell you that a
25 payment that was made against principal and

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2 interest due under one of the notes that was
3 tendered by an affiliate or himself should not
4 have been made?

5 A. Yes.

6 Q. Can you identify the payment for me?

7 A. It would be for -- for NexPoint
8 Advisors.

9 Q. Okay. And when did Mr. Dondero tell
10 you that a payment that you had initiated on
11 behalf of NexPoint should not have been made?

12 A. I wasn't initiating payment. It was
13 in the context of the -- I think you used this
14 term, "the advisors," so NexPoint Advisors and
15 Highland Capital Management Fund Advisors had
16 overpaid on certain agreements with Highland
17 Capital Management, L.P. And as a part of that
18 process, the advisors -- what I was told at the
19 time were in talks and negotiations and
20 discussions with Highland Capital Management,
21 L.P., on offsets in relation to those
22 overpayments.

23 Q. When did this conversation take
24 place?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall specifically.

3 Q. Do you recall what year it was?

4 A. Yes.

5 Q. What year did the conversation with
6 Mr. Dondero take place that you just described?

7 A. 2020.

8 Q. Okay. Do you remember if it was
9 December 2020?

10 A. It -- it -- I don't -- I don't
11 recall what month specifically, but it would
12 have been November or December.

13 Q. And we're talking here about a
14 payment of principal and/or interest that was
15 due -- withdrawn.

16 We're talking here about a payment
17 of principal and interest that was applied
18 against NexPoint's note; correct?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall what that payment
21 consisted of.

22 Q. Is it possible that the payment you
23 have in mind related to the shared services
24 agreement?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Are you certain that the payment --
4 that the payment that you have in mind related
5 to the promissory note that NexPoint issued in
6 favor of Highland?

7 MS. DANDENEAU: Objection to form.

8 A. Yes.

9 Q. Okay. Other than that one payment,
10 can you identify any other instance where
11 Mr. Dondero told you that a payment should not
12 have been applied against principal and
13 interest under any promissory note tendered by
14 any affiliate or Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Objection to
17 form.

18 A. Not that I recall.

19 Q. Thank you very much.

20 Do you know if Mr. Dondero approved
21 in advance of each loan made to each affiliate
22 and himself during the time that you were the
23 CFO?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Yes, generally.

3 Q. Can you identify any loan that was
4 ever made to an affiliate or to Mr. Dondero
5 that Mr. Dondero did not approve of in advance?

6 A. Other than the ones that are in
7 dispute, I'm not aware.

8 Q. Do you believe that Mr. Dondero did
9 not approve of each of the loans that are in
10 dispute in advance of the time that the loan
11 was made?

12 MS. DANDENEAU: Objection to form.

13 A. Given what is in the dispute, you
14 know, and -- and -- and the way things might --
15 yeah, I mean...

16 Q. I am not asking about the dispute,
17 and it was probably my mistake to follow you
18 there.

19 Were you aware of every loan made by
20 Highland to each of its affiliates and
21 Mr. Dondero while you were the CFO at the time
22 each loan was made?

23 A. Was I aware of every loan, yes.

24 Q. Okay. And if you put yourself back
25 in time, do you recall that any of the loans

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2 that were made to one of the affiliates or
3 Mr. Dondero during the time that you were the
4 CFO was made without Mr. Dondero's prior
5 knowledge and approval?

6 A. Not that I recall.

7 Q. Thank you. In fact, do you -- as
8 the CFO, would you have allowed Highland to
9 loan money to an affiliate or to Mr. Dondero
10 without obtaining Mr. Dondero's prior approval?

11 MS. DANDENEAU: Objection to form.

12 A. I can't -- there was so many times
13 over the years, I can't speak for every single
14 one, but generally, yes, I -- I spoke to him.

15 Q. You -- you never -- you never --
16 withdrawn. I will just take that.

17 Can you recall any payment that was
18 ever made against principal and interest on a
19 note that was issued in favor of Highland by an
20 affiliate or Mr. Dondero that you personally
21 did not know about in advance?

22 A. There are so many through the years,
23 I don't -- I don't -- I don't recall every
24 single one.

25 Q. Okay. Can you identify any payment

1 WATERHOUSE - 10-19-21
2 that was made against principal and interest on
3 any note tendered by any affiliate or
4 Mr. Dondero that you didn't know about in
5 advance?

6 A. I don't recall.

7 Q. Other than Mr. Dondero -- withdrawn.
8 Did anybody at Highland have the
9 authority to make a payment against principal
10 and interest due under a loan given to the
11 affiliates and Mr. Dondero without your
12 knowledge and approval?

13 MS. DANDENEAU: Objection to form.

14 A. Sorry, there was -- to make a
15 payment on an affiliate loan, what you are
16 saying would it require my knowledge and
17 approval, yes.

18 Q. Okay. I appreciate that. Thank
19 you.

20 Did anybody at Highland have the
21 authority, to the best of your knowledge, to
22 effectuate a loan to an affiliate without
23 Mr. Dondero's prior knowledge and approval?

24 MS. DANDENEAU: Objection to form.

25 A. I can't speak for all, but

1 WATERHOUSE - 10-19-21

2 generally, yes.

3 Q. Did you personally communicate with
4 Mr. Dondero to let him know each time a payment
5 of principal or interest was being made against
6 any note that was tendered by an affiliate or
7 Mr. Dondero to Highland?

8 A. I don't -- are you saying, did I let
9 Mr. Dondero know if a payment was made on any
10 affiliate or loan to Mr. Dondero? I mean,
11 not -- not every -- no.

12 Q. Let me ask it this way: Did you
13 have a practice of informing Mr. Dondero when
14 payments were made against principal and
15 interest on any note that was tendered by an
16 affiliate or Mr. Dondero?

17 MS. DEITSCH-PEREZ: Objection to
18 form.

19 MS. DANDENEAU: Objection to form.

20 A. No, I did not.

21 Q. Did Mr. Dondero ever tell you that a
22 payment of principal or interest had been made
23 against a note that was tendered by an
24 affiliate or himself that he had been unaware
25 of?

1 WATERHOUSE - 10-19-21

2 A. Not that I recall.

3 Q. Are you aware that Mr. Dondero and
4 the affiliates -- withdrawn.

5 Are you aware that Mr. Dondero
6 NexPoint, HCRE, and HCMS all contend that they
7 do not have to pay on any of the notes they
8 issued because they are subject to an oral
9 agreement between Mr. Dondero and Nancy
10 Dondero, in her capacity as the trustee of the
11 Dugaboy Investment Trust?

12 MS. DANDENEAU: Objection to form.

13 A. I didn't -- I didn't -- I didn't
14 know that it was all notes.

15 Q. Okay. Are you -- did you ever learn
16 that there was an oral agreement between Jim
17 Dondero and Nancy Dondero pertaining to any
18 notes issued by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. Yes.

22 Q. Do you have any understanding as to
23 the terms of that agreement?

24 A. Yes.

25 Q. What is your understanding of the

1 WATERHOUSE - 10-19-21

2 terms of the agreement?

3 A. That there were certain milestones
4 that had to be reached.

5 Q. Do you have any understanding of the
6 terms of the agreement between Mr. Dondero and
7 Nancy Dondero concerning any of the notes
8 issued by the affiliates or Mr. Dondero other
9 than that there have to be milestones reached?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 A. There are milestones, I found out
13 yesterday, or there was some --

14 MS. DANDENEAU: Okay. I'm just
15 going to object to the extent that you
16 learned anything in conversations with
17 counsel, please don't reveal -- that is
18 privileged, and don't reveal any privileged
19 communications.

20 THE WITNESS: Okay.

21 A. So I'm not aware of anything else.

22 Q. Do you know what the milestones
23 were?

24 MS. DANDENEAU: Objection to form.

25 A. I don't.

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2 Q. Do you know anything about -- do you
3 know what promissory notes the agreement
4 covered?

5 A. I don't.

6 Q. Do you know if -- if Jim and Nancy
7 Dondero entered into one agreement or more than
8 one agreement?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. I don't know.

12 Q. Do you know if the agreement is in
13 writing?

14 A. I don't know.

15 Q. How did you learn of the existence
16 of the agreement?

17 MS. DANDENEAU: Objection to form.
18 Again --

19 A. I don't -- I don't recall who told
20 me.

21 Q. You have no recollection of who told
22 you about this agreement between Jim and Nancy
23 Dondero?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. I don't recall.

3 Q. Do you recall how you learned of the
4 agreement?

5 Was it in a meeting? Was it in a
6 phone call? Was it in an email?

7 A. I don't recall.

8 Q. Do you recall when you learned of
9 the agreement?

10 A. Not specifically.

11 Q. Do you recall what year you learned
12 of the agreement?

13 A. In -- look, I mean, there are so
14 many notes. I may be getting -- I believe it
15 was 2020.

16 Q. All right. I'm not asking about
17 notes, sir. I'm asking about the agreement
18 that you testified you knew about between Jim
19 and Don- -- Nancy Dondero. Okay.

20 Do you understand my question now?
21 Should I ask my question again?

22 A. Yeah, sure. Go ahead.

23 Q. I'm going to use the word
24 "agreement" to refer to the agreement that
25 Mr. Dondero and Nancy Dondero entered into

1 WATERHOUSE - 10-19-21

2 where you understood that certain milestones
3 had to be reached. Okay?

4 A. Uh-huh.

5 MS. DANDENEAU: Objection.

6 MS. DEITSCH-PEREZ: Object to the
7 form.

8 MR. MORRIS: Just defining a term,
9 what is the objection.

10 MS. DEITSCH-PEREZ: The objection --

11 MR. MORRIS: I will move on. I will
12 move on.

13 MS. DEITSCH-PEREZ: John --

14 Q. Sir, are you okay with that
15 definition of agreement?

16 A. Okay.

17 Q. Okay. So you don't recall who --
18 who informed you of the existence of the
19 agreement; is that right?

20 A. I don't recall.

21 Q. You don't recall who told you the
22 terms of the agreement.

23 Do I have that right?

24 A. Correct.

25 Q. And you don't recall if you learned

1 WATERHOUSE - 10-19-21

2 about the agreement in a meeting, through an
3 email, or through a phone call.

4 Do I have that right?

5 A. I don't recall.

6 Q. Can you tell me when you learned of
7 the agreement?

8 A. I don't -- I don't -- I don't
9 remember specifically.

10 Q. Can you tell me if you learned of
11 the agreement before or after the petition
12 date?

13 A. It would have been -- it would have
14 been after.

15 Q. Can you tell me if you learned of
16 the agreement before or after January 9th,
17 2020?

18 A. It would have been after.

19 Q. Can you tell me if you learned of
20 the agreement before or after you left Highland
21 Capital Management in February of 2021?

22 A. I don't -- I don't -- I don't know.

23 Q. It is possible that you learned of
24 it while you were a Highland employee.

25 Do I have that right?

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2 A. I don't remember the -- I mean, it
3 was sometime in 2021. I don't remember when.

4 Q. All right. So to the best of your
5 recollection, it was in 2021 but you don't
6 recall if it was before or after you ceased to
7 be a Highland employee.

8 Do I have that right?

9 A. Yeah, I mean, it was -- it was
10 likely after I was -- after I left Highland
11 because, if I put myself back into the last
12 days of -- of 2021, it was -- you know, the
13 communications with Mr. Dondero were -- were --
14 were -- there weren't as many communications
15 because of the circumstances.

16 Q. And so based on that you believe
17 that it is most likely that you learned of this
18 agreement sometime after you left Highland
19 employment?

20 A. I wouldn't use the term "most
21 likely." I don't recall specifically. I don't
22 recall.

23 Q. Do you recall ever telling Jim Seery
24 about this agreement?

25 A. No, I don't -- I didn't tell

1 WATERHOUSE - 10-19-21

2 Jim Seery.

3 Q. Did you tell anybody at DSI about
4 this agreement?

5 A. No.

6 Q. Did you tell any of Highland's
7 independent directors about this agreement?

8 A. No.

9 Q. Did you tell anybody at Pachulski
10 Stang Ziehl & Jones about this agreement?

11 A. No.

12 Q. Did you tell any employee of
13 Highland about this agreement?

14 A. No.

15 MS. DANDENEAU: Mr. Morris, it has
16 been an hour and a half. Is this a good
17 time for a break?

18 MR. MORRIS: Sure.

19 Q. Mr. Waterhouse, I will just remind
20 you that during the break please don't speak
21 with anybody about the deposition, the
22 substance of your testimony or anything else
23 concerning the deposition. Okay?

24 A. Yes.

25 MR. MORRIS: So it is 11:02. We're

1 WATERHOUSE - 10-19-21

2 at 11:02 your time. Let's come back, I
3 guess, at 15 -- at 11:15 your time.

4 VIDEOGRAPHER: We're going off the
5 record at 11:02 a.m.

6 (Recess taken 11:02 a.m. to 11:20 a.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 11:20 a.m.

9 Q. Mr. Waterhouse, did you speak with
10 anybody during the break about this deposition?

11 A. No.

12 MS. DANDENEAU: Other than -- other
13 than his counsel.

14 Q. Did you speak to your counsel about
15 the substance of your deposition today?

16 A. No, I didn't bring it up.

17 Q. I didn't ask you if you brought it
18 up. I asked you if you had any conversation
19 with your lawyer about the substance of your
20 deposition.

21 MS. DANDENEAU: Yes, he did.

22 Q. Can you tell me what the -- you
23 discussed?

24 MS. DANDENEAU: No, I object to
25 that. He's not going to answer. That is a

1 WATERHOUSE - 10-19-21

2 privileged conversation.

3 MR. MORRIS: So I just want to make
4 sure that I understand. During the break
5 you spoke with your client about the
6 substance of this deposition; is that
7 right?

8 MS. DANDENEAU: Yes, John.

9 MR. MORRIS: And you refuse -- you
10 refuse to let your client tell me what was
11 discussed; is that right?

12 MS. DANDENEAU: That's correct.

13 MR. MORRIS: You know, I had given
14 the instruction prior to the break not to
15 speak with counsel. I would have
16 appreciated --

17 MS. DANDENEAU: No, you didn't --
18 actually, that is not true, Mr. Morris.
19 You said not to speak with anyone. We
20 never have interpreted that to mean
21 conversations with counsel. That's never
22 been -- I have never, ever heard that
23 instruction.

24 MR. MORRIS: Okay. We will -- we
25 will -- we will deal with it when and if we

1 WATERHOUSE - 10-19-21

2 have to.

3 Q. Mr. Waterhouse, after learning about
4 the agreement, did you ask anybody if the
5 agreement was reflected in a writing?

6 MS. DANDENEAU: Objection to form.

7 A. No.

8 Q. Did you ask anybody if the terms of
9 the agreement were memorialized anywhere?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: What is the --

12 A. No.

13 MS. DANDENEAU: Well, because you
14 keep talking about this agreement and I --
15 I -- I think, Mr. Morris, that is really
16 not clear what you mean by "the agreement."
17 And maybe you can just go back and restate
18 what that is.

19 MR. MORRIS: Okay. Your client has
20 agreed with me twice on the definition, but
21 I will try one more time.

22 Q. Mr. Waterhouse, do you understand
23 that when I use the term "agreement," I'm
24 referring to the agreement between Jim and
25 Nancy Dondero concerning certain promissory

1 WATERHOUSE - 10-19-21

2 notes where you learned that one of the terms
3 of the agreement was milestones reached?

4 A. Okay.

5 Q. And did you understand that that was
6 the -- the agreement that we were referring to
7 every time we used the word "agreement" in this
8 deposition?

9 A. I don't know anything about this
10 agreement. So, look, I do -- it -- I don't
11 know whether --

12 Q. Let's -- let's try this again.

13 A. Yeah. Look, I don't know what this
14 agreement relates.

15 MS. DEITSCH-PEREZ: John, John --

16 Q. Let me try --

17 MS. DEITSCH-PEREZ: John, please let
18 the witness finish.

19 MR. MORRIS: Please stop. Please
20 stop. Please stop talking.

21 MS. DEITSCH-PEREZ: No, you stop.
22 Let the witness --

23 MR. MORRIS: Stop talking.

24 MS. DEITSCH-PEREZ: -- finish -- you
25 interrupted him.

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2 MR. MORRIS: You know what, you
3 guys, this is really wrong. It is really,
4 really wrong. Okay?

5 I had the witness agree not once,
6 but twice to the definition of agreement.
7 Okay? I'm going to try and do it a third
8 time.

9 MS. DANDENEAU: No, but, please,
10 John, really --

11 MR. MORRIS: No, please stop
12 talking. Please. It is my deposition.
13 Object to questions.

14 MS. DANDENEAU: No, but also you
15 instructed him that -- that if you were
16 going -- if you were interrupting him, that
17 he should remind you that you're
18 interrupting him and -- and --

19 MR. MORRIS: Let him do that. Let
20 him do that.

21 MS. DANDENEAU: Okay. Well, you --

22 MR. MORRIS: Please stop talking.

23 A. Okay. I don't know any of the
24 details of these agreements. I don't know
25 anything about them. I heard -- someone -- I

1 WATERHOUSE - 10-19-21
2 don't know who, I don't know when, as you
3 asked, sometime in '21, someone told me about
4 this -- or I don't honestly know -- I don't
5 even recall exactly how I was made aware of
6 this, but I was. I don't know -- I don't know
7 any of these details, and I'm getting -- again,
8 there is, you know, I -- I -- I had a passing
9 conversation with -- with Jim at some point
10 on -- on some -- on the executive comp, and I'm
11 getting confused of what is what, because
12 again, I don't know any of these details.

13 Q. Okay. Let me try again,
14 Mr. Waterhouse, and I apologize.

15 Are you aware of any agreement
16 between Jim Dondero and Nancy Dondero
17 concerning any promissory note that was given
18 to Highland by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. I've heard of an agreement. That
22 is -- that is -- I mean, if you are using aware
23 as heard, sure.

24 Q. And you understand that one of the
25 terms of the agreement is that it was based on

1 WATERHOUSE - 10-19-21

2 milestones that had to be reached; is that
3 right?

4 MS. DANDENEAU: Objection to form.

5 A. That was one of the words that was
6 used when I heard about it, yes.

7 Q. And when you heard about this
8 agreement that had a term in it concerning
9 milestones reached, did you ask the person who
10 was telling you about the agreement whether or
11 not it was in writing?

12 A. I did not.

13 Q. Did you ask any questions at all?

14 MS. DANDENEAU: Objection to form.

15 A. Not that I recall.

16 Q. But do you understand that going
17 forward, we're going to refer to the agreement
18 as the agreement that you just described that
19 you were --

20 MS. DANDENEAU: Object to the form.

21 A. Yes.

22 Q. Okay. You don't have any personal
23 knowledge concerning the terms of the
24 agreement; correct?

25 MS. DEITSCH-PEREZ: Object to the

1 WATERHOUSE - 10-19-21

2 form.

3 Q. You can answer.

4 A. I don't -- I heard about the
5 agreement. I don't know anything -- I heard
6 there was an agreement. That is -- again, as I
7 testified before -- I said before, heard about
8 it, don't know the details. I believe it was
9 sometime this year.

10 Q. Do you have any personal knowledge
11 about the terms of the agreement, sir?

12 MS. DANDENEAU: Objection to form.

13 A. Other than what I have previously
14 discussed, I don't -- I don't know.

15 Q. Did -- did Mr. Dondero tell you
16 about the existence of the agreement?

17 A. I don't recall.

18 Q. Do you recall the source of your
19 information when you learned about the
20 agreement?

21 A. No, I don't -- I don't recall. I
22 don't remember. I just -- I heard about it
23 generally. I don't remember -- I don't
24 remember who, how, if, how. I don't remember.

25 Q. You know, Mr. Waterhouse, I just

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2 want to be clear that I never would have asked
3 you to appear at this deposition if your name
4 hadn't been included in responses to discovery
5 as to somebody with knowledge about the -- who
6 was told about the existence of the agreement.

7 That is what prompted me do this,
8 and I really do feel compelled to tell you that
9 I otherwise would never have called you as a
10 witness. So I regret that you're being put
11 through this today. I had no intention of
12 burdening you or taking your time, but that is
13 the reason that we issued the subpoena is
14 because certain of the defendants identified
15 you as somebody --

16 MS. DEITSCH-PEREZ: Mr. Morris, you
17 are here to ask questions, not to have --

18 MR. MORRIS: I feel badly for the
19 guy. I really do.

20 MS. DEITSCH-PEREZ: I'm sure you do.

21 MR. MORRIS: I do. Stop.

22 MS. DEITSCH-PEREZ: You stop.

23 MR. MORRIS: I'm allowed.

24 MS. DEITSCH-PEREZ: No, you're not
25 allowed to have a chat with the witness.

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2 Q. Okay. Well, I hope that you
3 appreciate what I'm saying here,
4 Mr. Waterhouse.

5 MS. DANDENEAU: All right. Let's go
6 ahead and ask questions, and again, you're
7 entitled to probe his -- his knowledge
8 of -- whatever knowledge he has about
9 this -- this agreement and --

10 MR. MORRIS: That is what I'm doing.

11 MS. DANDENEAU: -- he will answer
12 the questions to the best that he can.

13 MR. MORRIS: That is what I'm doing.

14 Q. Mr. Waterhouse, I take it you do not
15 know which promissory notes issued by which
16 affiliates or Mr. Dondero are the subject of
17 this agreement; do I have that right?

18 A. Yes, I don't -- I don't know.

19 Q. Do you know of any way to determine
20 which promissory notes issued by the affiliates
21 and Mr. Dondero are the subject of this
22 agreement other than asking Jim or Nancy
23 Dondero?

24 MS. DANDENEAU: Objection to form.

25 A. I don't know.

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2 Q. Did you ever make --

3 A. I don't know anything about these
4 agreements.

5 Q. Did you ever make any effort to
6 determine which promissory notes are subject to
7 this agreement?

8 A. No.

9 Q. Did you ever ask anybody which
10 promissory notes are subject to this agreement?

11 A. No.

12 Q. Do you know if there is a list
13 anywhere of the promissory notes that are
14 subject to this agreement?

15 A. I'm not aware.

16 Q. Have you ever seen the terms of the
17 agreement written down anywhere?

18 A. No.

19 Q. Have you ever asked anybody whether
20 the terms of the agreement were written down
21 anywhere?

22 A. I have not.

23 Q. Did learning about the agreement
24 cause you to do anything in response?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Did anybody ever describe to you the
4 nature of the milestones that you referred to
5 earlier?

6 A. No, I don't -- I don't have any
7 details of this.

8 Q. That is fine.

9 PricewaterhouseCoopers served as
10 Highland's outside auditors prior to the
11 petition date; correct?

12 A. Yes.

13 Q. You refer to PricewaterhouseCoopers
14 as PwC?

15 A. Yes.

16 Q. PricewaterhouseCoopers audited
17 Highland's financial statements on an annual
18 basis; correct?

19 A. During my -- during my time as -- as
20 CFO, yes, PricewaterhouseCoopers was the
21 auditor.

22 Q. Do you know why Highland had its
23 annual financial statements audited each year?

24 A. Generally.

25 Q. Tell me your general understanding

1 WATERHOUSE - 10-19-21

2 as to the reason why Highland had its annual
3 financial statements audited each year.

4 A. From -- from time to time, they were
5 used -- or asked for, as part of diligence or
6 transactions or -- or things of that nature.

7 Q. And were they given to third parties
8 for purposes of diligence or transactions from
9 time to time?

10 A. As far as I'm aware, yes.

11 Q. And was it your understanding as the
12 CFO that the third parties who received the
13 financial statements in diligence or
14 transactions was going to rely on those?

15 MS. DANDENEAU: Objection to form.

16 A. I don't know -- I don't know gen --
17 I don't know specifically what they were going
18 to rely on. You know, we would get requests
19 for audited financial statements. I don't know
20 what they were relying on.

21 Q. And --

22 A. You would have to ask them.

23 Q. Did you personally play a role in
24 PwC's annual audit and the conduct of the
25 audit?

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2 MS. DANDENEAU: Objection to form.

3 A. During my tenure as CFO, I played a
4 very minimal role.

5 Q. What was the minimal role that you
6 played?

7 A. You know, again, it was -- it was to
8 check in with the team, to make sure that, you
9 know, audit -- the deadlines were being hit,
10 information was being presented to the auditors
11 in a -- in a timely fashion, but, you know,
12 other than that, it was a very capable team
13 that are still current employees of Highland
14 and, you know, they -- they conducted 99
15 percent of -- look, I don't want to give
16 percentages. I mean, this is -- but I -- I --
17 I played a minimal role towards the end.

18 Before during my earlier years as
19 CFO, I did more, and then as time went on, I
20 did less in it.

21 Q. Okay. Was there a person at
22 Highland who was responsible for overseeing
23 Highland's participation in PwC's audit during
24 the time that you were the CFO?

25 A. Yeah. I mean, there was -- there

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2 was a -- there was a point -- it varies. It
3 varies by year, in function, in time and, you
4 know, depending on the request, but yes, I
5 mean, there is -- there is -- there is
6 generally a point person of communication.

7 Q. And who was the point person from
8 2016 until the time you left Highland?

9 A. I don't -- I don't know
10 specifically, but it would have been, you
11 know -- you know, someone on the corporate
12 accounting team.

13 Q. And was there a head of the
14 corporate accounting team?

15 A. Yes, so -- yes.

16 Q. Who was the head of corporate
17 accounting for the five years prior to the time
18 you left Highland?

19 A. I don't -- if you're asking from
20 2016 on, I don't -- it was Dave Klos, but,
21 again, there was -- there was changes to the
22 team and the reporting structure. I don't
23 remember exactly when that happened during --
24 you know, over the last -- since 2016.

25 Q. Did the folks who participated and

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2 ran the audit all report to you, directly or
3 indirectly?

4 A. Yes.

5 Q. And did you have any responsibility
6 for making sure that the audit report was
7 accurate before it was finalized?

8 A. Yeah. I mean, you know, that --
9 that is -- my responsibility to the auditors
10 was -- again, is -- and the CFO is to -- we are
11 providing accurate financial statements; right?

12 And -- and -- and as part of any
13 audit, we disclose all relevant information as
14 part of any audit.

15 Q. Okay. And as the CFO, did you take
16 steps to make sure that the audit report was
17 accurate?

18 A. I mean, I would say in a general
19 sense, yes. But, again, I mean, I had a
20 very -- I had a very capable and competent
21 team. I wasn't managing them.

22 You know, part of what I do is I let
23 the team -- I want managers to grow. I want
24 managers to have rope. And that is -- you
25 know, I'm not a stand-behind-you type of guy.

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2 If you -- if you talk to my team members, I'm
3 not micromanaging people. I want people to
4 learn and grow in their function so they can go
5 on and do bigger and better things with their
6 careers.

7 And so, yes, generally I was
8 responsible for it, but I wanted the team to
9 learn and grow and be responsible for the bulk
10 of the audit.

11 Q. Did you personally review each audit
12 report before it was finalized to satisfy
13 yourself that it was accurate?

14 A. I don't -- I don't recall, you know,
15 for every single -- we're talking 2016, there
16 would have been three years, 2016 to '17, '18.
17 I don't -- we're -- we're going back
18 five years-plus. I don't -- you know, I don't
19 recall.

20 Q. Did you have a practice that you
21 employed to make sure that you were satisfied
22 that Highland's audit reports were true and
23 accurate to the best of your knowledge?

24 A. I mean, our -- the practice was set
25 up with our -- the -- the practice to put

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2 together accurate audited or accurate financial
3 statements is to your control environment.

4 So, you know, the -- so the practice
5 was to maintain a stable control environment
6 which then the output is -- is accurate
7 financial statements.

8 So -- so, you know, if I was
9 comfortable that the control environment was
10 operating, then, you know, that would dictate
11 how I would -- you know, what I might or might
12 not do in a given year.

13 Q. Okay. Do you recall ever being
14 uncomfortable with the control environment
15 during the period that you served as CFO?

16 A. Yeah. I mean, look, yes, there are
17 times -- you know, nothing is perfect. So
18 there were -- there were times when, yes, you
19 know -- there are times I learned I was
20 uncomfortable with the control environment, and
21 that is part of the management of the process
22 and having, you know -- and -- and working
23 through whatever obstacles present themselves.

24 Q. Okay. Were you ever uncomfortable
25 with the control process as it related to

1 WATERHOUSE - 10-19-21

2 reporting and disclosures of loans to
3 affiliates and Mr. Dondero?

4 MS. DANDENEAU: Objection to form.

5 A. I don't -- I don't recall --

6 Q. So you don't recall --

7 A. -- the --

8 MS. DANDENEAU: Mr. Morris --

9 A. I don't recall being uncomfortable.

10 But, again, we're going back several years. I

11 don't -- you know, the practice in an audit is

12 to disclose all information to the auditors.

13 And I don't -- I don't recall.

14 Q. As part of the process of the audit,
15 did you sign what is sometimes referred to as a
16 management representation letter?

17 A. Yes.

18 MR. MORRIS: Can we put up on the
19 screen a document that we have premarked as
20 Exhibit 33.

21 (Exhibit 33 marked.)

22 MS. DANDENEAU: Mr. Morris, that is
23 not in the binder; correct?

24 MR. MORRIS: Correct.

25 Q. So you will see, Mr. Waterhouse,

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2 this is a letter dated June 3rd. And if we
3 could go to the signature page.

4 And do you see that you and
5 Mr. Dondero signed this document?

6 A. Yes.

7 Q. That is your signature; right?

8 A. Yes.

9 MR. MORRIS: Okay. Can you go back
10 to the top.

11 MS. DANDENEAU: Mr. Morris, can you
12 have somebody post this in the chat so that
13 we have can have a copy of this, please.

14 MR. MORRIS: Yeah, sure. Asia, can
15 you do that, please.

16 Q. Okay. Do you see at the bottom of
17 the second paragraph there is a reference to
18 materiality?

19 A. Yes.

20 Q. Okay. It says, Materiality used for
21 purposes of these representations is
22 \$1.7 million.

23 Do you see that?

24 A. I do.

25 Q. And did PwC set that level of

1 WATERHOUSE - 10-19-21

2 materiality?

3 A. Yes.

4 Q. And for purposes of the audit, did
5 PwC set the level of materiality each year?

6 A. Yes.

7 Q. Did that number change over time?

8 A. I'm not aware of what materiality is
9 every single year, so -- but, you know, this
10 number would likely fluctuate.

11 Q. Okay. I'm going to go back to a
12 question I asked you earlier today. And that
13 is in connection -- this letter is issued in
14 connection with the audit for the period ending
15 12/31/2018; correct?

16 A. Yes.

17 Q. Okay. And is it fair to say that if
18 any -- actually, withdrawn. I'm going to take
19 it outside of this.

20 If Highland ever forgave the loan to
21 any affiliate or any of its officers or
22 employees, in whole or in part, to the best of
23 your knowledge, would that forgiveness have
24 been disclosed in the audited financial
25 statements if it exceeded the level of

1 WATERHOUSE - 10-19-21

2 materiality that PwC established?

3 MS. DANDENEAU: Objection to form.

4 A. So, again, during my tenure as CFO,
5 and -- Highland -- it was -- it is required to
6 disclose any affiliate loans that are in excess
7 of materiality.

8 Now, the forgiveness of those loans
9 may or may not -- I mean, since materiality
10 fluctuates every year, a -- you know, if a loan
11 was forgiven, it may or may not, you know --
12 and, look, I would want to consult the guidance
13 around this.

14 It is not something we do -- you
15 know, it is not -- you know, GAAP can be and
16 disclosures can be very specialized so, again,
17 we want to consult the guidance. But we would
18 see if and what would need to be disclosed if
19 it were deemed immaterial.

20 Q. Did you and Mr. Dondero sign
21 management representation letters of this type
22 in each year in which you served as Highland's
23 CFO?

24 A. I -- I -- I will speak for myself.
25 I signed them. There may have been others that

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2 signed as well. I don't -- I don't recall.

3 Q. But to the best of your knowledge,
4 you, personally, signed a management
5 representation letter in connection with
6 Highland's audit each year that you served as
7 the CFO; correct?

8 A. I would say generally speaking,
9 Mr. Morris. I don't recall for every single
10 year, you know, generally, but I would want to
11 refer to all the rep letters and see who signed
12 them.

13 Q. Do you recall Highland having its
14 financial statements audited in any year during
15 the period that you were a CFO where you didn't
16 sign the management representation letter?

17 A. I don't recall. But, John, we're
18 going back five, six, seven, eight, nine,
19 decade. I don't -- I don't remember.

20 Q. I don't want to go back that many
21 decades, but I'm just asking you if you recall
22 that there was you didn't sign it?

23 A. I -- I -- I don't, but my memory
24 is -- again, I -- I -- I can't tell you what I
25 did in 2012. I mean, I think generally, yes,

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2 but I don't -- I don't know for sure, and I
3 would want to rely on the document.

4 Q. Let me ask the question a little bit
5 differently then.

6 Do you have any reason to believe
7 that Highland had its annual financial audit
8 and you did not sign a management
9 representation letter in connection with that
10 audit?

11 MS. DANDENEAU: Objection to form.

12 A. I don't believe it would, but,
13 again, I would want to -- I don't recall and I
14 would want to confirm it to -- to make, you
15 know, an affirmative -- to give an affirmative
16 answer.

17 Q. Do you know whether PwC required
18 management to sign management representation
19 letters?

20 MS. DANDENEAU: Objection to form.

21 A. Yes. I mean, it -- management
22 representation letters are signed by
23 management.

24 Q. Okay. And do you know -- do you
25 have any understanding as to why PwC requires

1 WATERHOUSE - 10-19-21

2 management to sign management representation
3 letters?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't know why PwC's -- what PwC's
7 specific practice is. I know generally what
8 management representation letters are.

9 Q. Okay. Do you personally -- I'm not
10 asking about PwC. I'm asking for you -- I'm
11 asking about you, do you have an understanding
12 as to why the auditor asks for management
13 representation letters?

14 A. Okay. So you're asking me in my
15 personal capacity, yes, I have a general
16 understanding of why.

17 Q. Can you give me the general
18 understanding that you have as to why
19 management representation letters are required?

20 A. They are -- they are required to --
21 they are -- they are one of the items required
22 in an audit to help verify completeness.

23 Q. Do you have any -- any other
24 understanding as to why management
25 representation letters are required?

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2 A. That is -- that is -- other than
3 what I said, it is -- it is -- it is required
4 so -- to ensure that the -- you know, there
5 is -- there is completeness in what is being
6 audited.

7 Q. Did you -- did you have a practice
8 whereby you and Mr. Dondero conferred about the
9 management representation letters before you
10 signed them?

11 A. No.

12 Q. Did you have a practice --
13 withdrawn.

14 Do you see just the next sentence
15 after the materiality, there is a sentence that
16 states: We confirm, to the best of our
17 knowledge and belief, as of June 3rd, 2019, the
18 date of your report, the following
19 representations made to you during your audit.

20 Do you see that sentence?

21 A. Yes.

22 Q. Okay. Did you understand when you
23 signed this letter that you were confirming the
24 representations that followed?

25 A. When I signed this management

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2 letter -- representation letter, yes.

3 Q. Okay. Did you discuss this letter
4 with Mr. Dondero before you signed it?

5 A. I don't recall.

6 Q. Do you recall if Mr. Dondero asked
7 you any questions before he signed the letter?

8 A. I don't recall.

9 Q. Do you recall if you asked
10 Mr. Dondero any questions before you signed
11 this letter?

12 A. I don't recall.

13 Q. Is it fair to say that Mr. Dondero
14 did not disclose to you the existence of the
15 agreement that we have -- as we've defined that
16 term prior to the time you signed this letter?

17 MS. DANDENEAU: Objection to form.

18 A. I don't think I understand the
19 question. So, again, you are saying, did
20 Mr. Dondero not disclose to me the existence of
21 this letter?

22 Q. No, I apologize.

23 Did Mr. Dondero disclose to you the
24 existence of the agreement prior to the time
25 you signed this letter on June 3rd, 2019?

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2 A. The agreement -- the agreement that
3 we talked about earlier?

4 Q. Correct.

5 A. Look, as I said earlier, the first
6 time I heard of this agreement was sometime
7 this year.

8 Q. Okay. Can we turn -- let's just
9 look at a couple of items on the list. If we
10 can go to page 33416. Do you see in Number 35
11 it talks about the proper recording or
12 disclosure in the financial statements of ND
13 relationships and transactions with related
14 parties.

15 Do you see that?

16 A. I do.

17 Q. As the CFO, do you have any
18 understanding as to whether Dugaboy is a
19 related party?

20 A. I don't recall.

21 Q. Do you know whether any of the
22 affiliates are related parties?

23 A. If -- if it was NexPoint, HCMFA,
24 HCMS, HCRE, yeah, if -- if that is the
25 affiliate definition, and there. In ASC 850 --

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2 again, I mean, I haven't looked at ASC 850 in
3 quite some time, but, you know, if -- if there
4 is a control language, you know, ASC 850, would
5 that -- that section in GAAP would -- would
6 pick up and define what are related parties.

7 So, you know, like I said, if -- one
8 of the four entities I just described, if -- if
9 they are in that control definition of ASC 850,
10 they would be picked up in 35D.

11 Q. Do you -- do you have any reason to
12 believe that they would be picked up in that
13 definition, based on your knowledge and
14 experience?

15 A. I -- I believe that entities
16 controlled under GAAP are -- are affiliates.

17 Q. Okay. Would Mr. Dondero also
18 qualify as a related party for purposes of
19 Section 35D, to the best of your knowledge?

20 A. Yeah, I don't -- I don't know. I
21 would think -- I would have to read the code
22 section to see if someone personally -- is it
23 talking about related parties. So, look, if
24 your own in control, yeah, I mean, I would have
25 to read the section.

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2 Q. To the best of your knowledge, was
3 the existence of the agreement ever disclosed
4 to PwC?

5 A. I'm not -- I'm not aware.

6 Q. Do you recall if the agreement was
7 ever disclosed in Highland's audited financial
8 statements?

9 A. I don't -- I don't remember if it
10 was in every Highland's audited financial
11 statements during my tenure. We would have to
12 read the financial statements to see what was
13 disclosed, but I'm not -- I mean, as I sit here
14 today, I'm not aware.

15 Q. That is all I'm asking for.

16 A. I'm not aware.

17 Q. Can we go to the next page, please,
18 and look at 36. 36 says, we have disclosed to
19 you the identity of the partnership's related
20 party relationships and all the related party
21 relationships and transactions of which we are
22 aware.

23 Do you see that?

24 A. Yes.

25 Q. To the best of your knowledge, as of

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2 June 3rd, 2019, did Highland disclose to PwC
3 the identity of the partnership's related
4 parties and all the related party relationships
5 and transactions of which it was aware?

6 A. I mean, I can speak for myself as
7 signer of this representation letter. I
8 disclosed what -- what, you know, what --
9 what -- what I knew. Sorry, look, yes, so I --
10 I disclosed what I knew.

11 Q. Okay. Can we go to page 419. Do
12 you see at the end there is a reference to
13 events that occurred since the end of the
14 fiscal year and the date of the letter?

15 A. Yes.

16 Q. And were you aware of that -- of
17 that provision of the management representation
18 letter before you signed the document?

19 A. Yes.

20 Q. Do you have an understanding as to
21 why PwC asked for that confirmation of that
22 particular part of the management
23 representation letter?

24 A. It is -- it is -- it is just -- it
25 is a typical audit request.

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2 Q. And do you understand -- do you have
3 an understanding that PwC wanted to know that
4 as of the date of the audit whether any
5 material changes had occurred since the end of
6 the fiscal year, using the definition of
7 materiality that is in this particular
8 management representation letter?

9 A. It -- it is -- it is -- it is a --
10 it is as described. It is just a poorly worded
11 question, so it is hard for me to say yes.

12 Q. If I asked you this, I apologize,
13 but did you ever learn when the agreement was
14 entered into?

15 A. I don't -- I don't -- like I said
16 before, I don't know or have any details of the
17 agreement.

18 Q. Okay. Did you ever ask anybody when
19 the agreement was entered into?

20 A. I did not.

21 Q. Let's look at the audited financial
22 statements. We will put up on the screen a
23 document that has been premarked as Exhibit 34.

24 (Exhibit 34 marked.)

25 MS. DANDENEAU: And again, if Ms. La

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2 Canty could please put that in the chat
3 room, that would be great.

4 MR. MORRIS: I will assure you we
5 will put every document in the chat room.

6 Q. Now, I'm just going to ask you
7 questions that are related to the provisions of
8 this report that concern the affiliate loans,
9 but again, Mr. Waterhouse, if there is any part
10 of the document that you need to see or that
11 you think you might need to see in order to
12 refresh your recollection to answer any of my
13 questions, will you let me know that?

14 A. Yes.

15 Q. Because this is a pretty lengthy
16 document, but do you see that the cover page
17 here is the Highland consolidated financial
18 statements for the period ending December 31st,
19 2018?

20 A. Yes.

21 Q. If we can go to -- I think it is the
22 next one, looking for PwC's signature line.

23 MS. CANTY: I'm sorry, John, did you
24 say something?

25 MR. MORRIS: Yes, can we turn the

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2 page. I think it is 215. Yes, stop right
3 there, just above -- I'm sorry, I want to
4 see just the date of the report.

5 Q. Okay. Do you see at the bottom of
6 that page there, Mr. Waterhouse,
7 PricewaterhouseCoopers has signed this audit
8 report?

9 A. Yes, I see their signature.

10 Q. Okay. And it is the dated same day
11 as your management representation letter; is
12 that right?

13 A. It is -- yes, it is the same day.

14 Q. Was that the practice to sign the
15 management representation letter on the same
16 day that the audit report was signed?

17 A. Yes, that is typical in every audit.

18 Q. Can we just scroll down to the
19 balance sheet on the next page.

20 Do you see that there is a line
21 there that says, Notes and Other Amounts Due
22 from Affiliates?

23 A. Yes.

24 Q. Does that line, to the best of your
25 knowledge, include the amounts that were due

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2 under the affiliate under the notes signed by
3 the affiliates and Mr. Dondero?

4 MR. RUKAVINA: Objection to the
5 extent that calls for a legal conclusion.

6 A. I mean, I would want to see the
7 detail and the build to this \$173,398,000, but,
8 yes, I mean, if -- if -- given what we
9 discussed before, you know, it -- it should
10 capture that.

11 Q. And -- and while you were the CFO of
12 Highland, were all notes held by Highland that
13 were issued by an affiliate or Mr. Dondero
14 carried as assets on Highland's balance sheets?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Object to form.

17 A. I don't -- I don't know how else
18 they would be carried.

19 Q. Okay. Can you think of any -- are
20 you aware of any promissory note issued by an
21 affiliate or Mr. Dondero that was not carried
22 on Highland's audited financial balance sheets?

23 A. I'm -- I'm -- I'm not aware.

24 Q. Okay. Are you aware of any category
25 of asset on Highland's balance sheet in which

1 WATERHOUSE - 10-19-21

2 any of the promissory notes issued by an
3 affiliate or Mr. Dondero would have been
4 included?

5 MS. DANDENEAU: Objection to form.

6 A. Sorry, am I aware of any asset of an
7 affiliate being included --

8 Q. That -- let me -- let me try again.

9 Do you see there is a number of
10 different assets that are described on this
11 balance sheet?

12 A. Yes.

13 Q. One of the assets that is described
14 is Notes and Other Amounts Due from Affiliates;
15 right?

16 A. Yes.

17 Q. And it is reasonable to conclude
18 that the notes from the affiliates and
19 Mr. Dondero are included in that line item;
20 right?

21 A. Yes, based on this description.
22 Again, I would want to see a build of this to
23 100 percent confirm, but based on the
24 description, the asset description, it is -- it
25 is likely.

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2 Now, does that mean absolute? I
3 don't know.

4 Q. Do you have any reason to believe
5 that the promissory notes would have been
6 carried on the balance sheet in a category
7 other than Notes and Other Amounts Due from
8 Affiliates?

9 A. If they were deemed -- no. If they
10 were deemed an affiliate, you know, under GAAP,
11 they should be carried in that line.
12 Otherwise, it would go into another line.

13 Q. Okay. And do you see the total
14 asset base as of December 31st, 2018, was
15 approximately \$1.04 billion?

16 A. Yes.

17 Q. Is my math correct that the Notes
18 and Other Amounts Due from Affiliates
19 constituted approximately 17 percent of
20 Highland's assets as of the end of 2018?

21 A. Well, so how are you defining
22 Highland?

23 Q. Highland Capital Management, L.P.,
24 the entity that this audit is subject to -- or
25 the subject of.

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2 A. On a consolidated or unconsolidated
3 basis?

4 Q. I'm looking at the balance sheet.
5 It is a consolidated balance sheet. Okay?

6 Does the Notes and Other Amounts Due
7 from Affiliates constitute approximately
8 17 percent of the total assets of Highland
9 Capital Management, L.P., on a consolidated
10 basis?

11 MS. DANDENEAU: Objection to form.

12 A. I don't have a calculator in front
13 of me but I will take your math, if you are
14 taking the 173 divided by the billion.

15 Q. Okay.

16 A. If that is accurate, yes. But,
17 again, on a consolidated basis.

18 Q. And on an unconsolidated basis the
19 percentage would be higher; correct?

20 A. I -- no. I don't know.

21 Q. Well, okay. That is fair.

22 MR. MORRIS: Can we turn to
23 page 241, please.

24 Q. Do you see that this is a section of
25 the audit report that is entitled Notes and

1 WATERHOUSE - 10-19-21

2 Other Amounts Due from Affiliates?

3 A. Sorry, I can't see the -- the --

4 Q. It is at the top.

5 A. Notes and Other Amounts Due from

6 Affiliates, yes, I see that. I don't -- I

7 don't have a page number, but I'm on a page

8 that says at the top: Notes and Other Amounts

9 Due from Affiliates.

10 Q. Okay. And that is the same title of

11 the line item on the balance sheet that we just

12 looked at; right? Notes and Other Amounts Due

13 from Affiliates?

14 A. Yes.

15 Q. And is it your understanding, based

16 on your experience and knowledge as the CFO,

17 that this is the section of the narrative that

18 ties into the line item that we just looked at?

19 A. Yes.

20 Q. And is this section of the audit

21 report intended to describe and disclose all of

22 the material facts concerning the Notes and

23 Other Amounts Due from Affiliates?

24 MS. DANDENEAU: Objection, form.

25 A. This -- these notes -- these notes

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2 of the financial statements are -- the purpose
3 is to disclose any material items in relation
4 to that balance sheet line item.

5 Q. Okay. And all of the information,
6 to the best of your knowledge, that is set
7 forth in this section of the audit report was
8 provided by Highland; correct?

9 A. Yes, it would have been provided by
10 the corporate accounting team.

11 Q. Okay. And the corporate accounting
12 team, did that team report to you in the
13 organizational structure?

14 A. Yes.

15 Q. And did you have any concerns about
16 the controls that were in place to make sure
17 that the information provided with respect to
18 Notes and Other Amounts Due from Affiliates was
19 accurate and complete?

20 MS. DANDENEAU: Objection to form.

21 A. Not that I recall.

22 Q. Okay. Do you recall ever being
23 concerned that any portion of the Notes and
24 Other Amounts Due from Affiliates in any audit
25 report was inaccurate, incomplete, or not

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2 reliable?

3 A. I didn't -- I had concerns about,
4 you know, like I talked about before, of there
5 were -- there were potentially issues in the
6 control environment. But as far as it relates
7 to the audited financial statements, any -- the
8 team would work with the auditors to disclose
9 all -- all notes in Highland's possession.

10 And any -- any notes that were
11 deemed material by the auditor, right, these
12 were disclosed in these -- in this section, you
13 know, in -- in the notes to the consolidated
14 financial statements as you presented.

15 Q. Do you recall ever having a
16 conversation with anybody at any time
17 concerning the accuracy of the section of audit
18 reports that relates to Notes and Other Amounts
19 Due from Affiliates?

20 MS. DANDENEAU: Objection to form.

21 A. You know, as -- as -- I didn't have
22 direct conversations with
23 PricewaterhouseCoopers as I had, you know --
24 I -- I had the team that managed this.

25 Again, I wasn't anywhere chose to

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2 being the point person of this audit. And I
3 can't recall, you know, when -- you know, I
4 don't even know if I was ever the point person
5 during my tenure as CFO.

6 I don't know if PwC had any concerns
7 when they were performing those audit
8 procedures. They may have and they may have --
9 and it may not have been communicated to me. I
10 don't know.

11 MR. MORRIS: All right. I move to
12 strike.

13 Q. And I'm going to ask you to listen
14 carefully to my question.

15 Did you -- do you recall ever having
16 a conversation with anybody at any time
17 concerning the accuracy of the reporting
18 provided in the audited financial statement on
19 the topic of Notes and Other Amounts Due?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall for this, but that
22 doesn't mean that it didn't exist.

23 Q. Okay. But you have no reason to
24 believe, as you sit here right now, that you
25 ever discussed with anybody concerns over the

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2 accuracy of the section of the audit reports
3 called Notes and Other Amounts Due from
4 Affiliates; correct?

5 MS. DANDENEAU: Object to the form.

6 MS. DEITSCH-PEREZ: Objection to
7 form.

8 A. I don't recall having any
9 conversations. But, again, I mean, this is --
10 this is two years ago.

11 Q. I'm just asking for your
12 recollection, sir.

13 A. Yes.

14 Q. If you don't recall, this will --

15 A. Yeah.

16 Q. (Overspeak) -- if you don't
17 recall --

18 A. Yeah, I don't -- I don't recall.

19 Q. Do you know who was responsible for
20 drafting the audit report?

21 A. Are you asking the actual Highland
22 employee responsible? I mean, it was
23 Highland's responsibility, so, I mean, that
24 is --

25 Q. Right.

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2 A. -- Highland's responsibility.

3 Highland's responsibility.

4 Q. Who, at Highland, was responsible
5 for drafting this section of the audit report?

6 A. I -- I don't know the answer to
7 that. Again, there was a team who worked on
8 this. And I don't know, you know, whether it
9 was the staff or the manager.

10 Again, this is where I let the teams
11 manage. And, you know, there may be a
12 corporate accountant who worked on this. I
13 just -- you know, I wasn't part of that process
14 to give that person experience. I don't know.

15 Q. Do you recall having any
16 communications with anybody at any time
17 concerning this section of the report?

18 A. Yeah, I don't recall.

19 Q. Do you recall whether you ever told
20 anybody at any time that any aspect of this
21 section of the report was inaccurate or
22 incomplete?

23 A. I don't recall.

24 Q. As you sit here today, do you have
25 any reason to believe that this section of the

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2 audit report is incomplete or inaccurate in any
3 way?

4 And I'm happy to give you a moment
5 to -- to look at it, if you would like.

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Same.

8 A. I mean, I would have to look at -- I
9 would have to look at the bill to the note
10 schedule to make sure I know you presented me
11 with materiality, but again, there might be a
12 note as of 12/31/18 that somehow was -- was
13 under materiality not disclosed. I don't -- I
14 don't know. I would need more information.

15 Q. Okay. But without more information,
16 you have no reason to believe anything this
17 section is inaccurate; correct?

18 MS. DANDENEAU: Objection to form.

19 A. I don't. I mean, you know, this was
20 part of the audit.

21 Q. Thank you. Now, you will see if we
22 could scroll just a little bit more that each
23 of the first five paragraphs concerns
24 specifically the four affiliates that we've
25 been discussing and Mr. Dondero.

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2 MR. MORRIS: If we could go the
3 other way, La Asia. We don't need Okada.
4 We're going to have to thread the needle.
5 Okay. Good, perfect.

6 Q. Do you see those five paragraphs
7 certain the four affiliates and Mr. Dondero as
8 we've been referring to today?

9 A. Yes.

10 Q. Okay. And do you see at the end of
11 every paragraph it states, quote: A fair value
12 of a partnership's outstanding notes receivable
13 approximates the carrying value of the notes
14 receivable?

15 A. Yes, I see that.

16 Q. Do you have an understanding of what
17 that means?

18 A. Yes.

19 Q. What is your understanding of that
20 sentence?

21 A. It is the -- again, the -- the fair
22 value, right, which is -- which is what the --
23 what Highland could sell that asset for. This
24 statement is comparing the fair value of the
25 notes to the carrying value, so the carrying

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2 value is the line item that you showed me
3 earlier that is in Notes and Other Amounts Due
4 from Affiliates.

5 Q. Okay. Is another way to say this is
6 that the fair market value of the notes equals
7 the principal amount and -- withdrawn.

8 Is the fair way to interpret this
9 that the fair market value of the notes equals
10 all remaining unpaid principal and interest due
11 under the notes?

12 MS. DANDENEAU: Object to the form.

13 MS. DEITSCH-PEREZ: Objection, form.

14 A. I don't know the answer to that,
15 because I don't recall where -- where any --
16 where -- in what line item was the interest
17 component reported.

18 Q. All right. Well, if we look in this
19 audit report, you will see in the middle of the
20 first paragraph, for example, it states that as
21 of December 31st, 2018, total interest and
22 principal due on outstanding promissory notes
23 was approximately \$5.3 million.

24 Do you see that?

25 A. I do.

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2 Q. Is that the carrying value or the
3 fair value?

4 A. That would be the carrying value --

5 Q. And is the last --

6 A. -- in my opinion.

7 Q. Okay. And it is in your opinion as
8 the chief financial officer of Highland during
9 the period of time that you described; right?
10 It is an educated opinion?

11 A. I'm reading this at face value. I'm
12 taking that as that is carrying value.

13 Q. Okay. And does the last sentence
14 say that the carrying value is roughly
15 approximate to the fair market value?

16 MS. DANDENEAU: Objection to form.

17 MS. DEITSCH-PEREZ: Objection, form.

18 A. Again, this note to the financial
19 statement is specific to notes and other
20 amounts due from affiliates.

21 Q. Correct.

22 A. If the interest component is
23 reported elsewhere on the balance sheet, you
24 know, it -- it -- it could be off. Again, I
25 don't have the detail. I don't know, but yes,

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2 look, I mean, if you -- I mean, if you are
3 saying the 5.3 million is in the notes and
4 other amounts due from affiliates, then the
5 last statement is saying the fair value
6 approximates 5.3 million. That is what that
7 last sentence is saying.

8 Q. Do you see in the middle of the
9 first paragraph -- not in the middle, the next
10 to last sentence there is a statement that the
11 partnership will not demand payment on amounts
12 that exceed HCMFA's excess cash availability
13 prior to May 31st, 2021.

14 Do you see that?

15 A. I do.

16 Q. Do you know when Highland agreed not
17 to demand payment as described in that
18 sentence?

19 A. I don't know specifically.

20 Q. Do you know why Highland agreed not
21 to demand payment on HCMFA's notes until May
22 2021?

23 A. Yes.

24 Q. Why was that decision made?

25 A. You know, well, it -- it -- that

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2 decision was made as to not put HCMFA into a
3 position where it didn't have sufficient assets
4 to pay for the demand note.

5 Q. And at the time the agreement was
6 entered into, pursuant to which the partnership
7 wouldn't demand payment, did HCMFA have
8 insufficient assets to satisfy the notes if a
9 demand had been made?

10 MS. DANDENEAU: Objection to form.

11 A. I don't have HCMFA's financial
12 statements in front of me as of 12/31/18.

13 Q. Was there a concern that HCMFA would
14 be unable to satisfy its demands under the
15 notes if demand was made?

16 MS. DANDENEAU: Objection to form.

17 A. Well, there is -- I don't recall --
18 I mean, there is something, right, in place to
19 basically not demand payment until May 31, 2021
20 as detailed here.

21 Q. And who made the decision to enter
22 into -- who made the decision on behalf of
23 Highland not to demand payment until May 31st,
24 2021?

25 A. I'm trying to remember. I don't

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2 remember exactly -- I don't remember if it was
3 myself or -- or Jim Dondero who -- who -- there
4 was -- there was something signed, from what I
5 recall, that -- that -- that backed up this
6 line item in the -- in the notes I'm -- look,
7 I'm, I'm --

8 Q. We will get to that.

9 A. You --

10 Q. I'm just --

11 A. You have -- I mean --

12 Q. We're going to give that to you.

13 I'm going to give that to you.

14 A. You -- you -- you have all the
15 documents. I don't have the documents, and
16 that is what makes it so hard. I don't have
17 any documents to prepare for this deposition;
18 right? You have all -- I don't -- I don't -- I
19 don't remember, but, you know, again, it would
20 probably be myself or Jim.

21 Q. Do you know if Highland received
22 anything in return for its agreement not to
23 make a demand for two years?

24 A. I don't -- I don't think it referred
25 anything.

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2 Q. And did you and Mr. Dondero discuss
3 HCMFA's ability to satisfy the notes if a
4 demand was made at the time this agreement was
5 entered into?

6 MS. DANDENEAU: Objection to form.

7 A. I don't -- I don't -- I don't recall
8 having a specific conversation, if I did, or --
9 or David Klos.

10 Q. Okay. I'm just asking if you recall
11 any conversations that you had.

12 A. I don't recall.

13 Q. Okay. Do you know why Highland
14 loaned the money to HCMFA that is the subject
15 of the notes described in this paragraph?

16 A. I don't remember specifically why
17 5.3 million was loaned. I mean, I -- it would
18 have to be put in the context.

19 Q. Do you have any recollection at all
20 as to why Highland ever loaned any money to
21 HCMFA?

22 A. Yes.

23 MS. DANDENEAU: Objection to form.

24 Q. What do you remember about that?

25 A. There was a Highland Global

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2 Allocation Fund, which was a -- a fund managed
3 by Highland Capital Management Fund Advisors.
4 There was a -- we -- I'm just telling you,
5 there was -- there was -- there was a -- a
6 ultimately a NAV error found in this fund while
7 it was an open-ended fund and, you know, there
8 were amounts owed by the advisor in -- in
9 relation to that NAV error.

10 There were also, for the same fund,
11 that same fund was ongoing an
12 open-end-to-close-end conversion, and as part
13 of that proposal, shareholders who voted for
14 the conversion received compensation from the
15 advisor.

16 Q. All right. Now, the events that
17 you're describing occurred in the spring of
18 2019; right?

19 A. These started back -- I think, I
20 mean --

21 Q. I apologize.

22 A. -- that -- I mean, the answer to
23 that is no.

24 Q. I apologize, the loans that were
25 made in connection with the events that you're

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2 describing occurred in May 2019; right?

3 MR. RUKAVINA: Objection to the
4 extent that calls for a legal conclusion.

5 A. I don't recall specifically what
6 amounts of money were moved when, for what
7 purpose.

8 Q. Okay. Fair enough. Going to the
9 next paragraph, do you recall that NexPoint
10 Advisors had obtained a number of loans from
11 Highland, and they rolled up those loans into
12 one note in approximately 2017?

13 A. This is for NexPoint Advisors?

14 Q. Yes.

15 A. I -- I mean, I don't -- I don't
16 recall the NexPoint Advisors loan being a
17 roll-up loan, but --

18 Q. Do you know why?

19 A. But, look, if you have documents
20 that show -- I mean, look, I just don't recall.

21 Q. Okay. That is fair. Do you know
22 why -- do you have any recollection as to why
23 Highland loaned money to NexPoint?

24 A. Yes.

25 Q. Why did High -- why do you recall --

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2 what is the reason you recall Highland lending
3 money to NexPoint?

4 A. I mean, I was just -- I just -- I
5 just recall. I mean, I just -- I don't
6 remember why.

7 Q. I understand. And I'm asking you if
8 you recall --

9 A. Oh, why -- I thought you say --
10 NexPoint Advisors was launching a fund which
11 is -- I believe that the legal name is NexPoint
12 Capital, Inc. And it -- it provided a
13 co-invest into that fund.

14 And, from what I remember, the --
15 the -- that NexPoint borrowed money from
16 Highland at the time to make that co-invest.

17 Q. So this was an investment that
18 NexPoint was required to make; is that right?

19 MS. DANDENEAU: Objection to form.

20 A. I don't know if it was required to
21 make, I don't recall that, or if it just made
22 it.

23 Q. Okay. But your recollection is that
24 NexPoint made an investment and they borrowed
25 money from Highland to finance the investment.

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2 Do I have that right?

3 A. Yes.

4 Q. How about HCRE? Do you know why
5 HCRE borrowed money from Highland?

6 A. I don't remember specifically.

7 Q. Do you remember generally?

8 A. Generally, yeah -- I mean, yes.

9 Q. Can you tell me your general
10 recollection as to why Highland loaned money to
11 HCRE?

12 A. For -- for -- for investment
13 purposes.

14 Q. So HCRE made the investment and it
15 obtained a loan, or loans, from Highland in
16 order to finance that investment or those
17 investments.

18 Do I have that right?

19 A. I mean, I -- you know, generally.

20 Q. Okay. How about Highland Management
21 Services, Inc.?

22 Do you have any recollection as to
23 why HCMS borrowed money from Highland?

24 A. Generally.

25 Q. What is your general recollection as

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2 to why HCMS borrowed money from Highland?

3 A. For -- for investment purposes.

4 Q. So it is the same thing, HCMS wanted
5 to make investments and it borrowed money from
6 Highland in order to finance those investments;
7 is that right?

8 A. I mean, yes, generally. I mean, I
9 can't -- I don't -- on the services, there --
10 there are several loans in these schedules.
11 You know, I can't remember why every single one
12 of these were made, but I would say, yeah, I
13 mean, generally.

14 Q. Okay. I appreciate that.

15 MR. MORRIS: Let's go to the page
16 with Bates No. 251. La Asia, are you
17 there?

18 MS. CANTY: Sorry, John. It went
19 out for a minute. Can you say that again.
20 I don't know what is going on.

21 MR. MORRIS: The page with Bates
22 No. 251, can we go to that.

23 MS. CANTY: Yes, sorry.

24 MR. MORRIS: Keep going to the
25 bottom. Yeah, there you go.

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2 Q. Do you see, Mr. Waterhouse, that
3 there is a section there called Subsequent
4 Events?

5 A. I do.

6 Q. And does this relate to the last
7 sentence above the signature line on the
8 management representation letter that we talked
9 about earlier where you made the representation
10 that you disclosed subsequent events?

11 A. I mean, it relates to it, but not in
12 its entirety.

13 Q. Okay.

14 MR. MORRIS: If we can scroll up to
15 capture the entirety of this section right
16 here.

17 Q. And what do you mean by that, sir?

18 MR. MORRIS: Yeah, right there.
19 Perfect.

20 A. There are -- there are different
21 subsequent events in -- under GAAP. So there
22 are -- and -- and -- so what we see in the
23 notes to the financial statements are one type
24 of subevent.

25 Q. Okay. And -- and would the type of

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2 subsequent event relating to affiliate loans be
3 captured in this section if they were -- if
4 they were made after the end of the fiscal year
5 and prior to the issuance of the audit report?

6 A. Yes, if they were deemed material or
7 disclosable.

8 Q. Okay. I appreciate that.

9 Do you see the next to the last
10 entry there? It says, Over the course of 2019
11 through the report date, HCMFA issued
12 promissory notes to the partnership in the
13 aggregate amount of \$7.4 million?

14 A. Yes.

15 Q. And does that refresh your
16 recollection that those are the notes that
17 related to the NAV error that you mentioned
18 earlier?

19 A. I don't -- I don't remember the
20 exact. Again, there are -- I mentioned two
21 line items; right?

22 Q. Yes.

23 A. I mean, it was the GAAP conversion
24 process plus the -- the NAV error. I don't
25 have the details. I don't recall specifically

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2 if -- you know, what -- if that 7.4 million was
3 solely attributable to the NAV error.

4 Q. Okay. But there is no question that
5 Highland told PricewaterhouseCoopers that over
6 the course of 2019 HCMFA issued promissory
7 notes to the partnership in the aggregate
8 amount of \$7.4 million; correct?

9 A. In the course of the audit, we would
10 have produced all promissory notes in our
11 possession, including the ones that are
12 detailed here.

13 Q. Do you recall that you signed the
14 two promissory notes that are referenced in
15 that provision?

16 MS. DANDENEAU: Objection to form.

17 A. I didn't recall initially but I've
18 been reminded.

19 Q. Okay. And -- and do you recall that
20 those notes are dated May 2nd and May 3rd,
21 2019?

22 A. Yes.

23 Q. So that was just a month before the
24 audit was completed; correct?

25 A. Yes. I think we had a June 3rd

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2 date, right, if -- if my memory serves me
3 right.

4 Q. Yes, I will represent to you that
5 your memory is accurate in that regard.

6 Did anybody ever instruct you as the
7 CFO to correct this statement that we're
8 looking at in subsequent events?

9 A. So let me understand. You're saying
10 when I was CFO at Highland Capital did anyone
11 ever ask me to correct the -- over the course
12 of 2019 through the report date HCMFA issued
13 promissory notes, this statement?

14 Q. Right.

15 A. Not that I'm aware.

16 Q. While you were the CFO of Highland,
17 did anybody ever tell you that that sentence
18 was wrong?

19 A. Not that I'm aware.

20 Q. Highland -- withdrawn.
21 HCMFA disclosed these notes in its
22 own audited financial statements; right?

23 MR. RUKAVINA: Objection, form.

24 A. I assume that these would be
25 material -- if these are material financial

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2 statements, yes, they -- they -- they should be
3 and they were likely disclosed.

4 Q. Now, there is no statement
5 concerning the 2019 notes about the forbearance
6 that we looked at in the affiliated note
7 section of the report; right?

8 MS. DANDENEAU: Objection to form.

9 Q. I'll withdraw. That was bad.

10 Do you recall when we were looking
11 at the paragraph concerning HCMFA earlier it
12 had that disclosure about the agreement whereby
13 Highland wouldn't ask for demand on the -- on
14 the HCMFA notes?

15 A. Yes.

16 Q. That forbearance disclosure is not
17 made with respect to the 2019 notes; right?

18 A. Not -- look, not that I can recall,
19 unless -- unless it was done at a subsequent
20 day.

21 Q. Right. And it is not in the
22 subsequent event section that we're looking at
23 right now where the 2019 notes are described;
24 right?

25 A. Right. But this is through

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2 June 3rd. It could have been done on June 4th.

3 I don't -- I don't -- I don't recall.

4 Q. Okay.

5 MR. MORRIS: Can we put up on the
6 screen the HCMFA audit report. And while
7 we're --

8 MS. DANDENEAU: What exhibit is
9 this?

10 MR. MORRIS: La Asia, what number is
11 that?

12 MS. CANTY: 45.

13 MR. MORRIS: So this will be marked
14 as Exhibit 45.

15 (Exhibit 45 marked.)

16 MS. CANTY: Yeah, and I will put it
17 in the chat.

18 MS. DANDENEAU: Thank you.

19 Q. Okay. All right. Do you see that
20 this is the consolidated financial statements
21 for HCMFA for the period ending 12/31/18?

22 A. Yes.

23 Q. As the treasurer of HCMFA at the
24 time, did you have to sign a management
25 representation letter similar to the one that

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2 we looked at earlier for Highland?

3 A. I would imagine I would have been
4 asked to. I don't recall if I did.

5 Q. Do you recall ever being asked by an
6 auditor to sign a management representation
7 letter and then not doing it?

8 A. No.

9 MR. MORRIS: Can we just scroll down
10 again. I just want to see the date of the
11 document.

12 A. I mean, let me -- you know, there
13 are different versions to management
14 representation letters I will qualify.

15 Yes, there are certain -- from time
16 to time auditors can make representations
17 that -- in the rep letter that is being
18 proposed that are inaccurate or out of scope or
19 things like that and they've asked for
20 signature.

21 In that context, yes. I mean, you
22 know -- I mean, if I have been asked to sign
23 and make those representations and those
24 representations are invalid, yes, I would not,
25 I mean, I -- I wouldn't sign that.

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2 Q. Okay. PricewaterhouseCoopers served
3 as HCMFA's outside auditors as well; correct?

4 A. Yes.

5 Q. Do you see that this audit report is
6 signed on June 3rd, 2019, just like the
7 Highland audit report?

8 A. That is correct.

9 Q. And did the process of -- of
10 preparing HCMFA's audit report, was that the
11 same process that Highland followed when it did
12 its audit report at this time?

13 A. I mean, it is a different entity.
14 There are different assets. You know, it --
15 it -- it is -- as you saw, Highland's
16 financials are on a consolidated basis. This
17 is different, so it is under the same control
18 environment and team.

19 Q. Okay. I appreciate that. So the
20 same control environment and team participated
21 in the preparation of the audit for Highland
22 and for HCMFA at around the same time; correct?

23 A. Yes.

24 MR. MORRIS: Can we go to page 17 of
25 the report. I don't have the Bates number.

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2 Q. Okay. Do you see that just like
3 Highland's audited financial report, HCMFA's
4 audited financial report also has a section
5 related to subsequent events?

6 A. Yes.

7 Q. And am I reading this correctly that
8 just as Highland had done, HCMFA disclosed in
9 its audited financial report a subsequent event
10 that related to the issuance of promissory
11 notes to Highland in the aggregate amount of
12 \$7.4 million in 2019?

13 A. That is what I see in the report.

14 Q. And you were the treasurer of HCMFA
15 at the time; right?

16 A. Yes, to the best of my knowledge.

17 Q. And did anybody ever tell you prior
18 to the time of the issuance of this audit
19 report that that sentence relating to HCMFA's
20 2019 notes was inaccurate or wrong in any way?

21 A. Not that I recall.

22 Q. As you sit here right now, has
23 anybody ever told you that that sentence is
24 inaccurate or wrong in any way?

25 A. Not that I recall.

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2 Q. I apologize if I asked you this
3 already, but has anybody ever told you at any
4 time that you are not authorized to sign the
5 promissory notes that are the subject of the
6 sentence we're looking at?

7 A. Not that I recall.

8 Q. Did anybody ever tell you at any
9 time that you had made a mistake when you
10 signed the promissory notes that are the
11 subject of this sentence?

12 A. Say that again. Did anyone ever say
13 that I made a mistake?

14 Q. Let me ask the question again.
15 Did anybody ever tell you at any
16 time that you made a mistake when you signed
17 the two promissory notes in Highland's favor on
18 behalf of HCMFA in 2019?

19 A. Not that I recall.

20 MR. MORRIS: Let's just look at the
21 promissory notes quickly. Can we please
22 put up Document Number 1, and so this is in
23 the pile that y'all have. We'll just go
24 for a few more minutes and we can take our
25 lunch break.

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2 Q. All right. So I don't know if you
3 have seen this before, sir. Do you see that
4 this is a complaint against HCMFA?

5 A. Yes, I am looking at it on the
6 screen.

7 Q. Okay. And have you ever seen this
8 document before?

9 A. I went through some of these
10 documents with my counsel here yesterday.

11 MR. MORRIS: All right. Can we go
12 to Exhibit 1 of this document.

13 Q. Do you see Exhibit 1 is a
14 \$2.4 million promissory note back in 2019?

15 A. Yeah, I found it in the book. Yes,
16 I have it here in front of me.

17 Q. And this is a demand note, right, if
18 you look at Paragraph 2?

19 A. Yes.

20 Q. And this is a note where the maker
21 is HCMFA, and Highland is the payee; right?

22 A. Yes.

23 MR. MORRIS: And if we can scroll
24 down, can we just see Mr. Waterhouse's
25 signature.

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2 Q. Is that your signature, sir?

3 A. Yes, it is.

4 Q. And did you sign this document on or
5 around May 2nd, 2019?

6 A. I don't recall specifically signing
7 this, but this is my signature.

8 Q. Okay. And do you recall that
9 Highland transferred \$2.4 million to HCMFA at
10 or around the time you signed this document?

11 A. I don't recall specifically. I
12 would want to, as I sit here today, go back and
13 confirm that, but again, presumably that --
14 that -- that did happen.

15 Q. You wouldn't have signed this
16 document if you didn't believe that HCMFA
17 either received or was going to receive
18 \$2.4 million from Highland; is that fair?

19 A. I mean, it -- if -- if -- if there
20 wasn't a transfer of value, yeah, I mean, you
21 know, I would have no reason to -- to sign a
22 note.

23 Q. And -- and Highland wouldn't have
24 given this note to PricewaterhouseCoopers if --
25 withdrawn.

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2 HCMFA wouldn't have given this note
3 to PricewaterhouseCoopers if it hadn't received
4 the principal value of -- of the note in the
5 form of a loan; correct?

6 MR. RUKAVINA: Objection, legal
7 conclusion, speculation and form.

8 A. Again, we -- what we provided to PwC
9 were, as part of the audit, any promissory
10 notes executed and outstanding. You know, as a
11 part of the audit, they, you know, they -- they
12 have copies of all the bank statements,
13 things -- things of that sort.

14 MR. MORRIS: Okay. Can we go to
15 Exhibit 2.

16 (Exhibit 2 marked.)

17 Q. Do you see that this is a promissory
18 note dated May 3rd, 2019 in the amount of
19 \$5 million?

20 A. Yes.

21 Q. Do you believe this is also a demand
22 note if you look at Paragraph 2?

23 A. Yes.

24 Q. And do you see that HCMFA is the
25 maker, and Highland is the payee?

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2 A. Yes.

3 Q. And if we go to the bottom, can we
4 just confirm that that is your signature?

5 A. Yes.

6 Q. And together these notes are the
7 notes that are referred to both in Highland and
8 HCMFA's audited financial reports in the
9 subsequent event sections; correct?

10 MS. DANDENEAU: Objection to form.

11 A. They -- they -- they totaled
12 \$7.4 million, so presumably, yes.

13 Q. Okay. And you were authorized to
14 sign these two notes; correct?

15 MR. RUKAVINA: Objection, legal
16 conclusion.

17 A. Yeah. I mean, I'm -- I was the
18 officer of -- of HCMFA. You know, I -- I'm not
19 the legal expert on -- on what that -- what
20 that confers to me or what it doesn't. I mean,
21 that is my signature on the notes.

22 Q. And you believed you were authorized
23 to sign the notes; is that fair?

24 A. I signed a lot of documents in my
25 capacity, just because it is operational in

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2 nature. So, you know, to me this was just
3 another document, to be perfectly honest.

4 Q. Sir, would you have signed
5 promissory notes with the principal amount of
6 \$7.4 million if you didn't believe you were
7 authorized to do so?

8 MS. DANDENEAU: Objection to form.

9 Q. Are you frozen?

10 A. No. I'm just -- you know, it is --
11 you know, again, I typically don't sign
12 promissory notes, and I don't recall why I
13 signed these, but -- you know, but I did.

14 Q. All right. So listen carefully to
15 my question. Would you have ever signed
16 promissory notes with a face amount of
17 \$7.4 million without believing that you were
18 authorized to do so?

19 A. No. I mean, I'm -- I'm putting my
20 signature on there, so no.

21 Q. Okay. And would you have signed two
22 promissory notes obligating HCMFA to pay
23 Highland \$7.4 million without Mr. Dondero's
24 prior knowledge and approval?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. You know, from -- from what I recall
4 around these notes, you know, I don't recall
5 specifically Mr. -- Mr. Dondero saying to -- to
6 make this a loan.

7 So my conversation with Mr. Dondero
8 around the culmination of the NAV error as
9 related to TerreStar which was a -- a -- I
10 think it was a year and a half process. I
11 don't know, it was a multi-month process, very
12 laborious, very difficult.

13 When we got to the end, I had a
14 conversation with Mr. Dondero on where to, you
15 know, basically get the funds to reimburse the
16 fund, and I recall him saying, get the money
17 from Highland.

18 Q. And so he told you to get the money
19 from Highland; is that right?

20 A. That is what I recall -- in my
21 conversation with him, that is -- that is what
22 I can recall.

23 Q. Do you know who drafted these notes?

24 A. I don't.

25 Q. Did you ask somebody to draft the

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2 notes?

3 A. I didn't ask -- I don't specifically
4 ask people to draft notes really. I mean,
5 again, you know, the legal group at Highland is
6 responsible and has always been responsible for
7 drafting promissory notes.

8 Q. So based on your -- based on the
9 practice, you believe that somebody from the
10 Highland's legal department would have drafted
11 these notes. Do I have that right?

12 MS. DEITSCH-PEREZ: Object to the
13 form. John, I also asked you for the Word
14 versions of these notes so we could look at
15 the properties, and you have not provided
16 them. Are you intending to?

17 MR. MORRIS: No.

18 Q. Can you answer my question, sir?

19 A. Again, I --

20 MS. DANDENEAU: Do you want him to
21 repeat it?

22 A. Yeah, why don't you repeat it?

23 Q. Sure. Mr. Waterhouse, based on the
24 practice that you have described in your
25 understanding, do you believe that these notes

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2 would have been drafted by somebody in the
3 legal department?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Yes.

7 Q. Okay. And do you know who would
8 have instructed -- do you have any knowledge as
9 to who would have instructed the legal
10 department to draft these notes?

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 A. It was whoever was working -- I
14 mean, it was likely someone on the team. I
15 mean, I don't remember exactly on every note or
16 every document, but, again, a lot of these
17 things of this nature -- they're operational in
18 nature -- were handled by the team.

19 The team knows to -- I mean, we
20 don't draft documents. We're not lawyers.
21 We're not attorneys. It is not what I do or
22 accountants do.

23 So they are always instructed to go
24 and -- and go to the legal team to get
25 documents like this drafted. Also, when you go

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2 to the legal team, the -- you know, we always
3 loop in compliance. And compliance -- when you
4 go to the legal team, compliance is part of
5 legal team. They're made aware of -- of -- of
6 these types of transactions.

7 Q. And do you believe that you had
8 the -- withdrawn.

9 Did you ever tell Mr. Dondero --
10 (inaudible) -- did you see those?

11 A. Sorry.

12 MS. DEITSCH-PEREZ: I did not hear
13 the end of that question.

14 Q. Did you ever tell Mr. Dondero that
15 you signed these two notes?

16 A. I don't recall ever -- no, I don't
17 recall having a conversation with him.

18 Q. Did you ever discuss these two notes
19 with him at any time?

20 A. The conversation, I recall, was what
21 I described earlier. And that is the only time
22 I recall ever discussing this.

23 Q. Okay. But the corporate accounting
24 group had a copy of this -- of these two notes.
25 And pursuant to the audit process, the

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2 corporate accounting group gave the two notes
3 to PricewaterhouseCoopers in connection with
4 the audit; correct?

5 MS. DANDENEAU: Objection to form.

6 A. Yes. I mean, that is -- yeah, I
7 mean, they -- unless the legal team can also
8 retain copies of items like this. I mean, I
9 don't know everything that they would retain as
10 well.

11 The legal team would also, if they
12 had documents as part of audits, turn that over
13 to the auditors as well. So it could have been
14 the corporate accounting team. It could be
15 someone on the legal team.

16 Q. All right. So you didn't -- you
17 didn't draft this note; right?

18 A. I -- I -- I did not.

19 Q. But somebody at Highland did; is
20 that fair?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 A. I don't know. I mean, we can go to
24 the legal team. I don't -- I'm not sitting
25 behind someone in legal. Maybe they went to

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2 outside counsel. I have no idea.

3 Q. Did you have any reason to believe
4 you weren't authorized to sign this note,
5 either of these two notes?

6 A. I think I have already answered that
7 question.

8 Q. Okay. You didn't give these notes
9 to PricewaterhouseCoopers; correct?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall giving these to
12 PricewaterhouseCoopers.

13 Q. And in the practice that you have
14 described, somebody in the corporate accounting
15 group would have given these two notes to
16 PricewaterhouseCoopers; correct?

17 MS. DANDENEAU: Objection to form.

18 A. I think I've answered that. I said
19 either the corporate accounting team or maybe
20 the legal team.

21 MR. MORRIS: Okay. Why don't we
22 take our lunch break here.

23 VIDEOGRAPHER: We're going off the
24 record at 1:04 p.m.

25 (Recess taken 1:04 p.m. to 1:49 p.m.)

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2 VIDEOGRAPHER: We are back on the
3 record at 1:49 p.m.

4 Q. Mr. Waterhouse, did you speak with
5 anybody during the break about the substance of
6 this deposition?

7 A. I spoke to -- to Deb and Michelle.

8 Q. About the substance of the
9 deposition?

10 A. Yes.

11 Q. Can you tell me what you talked
12 about?

13 MS. DANDENEAU: No. We object on
14 the basis of privilege.

15 Q. Okay. You are going to follow your
16 counsel's objection here?

17 A. Yes.

18 Q. Okay.

19 MR. MORRIS: Can we put up on the
20 screen Exhibit 35.

21 (Exhibit 35 marked.)

22 Q. Are you able to see that document,
23 sir?

24 A. Yes.

25 Q. Have you ever seen an incumbency

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2 certificate before?

3 A. I have.

4 Q. Do you have a general understanding
5 of what an incumbency certificate is?

6 A. I have a general understanding.

7 Q. What is your general understanding?

8 A. You know, those -- my general
9 understanding is that the incumbency
10 certificate basically lists folks that can --
11 are like authorized signers.

12 Q. Okay. And do you see that this is
13 an incumbency certificate for Highland Capital
14 Management Fund Advisors, L.P.?

15 A. Yes.

16 Q. Okay. And if we could scroll down
17 just a little bit, do you see that it's dated
18 effective as of April 11th, 2019?

19 A. Yes, I see that.

20 Q. Okay. And is that your signature in
21 the middle of the signature block?

22 A. Yes, it is.

23 Q. And by signing it, did you accept
24 appointment as the treasurer of HCMFA effective
25 as of April 11th, 2019?

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2 A. Again, I'm not the legal -- I don't
3 know if this makes me the treasurer or the
4 appointment. I don't know -- I don't know
5 that, so I don't -- I don't know if that
6 document -- again, I think -- again, I'm not
7 the legal expert. I think isn't there --
8 aren't there other legal documents that detail
9 who the officers are that could be incorporated
10 or things like that? Again, I don't want to
11 play armchair attorney here.

12 Q. I'm not asking you for a legal
13 conclusion. I'm asking you for your knowledge
14 and understanding. When you signed this
15 document, did you understand that you were
16 accepting an appointment as the treasurer of
17 HCMFA?

18 MS. DANDENEAU: Objection to form.

19 MS. DEITSCH-PEREZ: Objection, form.

20 A. Again, I don't think this -- that
21 wasn't my understanding. I don't think this
22 makes -- this document makes me the treasurer.

23 Q. What do you think this document --
24 why did you sign this document?

25 MS. DEITSCH-PEREZ: Objection to

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2 form.

3 MR. MORRIS: You're objecting to the
4 form of the question when I asked him why
5 did you sign the document? What is the
6 basis for the objection?

7 MS. DEITSCH-PEREZ: Because, John, I
8 think that it does call for a legal
9 conclusion other than -- with him saying
10 because somebody told me to sign this
11 document. But if you want to go there,
12 that is fine.

13 MR. MORRIS: Okay.

14 MS. DANDENEAU: I don't think --
15 he's already said he's not a lawyer.

16 MR. MORRIS: I'll allow the witness
17 to answer this question.

18 Q. Why did you sign this document, sir?

19 A. I mean, our -- our legal group would
20 bring by these incumbency certificates from
21 time to time. I have no idea why they're being
22 updated, and I was asked to sign.

23 Q. Did you ask anybody, what is this
24 document?

25 A. No.

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2 Q. Did anybody tell you why they needed
3 you to sign the document?

4 A. Not that I can recall.

5 Q. You testified earlier that you
6 understood that you served as the acting
7 treasurer for HCMFA; correct?

8 A. Yes.

9 Q. How did you become the acting
10 treasurer of HCMFA?

11 MS. DANDENEAU: Objection to form.

12 A. I don't -- I don't know the legal --
13 I don't know the legal mechanic of how I became
14 the acting treasurer.

15 Q. I'm not asking for the legal
16 mechanic. I'm asking you as the person who
17 is --

18 MS. DANDENEAU: John, you said --

19 MR. MORRIS: Stop.

20 MS. DANDENEAU: -- how did you
21 become the treasurer. That is --

22 MR. MORRIS: Please stop.

23 MS. DANDENEAU: That is a legal
24 question.

25 MR. MORRIS: I am not asking any

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2 legal questions, to be clear. I'm asking
3 for this witness' understanding as to how
4 he became the acting treasurer of HCMFA.
5 If he doesn't know, he can say he doesn't
6 know, but this legal stuff is nonsense, and
7 I really object to it.

8 Q. Sir, I'm asking you a very simple
9 question.

10 MS. DANDENEAU: Argumentative.

11 Q. You testified -- you testified that
12 you became the acting treasurer of HCM --
13 HCMFA; correct?

14 A. Yes.

15 Q. How did that happen?

16 MS. DANDENEAU: Again, object to
17 form.

18 MR. MORRIS: I can't wait to do this
19 in a courtroom. Good God.

20 Q. Go ahead, sir.

21 A. I don't know the exact process of
22 how that happened.

23 Q. Do you have any idea whether signing
24 this document was part of the process?

25 MR. MORRIS: You know what --

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2 MS. DANDENEAU: Objection.

3 MR. MORRIS: -- withdrawn. You guys
4 want to do this, I can't wait. I can't
5 wait. This is the craziest stuff ever.

6 MS. DANDENEAU: John, he said he's
7 not a lawyer, and you are asking him for a
8 legal conclusion, and he says he doesn't
9 know, and you persist.

10 MR. MORRIS: Okay.

11 MS. DANDENEAU: So you can ask these
12 questions --

13 MR. MORRIS: Did anyone -- please
14 stop talking.

15 MS. DANDENEAU: -- at another
16 point -- no, no, no, I'm entitled to talk,
17 too; right? If you're going to make these
18 accusations as if we're trying to stonewall
19 you, this is not the witness to ask that
20 question.

21 MR. MORRIS: I can't -- I can't
22 wait -- I can't wait to do this in a
23 courtroom. I will just leave it at that.

24 MS. DANDENEAU: That's right, I'm
25 sure you can't.

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2 Q. Did anyone ever tell you, sir, that
3 even though you were the acting treasurer of
4 HCMFA, that you were not authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. I'm not sure I understand the
8 question. I wasn't -- I mean, I'm -- I'm the
9 current acting treasurer.

10 Q. Did anybody ever tell you at any
11 time that even though you were the acting
12 treasurer of HCMFA, that you were not
13 authorized to sign the two promissory notes
14 that we looked at before lunch?

15 MS. DANDENEAU: Objection to form.

16 A. Not that I recall.

17 Q. Did anybody ever tell you at any
18 time that you were not authorized to sign the
19 two promissory notes that we looked at before
20 lunch?

21 A. Not that I recall.

22 Q. Did anybody ever tell you at any
23 time that you should not have signed the two
24 promissory notes that we looked at before
25 lunch?

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2 A. Not that I recall.

3 Q. Did you ever tell anybody at any
4 time that you weren't authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. Not that I recall.

8 Q. Did you ever tell anybody at any
9 time that you made a mistake when you signed
10 the two promissory notes that we looked at
11 before lunch?

12 A. Not that I recall.

13 Q. As you sit here right now, do you
14 have any reason to believe that you were not
15 authorized to sign the two documents that we
16 looked at before lunch?

17 MS. DANDENEAU: Objection to form.

18 A. If -- if this is the -- the valid
19 incumbency certificate, I mean, this does --
20 this does detail who the signers are.

21 Q. Okay. And looking at that document,
22 does that give you comfort that you were
23 authorized to sign the two promissory notes
24 that we looked at before lunch?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 MS. DANDENEAU: Objection, form.

4 A. Yes.

5 Q. As of October 20th -- withdrawn.

6 I'm trying to take your mind back to
7 a year ago, October 2020. Do you recall at
8 that time that the boards of the retail funds
9 were making inquiries about obligations that
10 were owed by the advisors to Highland in
11 connection with their 15(c) review?

12 MS. DANDENEAU: Objection to form.

13 A. I don't -- I don't recall.

14 Q. As of October 2020, you had no
15 reason to believe you weren't authorized to
16 sign the two promissory notes that we just
17 looked at; correct?

18 MS. DANDENEAU: Objection, form.

19 MS. DEITSCH-PEREZ: Objection to
20 form.

21 A. I didn't think about it in October
22 of 2020, but I mean --

23 Q. Did you have any reason to believe
24 at that time that you weren't authorized to
25 sign the two notes that we just looked at?

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2 A. Not that I'm aware, no.

3 Q. Did you have any reason to believe a
4 year ago that you made a mistake when you
5 signed those two notes?

6 A. Not that I'm aware.

7 Q. A year ago you believed that HCMFA
8 owed Highland the unpaid principal amounts that
9 were due under those two notes; correct?

10 A. They're -- they're promissory notes
11 that were -- as you presented, that were --
12 that were executed. Whether they're valid or
13 if there's other reasons, I didn't -- I don't
14 know.

15 Q. I'm not asking you whether they're
16 valid or not. I'm asking you for your state of
17 mind. A year ago you believed that HCMFA
18 was -- was obligated to pay the unpaid
19 principal amount under the two notes that you
20 signed; correct?

21 A. Yeah, I'm -- I'm -- yes.

22 Q. Thank you. Are you aware -- you're
23 aware that -- that in 2017, NexPoint issued a
24 note in favor of Highland in the approximate
25 amount of \$30 million; correct?

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2 A. I'm -- I'm -- I'm generally aware.

3 Q. Okay. And are you generally aware
4 that from time to time, after the note was
5 issued by NexPoint, that moneys were applied to
6 principal and interest that were due under the
7 NexPoint note?

8 A. Yes, I'm generally aware.

9 Q. Okay. And did anybody ever tell you
10 that the payments that were made against the
11 NexPoint notes were made by mistake?

12 A. Yes.

13 Q. And is it the one payment that we
14 talked about earlier today?

15 A. We talked about a lot of things
16 today. What payment are we talking about?

17 Q. Okay. Who told you that any payment
18 made against the NexPoint note was made by
19 mistake?

20 A. D.C. Sauter.

21 Q. When did Mr. Sauter tell you that?

22 A. I don't -- I don't remember
23 specifically.

24 Q. Do you remember what payments --

25 A. Sometime -- sometime this year.

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2 Q. Sometime in 2021?

3 A. Yes.

4 Q. Do you remember what payment he was
5 referring to?

6 A. It was the -- the payment made in
7 January of 2021 or -- yeah, January of -- of
8 this -- January of 2021.

9 Q. Okay. So did anybody ever tell you
10 at any time that any payment that was made
11 against principal --

12 A. And -- and -- and -- hold on, and it
13 may have been other -- again, it may have been
14 that payment or -- or there may have been what
15 he was explaining, a misapplication of prior
16 payments as well.

17 Q. Can you -- can you give me any
18 specificity -- withdrawn.

19 Withdrawn. Can you tell me
20 everything that Mr. Sauter told you about --
21 about errors in relation to payments made
22 against principal and interest due under the
23 NexPoint note?

24 MS. DANDENEAU: Can I just --

25 MR. RUKAVINA: Hold on. Hold on.

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2 I'm going to object here, and I'm going to
3 instruct the witness not to answer
4 depending on the discussion that you had --
5 Mr. Waterhouse, I'm the lawyer for
6 NexPoint, and as everyone here knows, D.C.
7 Sauter is in-house counsel.

8 So if you and Mr. Sauter were having
9 a factual discussion and him preparing his
10 affidavit, et cetera, then go ahead and
11 answer that. But if you were having a
12 discussion as to our legal strategy in this
13 lawsuit, or anything having to do with
14 that, then do not answer that.

15 And if you need to talk to either
16 your counsel or me about that, then we need
17 to have that discussion now.

18 A. Okay. Yeah, I don't -- I don't
19 really know how to make that distinction, so
20 maybe I need to talk to counsel before I
21 answer, or if I can answer.

22 Q. Let me just ask you this question:
23 Did -- did you have any conversation with
24 Mr. Sauter about any payment of principal and
25 interest prior to the time that you left

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2 Highland's employment, or did it happen after
3 you left Highland's employment?

4 A. I don't -- I don't recall if -- I
5 don't recall. I mean, it was sometime in 2021.
6 I don't remember if it was before or after I
7 was let go from Highland.

8 Q. Okay. So -- so nobody told you
9 prior to 2021 that any error or mistake was
10 made in the application of payments against
11 principal and interest due on the NexPoint
12 note. Do I have that right?

13 A. Yeah, I don't -- I don't recall this
14 being in 2020.

15 Q. Okay. And it didn't happen in 2019;
16 correct?

17 A. I don't recall that happened.

18 Q. And it didn't happen in 2018;
19 correct?

20 A. I don't -- I don't recall that
21 happening.

22 Q. And it didn't happen in 2017;
23 correct?

24 A. I don't recall.

25 Q. But -- but you believe the

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2 conversation took place in 2021. You just
3 don't remember if it was before or after you
4 left Highland's employment. Do I have that
5 right?

6 A. It was sometime this year. I
7 don't -- I don't remember.

8 Q. Okay. Did you report this
9 conversation to Mr. Seery at any point?

10 A. I don't believe so.

11 Q. Did you report this conversation to
12 anybody at DSI at any time?

13 A. I don't recall.

14 Q. Do you have -- you don't have a
15 recollection of ever doing that; correct?

16 A. Yeah, that's right. I don't recall
17 doing that.

18 Q. Do you recall telling anybody at
19 Pachulski Stang about the conversation you
20 recall with Mr. Sauter?

21 A. No, I don't -- I don't recall.

22 Q. Did you tell any of the independent
23 board members about your conversation with
24 Mr. Sauter?

25 A. I don't recall.

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2 Q. Did you tell any of the employees at
3 Highland before you left Highland's employment
4 about this call that you had with Mr. Sauter?

5 MS. DANDENEAU: Objection to form.

6 A. No, I don't -- no, I don't recall.

7 Q. NexPoint -- to the best of your
8 knowledge, did NexPoint ever file a proof of
9 claim against Highland to try to recover moneys
10 that were mistakenly paid against the principal
11 and interest due under the note?

12 A. Okay. Hold on. You are saying did
13 NexPoint Advisors file a proof of claim to
14 Highland for errors related to payments under
15 the NexPoint note to Highland?

16 Q. Correct.

17 A. I'm -- I'm -- I'm not -- I'm not
18 aware.

19 Q. Are you aware --

20 A. I'm not the legal person here, I
21 don't know.

22 Q. I'm just asking for your knowledge,
23 sir.

24 A. Yeah, I don't know. I'm not aware.

25 Q. Are you aware of any claim of any

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2 kind that NexPoint has ever made to try to
3 recover the amounts that it contends were -- or
4 that Mr. Sauter contend were mistakenly applied
5 against principal and interest due under the
6 NexPoint note?

7 A. I'm not aware.

8 MS. DANDENEAU: Objection to form.

9 Q. Okay. The advisors' agreements with
10 the retail funds are subject to annual renewal;
11 correct?

12 A. Yes.

13 Q. And do you participate in the
14 renewal process each year?

15 A. Yes.

16 Q. What role do you play in the renewal
17 process?

18 A. I'm -- I'm asked by the retail board
19 to walk-through the advisors financials.

20 Q. And do you do that in the context of
21 a board meeting?

22 A. Yes, it is -- yes, it is typically
23 done in a board meeting.

24 Q. And do you recall the time --
25 does -- does the renewal process happen around

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2 the same time each year?

3 A. Yes, it is -- it is around the same
4 time every year.

5 Q. And what -- what time period of the
6 year does the renewal process occur?

7 A. Approximately the September
8 timeframe.

9 Q. During that process, in your
10 experience, does the board typically conduct
11 its own diligence and ask for information?

12 A. Does the board ask for lots of -- I
13 mean, just -- I mean, lots of information as a
14 part of that -- that -- as part of that board
15 meeting and that process.

16 Q. Okay. And do you recall that the
17 process in 2020 spilled into October?

18 A. Yes. Yes.

19 Q. Okay. And as part of the process in
20 2020, the retail board asked -- asked what are
21 referred to as 15(c) questions; right?

22 A. I guess I don't want to be -- they
23 asked 15(c) -- are you saying they asked 15(c)
24 questions and this is why it went into October
25 or --

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2 Q. No, I apologize.

3 Do you have an understanding of
4 what -- of what 15(c) refers to in the context
5 of the annual renewal process?

6 A. Yes, generally.

7 Q. All right. What is your general
8 understanding of the term "15(c)" in the
9 context of the annual renewal process?

10 A. I -- I think 15(c) is the section
11 that -- that -- you know, that -- that the
12 board has to evaluate every year, the retail
13 board. They have to, you know, go through,
14 evaluate, and go through that approval process
15 on a yearly basis.

16 Q. Okay.

17 MR. MORRIS: Can we put up on the
18 screen Exhibit 36, please.

19 (Exhibit 36 marked.)

20 MR. MORRIS: I guess let's just
21 start at the bottom so Mr. Waterhouse can
22 see what is here.

23 Q. You see this begins with an email
24 from Blank Rome to a number of people.

25 MR. MORRIS: And if we can scroll

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2 up -- keep going just a little bit.

3 Q. You will see that there is an email
4 from Lauren Thedford to Thomas Surgent and
5 others where she reports that she was attaching
6 and reproducing below additional 15(c)
7 follow-up questions from the board.

8 Do you see that?

9 A. Yes.

10 Q. And do you see Question No. 2 asks
11 whether there are any material outstanding
12 amounts currently payable or due in the future
13 (e.g., notes) to HCMLP by HCMFA or NexPoint
14 Advisors or any other affiliate that provides
15 services to the funds?

16 Do you see that?

17 A. Yes.

18 Q. And -- and did you -- do you recall
19 that in -- in October of 2020 the retail boards
20 were asking for that information?

21 A. I don't recall it, but there --
22 they're obviously asking in this email.

23 Q. Okay.

24 MR. MORRIS: Can we scroll up a
25 little bit, please.

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2 Q. And then do you see that
3 Ms. Thedford includes you on the email string
4 on Tuesday, October 6th, at 5:52?

5 A. Yes.

6 Q. And she asks you and Dave Klos and
7 Kristin Hendrix for advice on that particular
8 Request No. 2 that I have just read; right?

9 A. Yes.

10 Q. Okay. Can you tell me who
11 Ms. Thedford is?

12 A. She was an attorney that was in the
13 legal group.

14 Q. At Highland Capital Management,
15 L.P.?

16 A. I'm -- I'm -- I'm -- I don't
17 remember if she was an employee of Highland or
18 any of the advisors.

19 Q. Okay. Do you know if she served as
20 the corporate secretary for both HCMFA and
21 NexPoint?

22 A. Yes.

23 Q. And -- okay.

24 Do you know whether Ms. Thedford
25 held any positions in relation to the retail

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2 funds as we defined that term?

3 A. Yes.

4 Q. What is your understanding of the
5 positions that Ms. Thedford held at the retail
6 funds?

7 A. I -- I recall her being an officer.
8 I don't recall her title.

9 Q. Okay. Is she still an officer at
10 any of the retail funds today?

11 A. No.

12 Q. Do you know when she ceased to be an
13 officer of the retail funds?

14 A. Approximately.

15 Q. And when did she approximately cease
16 to be an officer of the retail funds?

17 A. It was in -- it was in early of
18 2021.

19 Q. Okay. Do you know when she became
20 an officer of the retail funds?

21 A. I don't recall.

22 Q. To the best of your recollection,
23 was she an officer of the retail funds in
24 October of 2020?

25 A. I believe so.

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2 Q. Okay. Do you know what title she
3 held in her capacity as an officer, if any?

4 A. I told you I don't remember.

5 Q. Okay. So she sends this email to
6 you at 5:52 p.m. on October 6th.

7 And if we can scroll up to the
8 response, you responded a minute later with a
9 one-word answer: Yes.

10 Do you see that?

11 A. Yes.

12 Q. And -- and yes is -- yes was in
13 response to the retail board's Question No. 2,
14 right, whether there are any material
15 outstanding amounts currently payable or due in
16 the future?

17 A. Yes.

18 MR. MORRIS: And can we scroll up to
19 see what happened next.

20 Q. So Ms. Thedford writes back to you a
21 few minutes later and she asks whether you
22 could provide the amounts.

23 Do you see that?

24 A. Yes.

25 Q. And then you respond further and you

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2 refer her to the balance sheet that was
3 provided to the board as part of the 15(c)
4 materials.

5 Do you see that?

6 A. Yes.

7 Q. And -- and did the advisors provide
8 to the board certain balance sheets in 2020 in
9 connection with the 15(c) review?

10 A. Yes, they did.

11 Q. Okay. And were the amounts that
12 were outstanding or that were to be due in the
13 future by the advisors to Highland included in
14 the liability section of the balance sheet that
15 was given to the retail board?

16 A. Yes. Notes would be reflected as
17 liabilities.

18 Q. Okay. And --

19 A. If I'm understanding your question
20 correctly.

21 Q. You are. And -- and -- and those
22 liabilities you -- you were -- you believed
23 were responsive to the retail board's question;
24 correct?

25 A. Yes.

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2 Q. Okay. And then if we can scroll up,
3 you see Ms. Thedford responds to you
4 nine minutes later with a draft response.

5 Do you see that?

6 A. Yes.

7 Q. And she says that she is taking from
8 the 6/30 financials certain information about
9 amounts that were due to HCMLP and affiliates
10 as of June 30th, 2020.

11 Do you see that?

12 A. I do.

13 Q. Okay. And did you believe, as the
14 treasurer of NexPoint and HCMFA and as the CFO
15 of Highland, that the information that
16 Ms. Thedford obtained from the 6/30 financials
17 was accurate and responsive in relation to the
18 retail fund board's question?

19 A. I just want to make sure I
20 understand the question.

21 Are you saying that the financial
22 information provided to the retail board as
23 part of the 15(c) process, which included
24 financial statements as of June 30th of 2021,
25 did I feel like those were responsive to their

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2 questions?

3 Q. Yes.

4 A. Yes.

5 Q. Thank you.

6 MS. DEITSCH-PEREZ: John, it is not
7 in the chat yet. Can you just make sure it
8 gets put in there.

9 MR. MORRIS: Sure.

10 MS. CANTY: I put it in there. I
11 think maybe I just sent it directly, so let
12 me make sure it says to everyone. But I
13 did put it in there. I will try again.

14 MR. MORRIS: Thank you, La Asia.

15 MS. DANDENEAU: What number is it.

16 MR. MORRIS: What, the Bates number?

17 MS. DEITSCH-PEREZ: No, the --
18 this -- yeah, 36 is not in the chat.

19 MR. MORRIS: Okay. We'll get it.

20 MS. DANDENEAU: I think that
21 Ms. Canty just sent it to me originally.
22 Sorry.

23 MR. MORRIS: Okay. We will get it
24 there.

25 MS. CANTY: Okay. It is there now

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2 for everyone.

3 MS. DEITSCH-PEREZ: Got it. Thank
4 you.

5 Q. Do you recall if the proposed
6 response that Ms. Thedford crafted was
7 delivered to the retail board with the -- with
8 the yellow dates having been completed?

9 A. I don't know.

10 MR. MORRIS: Davor, I'm going to ask
11 that the advisors and -- the advisors of
12 both HCMFA and NexPoint produce to me any
13 report that was given to the retail board
14 concerning the promissory notes at issue,
15 including the obligations under the notes.

16 Q. Do you know -- do you know if
17 ultimately NexPoint informed the retail board
18 in response to its question that NexPoint owed
19 Highland approximately 23 or \$24 million?

20 MS. DANDENEAU: Objection to the
21 form.

22 A. Sorry, are you asking, did NexPoint
23 tell the retail board that it owed Highland?

24 Q. Let me ask a better question,
25 Mr. Waterhouse.

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2 Did -- do you know if anybody ever
3 answered the retail board's question that was
4 Number 2?

5 A. I don't -- I can't say for sure.

6 Q. Okay. Do you recall -- I think you
7 testified earlier that you walked through the
8 advisors' financials with the retail board;
9 correct?

10 A. Yes.

11 Q. And as part of that process, did you
12 disclose to the retail board the obligations
13 that NexPoint and HCMFA had to Highland under
14 promissory notes?

15 A. The retail board, as I stated
16 earlier, receives financial information,
17 balance sheet, income statement information
18 from the advisors. That information is
19 provided to the retail board in connection with
20 the 15(c) process.

21 So any notes between the advisors
22 and the Highland would be -- anything would be
23 detailed in those financial statements.

24 Q. Do you recall in 2020 ever speaking
25 with the retail board about the advisors'

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2 obligations under the notes to Highland?

3 MS. DANDENEAU: Objection to form.

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall specifically.

7 Q. Do you have any general recollection
8 of discussing with the retail board the
9 advisors' obligations to Highland under the
10 notes that they issued?

11 MS. DANDENEAU: Object to the form.

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. I just recall generally just -- it
15 is just -- I present the financial statements,
16 and if they have questions, I answer their
17 questions and walk them through.

18 I don't recall what they asked. I
19 don't recall where the discussion went. I
20 don't recall anything of that nature.

21 Q. Okay. Do you know if anybody on
22 behalf of HCMF -- HCMFA ever told the retail
23 board that HCMFA had no obligations under the
24 two 2019 notes that you signed? Withdrawn.

25 Do you know whether anybody on

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2 behalf of HCMFA ever told the retail boards
3 that you weren't authorized to sign either of
4 the two 2019 notes?

5 MS. DANDENEAU: Objection to form.

6 A. I'm not aware.

7 Q. Are you aware of anybody on behalf
8 of HCMFA ever telling the retail boards that
9 your execution of the two 2019 notes was a
10 mistake?

11 MS. DANDENEAU: Objection to form.

12 A. I'm not aware.

13 Q. Are you aware of anybody on behalf
14 of HCMFA ever telling the retail boards that
15 HCMFA did not have to pay the amounts reflected
16 in the two notes that you signed in 2019?

17 A. I'm not aware.

18 Q. Do you know whether anybody ever
19 told the retail boards -- withdrawn.

20 Do you know whether anybody ever
21 told the retail boards that Highland has
22 commenced a lawsuit to recover on the two notes
23 that you signed in 2019?

24 A. I'm not aware.

25 Q. Are you aware of anybody informing

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2 the retail boards that Highland has sued to
3 recover on the NexPoint note?

4 A. I'm not aware.

5 Q. Do you know whether anybody ever
6 told the retail board that Highland had
7 declared a default with respect to the two
8 HCMFA notes that you signed in 2019?

9 A. I'm not aware.

10 Q. Are you aware of anybody ever
11 informing the retail boards that Highland had
12 declared a default under the NexPoint note?

13 A. I'm not aware.

14 Q. Are you aware of anybody telling the
15 retail board that Highland made a demand for
16 payment under the 2019 notes that you signed on
17 behalf of HCMFA?

18 A. I'm not aware.

19 Q. Let's -- let's see if there is a
20 response to Ms. Thedford's email, if we can
21 scroll up.

22 Do you see you responded to
23 Ms. Thedford five minutes after she provided
24 the draft response to you?

25 A. Yes.

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2 Q. Okay. And do you see that Dustin
3 Norris is copied on this email?

4 A. Yes, he is.

5 Q. Great. Do you know whether
6 Mr. Norris held any positions at either of the
7 advisors as of October 6, 2020?

8 A. I will go back to -- I'm not the
9 legal expert of what appoints you or how or
10 why, but you did see Dustin's name on the
11 incumbency certificate that you produced
12 earlier.

13 Q. Do you know what his title was in
14 October of 2020?

15 MS. DANDENEAU: Objection to form.

16 A. I don't -- I don't recall.

17 Q. Was he -- did he have a title with
18 each of the advisors, to the best of your
19 recollection?

20 A. I don't recall.

21 Q. Do you know why he is included on
22 this email string?

23 A. I didn't add Dustin. It looks like
24 Lauren did. I don't know why she added him or
25 not. You would have to ask her.

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2 Q. Does Mr. Norris play a role in
3 formulating the advisors' responses to the
4 questions asked by the retail board in
5 connection with the 15(c) annual review?

6 MS. DANDENEAU: Objection to form.

7 A. He -- Dustin Norris is there in the
8 board meetings. But -- so he has a role, yes.

9 Q. Okay. And does Mr. Norris hold any
10 positions, to the best of your knowledge, in
11 relation to any of the retail funds?

12 A. I don't -- I don't believe he does.

13 Q. How about Mr. Post, do you know
14 whether Mr. Post holds any position in either
15 of the advisors?

16 A. I mean, he -- he -- yes.

17 Q. What is your understanding of the
18 positions that Mr. Post holds in relation to
19 the advisors?

20 MS. DANDENEAU: Objection to form.

21 A. He is an employee of NexPoint
22 Advisors. He is also the chief compliance
23 officer for -- for NexPoint.

24 Q. Who is the chief compliance officer
25 for HCMFA, if you know?

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2 MS. DANDENEAU: Objection to form.

3 A. That would be Jason as well.

4 Q. Okay. Now, looking at your
5 response, you noted initially that nothing was
6 owed under shared services. Do I have that
7 right in substance?

8 A. Yeah. I think I'm being responsive
9 to Lauren's question here, whether any of the
10 shared service invoices are outstanding.

11 Q. Right.

12 A. Yes.

13 Q. And that is because -- and that is
14 because the retail the retail board has asked
15 for the disclosure of all material obligations
16 that were owed to HCMLP either then or in the
17 future; isn't that right?

18 MS. DANDENEAU: Objection to form.

19 Q. We can go back down and look.

20 A. Look, I don't know if that's a
21 material item, I mean, again, but sure.

22 Q. Okay. But there were no shared
23 services outstanding; correct?

24 MS. DANDENEAU: Objection to form.

25 A. That is what this email seems to

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2 indicate.

3 Q. And you wouldn't have written it if
4 you didn't believe it to be true at the time;
5 correct?

6 A. Correct.

7 Q. And when you referred to shared
8 services outstanding, what you meant there was
9 that neither NexPoint nor HCMFA owed Highland
10 any money under the shared services agreements
11 that they had with Highland as of October 6th,
12 2020; right?

13 A. I don't know if it is as of October
14 6, 2020 or if it was from -- like through the
15 financials -- through the date of the
16 financials as of June 30.

17 Q. Okay. And then you noted that
18 HCMA -- the HCMFA note is a demand note; right?

19 A. Yes.

20 Q. And then you referred Ms. Thedford
21 to Kristin Hendrix for the term of the NexPoint
22 note. Do I have that right?

23 A. Yes.

24 Q. And then you refer to that agreement
25 that is referenced in the 2018 audited

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2 financials about Highland's agreement not to
3 make demand upon HCMFA until May 2021; correct?

4 A. Correct.

5 Q. And then -- and then the next thing
6 you write is that the attorneys think that BK
7 doesn't change that, but don't know for sure at
8 the end of the day.

9 Do you see that sentence?

10 A. Yes.

11 Q. Which attorneys were you referring
12 to?

13 A. I don't remember.

14 Q. Did you have a conversation with
15 attorneys concerning whether the bankruptcy
16 would change or alter in any way the agreement
17 not to make a demand under the HCMFA note?

18 A. Look, yeah, I mean, I don't
19 specifically remember, but generally, I mean,
20 it is in this email. I don't -- I don't -- I
21 don't -- I don't remember who I talked to or,
22 you know, was it inside counsel, outside
23 counsel, but obviously I talked to somebody.

24 Q. Do you have any recollection --

25 A. Well, I don't even know if it's --

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2 actually, it may not even have been me. I say
3 the attorneys in, you know, a lot of -- like I
4 talked about the team.

5 It could have been someone on the
6 team, like, hey, we need to run this down, and
7 maybe they talked to attorneys again and
8 relayed that information to me.

9 So I really don't know if I spoke or
10 someone else did or -- or, I mean, and maybe it
11 wasn't even from corporate accounting. Maybe
12 it was, you know, other -- I'm kind of
13 summarizing, you know, again, so I don't really
14 know -- I can't really say for sure. I don't
15 remember how I came about of this knowledge.

16 Q. I appreciate your efforts,
17 Mr. Waterhouse, but I will just tell you that
18 if I ask a question and you don't know the
19 answer or you don't recall, I'm happy to accept
20 that. I don't -- I don't want you to
21 speculate, so I want to be clear about that.
22 So I appreciate it.

23 Let me just ask you simply: Do you
24 know what attorneys -- can you identify any of
25 the attorneys who thought that the bankruptcy

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2 process didn't change the agreement?

3 A. I don't recall.

4 Q. Okay. Perfect.

5 And then let's look at the last
6 sentence. It says, quote: The response should
7 include, as I covered in the board meeting,
8 that both entities have the full faith and
9 backing from Jim Dondero, and to my knowledge
10 that hasn't changed.

11 Do you see that?

12 A. Yes.

13 Q. Okay. Prior to October 6th, 2020,
14 had you told the retail board that HCMFA and
15 NexPoint have the full faith and backing from
16 Jim Dondero?

17 A. Yes.

18 Q. Do you remember in the context in
19 which you told the retail board that?

20 A. I mean, generally, yes.

21 Q. Tell me what you recall.

22 A. So we were walking through the
23 financials from the advisors; right? So as I
24 described to you, you have got HCMFA and NPA.
25 And these -- the financials, you know, show

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2 they have liabilities on them that exceed
3 assets.

4 So the retail board has asked, okay,
5 you know, how -- you know, if -- if these
6 liabilities come due or they're payable, you
7 know, how does that come about?

8 And, you know, the response is,
9 well, the advisors have the -- the full faith
10 and backing from -- from Jim Dondero.

11 Q. And how did you know that the
12 advisors had the full faith and backing from
13 Jim Dondero? What was the basis for that
14 statement that you made to the retail board?

15 A. I talked to Jim about it at some
16 point in the past.

17 Q. And did you tell Mr. Dondero that
18 you were going to inform the retail board that
19 the advisors had his full faith and backing
20 before you actually told that to the retail
21 board?

22 A. I don't recall having that
23 conversation.

24 Q. Do you recall if you ever informed
25 Mr. Dondero that you had disclosed or told the

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2 retail board that the advisors had the full
3 faith and backing of Mr. -- Mr. Dondero?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall discussing that with
7 him at the time.

8 Q. When you told this to the board, was
9 Mr. Dondero participating in the discussion?

10 A. Not that I recall.

11 Q. Withdrawn. Was it not -- withdrawn.

12 Do you recall whether -- when you
13 covered this issue with the board, was that in
14 a -- a Zoom call or a Webex call? Was it a
15 telephone call? Was it in-person? Like where
16 were you physically in relation to the board?

17 A. I believe I was at home.

18 Q. Okay. Can you identify every person
19 that you recall who was present for this
20 disclosure other than -- other than the board
21 members themselves?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't recall everyone on the call.

25 Q. Can you identify anybody who was on

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2 the call?

3 A. Other than the board members?

4 Q. Yes.

5 A. Lauren Thedford. I mean, there
6 are -- there are many -- my section is just one
7 of many sections that are just -- you know, as
8 you can appreciate, this is a long board
9 meeting.

10 I can't recall specifically, really
11 even generally, or who was on when this was
12 discussed. But Lauren was typically on for the
13 entire time.

14 Q. I apologize if I asked you this, but
15 do either of Mr. Norris or Mr. Post hold any
16 positions relative to the retail funds?

17 A. I think you asked me this already,
18 John.

19 Q. Okay. I just don't recall. Can you
20 just refresh my recollection if I did, in fact,
21 ask you the question?

22 A. I don't believe -- if we can go
23 back. I don't believe Mr. Norris has a title
24 at the retail funds. Mr. -- and Mr. Post is
25 the CCO of the advisor, the advisors.

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2 Q. Okay. Do you know if either of them
3 have a position with the retail board -- with
4 the retail funds?

5 A. I don't believe Mr. Norris has a
6 position with the retail funds.

7 Q. All right. What about Mr. Post?

8 A. Mr. Post is the CCO of the advisors.

9 Q. Okay. Does he hold any position --

10 A. I don't believe so.

11 Q. -- with the retail funds?

12 A. I don't believe so.

13 Q. Okay.

14 A. I don't know if being the CCO for
15 the advisor conveys something for the retail
16 funds. Again, I am not -- that is the legal
17 compliance part of it. I don't know.

18 Q. Why did you tell the retail board
19 that the advisors have the full faith and
20 backing from Mr. Dondero?

21 MS. DANDENEAU: Objection to form.

22 A. It is -- it is -- it is what has
23 been discussed with them prior.

24 Q. And were you -- were you trying to
25 give them comfort that even though the

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2 liabilities exceeded the assets that the
3 advisors would still be able to meet their
4 obligations as they become due?

5 MS. DANDENEAU: Objection to form.

6 MS. DEITSCH-PEREZ: Object form.

7 A. I -- I can't -- I don't remember
8 specifically the conversation, but generally --
9 you know, generally, yes. And that is why --
10 but, you know, again, in this email saying, you
11 know, I am sure I qualified it with the retail
12 board, you know, as I said I like -- you know,
13 to my knowledge, that hasn't changed. But,
14 again, generally -- generally that is what I
15 remember.

16 Q. Okay. Do you recall if in the
17 advisors' response to the retail board's
18 question if the response included any statement
19 concerning Mr. Dondero and -- and the full
20 faith and backing that he was giving to the
21 advisors?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't -- I don't remember
25 specifically what was provided.

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2 Q. Okay.

3 A. And I don't really -- I don't really
4 remember generally either.

5 Q. Okay.

6 MR. MORRIS: So -- so, again, I'm
7 just going to ask Mr. Rukavina if your
8 clients can produce as soon as possible the
9 15(c) response, the written response that
10 the advisors made, if any, to the board's
11 Question No. 2.

12 I'm not looking for the whole
13 response, but I certainly want the response
14 to Question No. 2.

15 Q. Do you have a general understanding
16 as to the amount by which -- withdrawn.

17 Did -- did the assets of --
18 withdrawn.

19 Did the liabilities of HCMFA exceed
20 its assets in 2020?

21 MS. DANDENEAU: Objection to form.

22 MS. DEITSCH-PEREZ: Objection, form.

23 A. I believe I have already answered
24 that question earlier, I think. I believe I
25 said yes.

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2 Q. Okay. And did the liabilities of
3 NexPoint exceed its assets in 2020?

4 MS. DEITSCH-PEREZ: Objection to
5 form.

6 A. I don't believe so.

7 Q. Okay. So -- so it was only one of
8 the two advisors who had liabilities that
9 exceeded the value of the assets.

10 Do I have that right?

11 MS. DEITSCH-PEREZ: Objection to
12 form.

13 MS. DANDENEAU: Form.

14 A. Yes.

15 Q. And do you know, ballpark, the
16 amount by which the value of HCMFA's
17 liabilities exceeded their assets in 2020?

18 MS. DANDENEAU: Objection to form.

19 A. I don't -- I don't recall.

20 MR. MORRIS: I had specifically
21 requested in discovery the audited
22 financial reports for both advisors and
23 NexPoint. I think I may have gotten one
24 for NexPoint but I'm still waiting for the
25 balance. And I'm going to renew my request

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2 for those documents too.

3 Q. Let's go to the next exhibit, which
4 is Number 10. So I think it is in your stack,
5 Mr. Waterhouse.

6 MR. MORRIS: And we can take the one
7 down from the screen and put up Number 10
8 for everybody.

9 (Exhibit 10 marked.)

10 Q. And I don't know if you have ever
11 seen this before, but I'm really putting it up
12 on the screen for purposes of turning to the
13 very last page of the document.

14 So this is a document that we have
15 been -- that we premarked as Exhibit 10. And
16 we're turning to the last page of the document,
17 which is a document that was filed in the
18 adversary proceeding 21-3004. And -- no, I
19 apologize, I think we -- right there. Perfect.

20 And it is page 31 of 31.

21 MR. MORRIS: I think there may have
22 been some something erroneously stapled to
23 the hard copy that I gave you folks, but
24 I'm looking for page 31 of 31 in the
25 document that begins with the first page of

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2 Exhibit 10.

3 Q. Do you have that, Mr. Waterhouse?

4 A. I don't have it yet. I'm looking.

5 Q. All right. If you look at the top
6 right-hand corner, you will see it says page
7 hopefully something of 31?

8 A. Yes, I've got it now.

9 Q. Okay. You have got 31 of 31. You
10 can take a moment to read that, if you would
11 like.

12 A. (Reviewing document.) Okay.

13 Q. Have you ever seen this before?

14 A. I don't know if I have seen this
15 specific document, but, you know, I've --
16 I'm -- I'm aware of it.

17 Q. And is this the document that you
18 had in mind when you sent that email to
19 Ms. Thedford that we just looked at where you
20 said that Highland had agreed not to make a
21 demand upon HCMFA until May 2021?

22 A. Honestly, I don't -- it wasn't this
23 document. I mean, it's something like this,
24 yes. I mean, yes.

25 Q. Well --

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2 A. It is something like this, but I
3 don't think it was this specific document.

4 Q. Well, but this document does say in
5 the last sentence that Highland agreed not to
6 seek -- not to demand payment from HCMFA prior
7 to May 31, 2021; right?

8 A. Yes.

9 Q. And are you aware of any other
10 document that was ever created pursuant to
11 which Highland agreed not to demand payment on
12 amounts owed by HCMFA before May 31, 2021?

13 A. Hold on. Are you asking, am I aware
14 of a document that by HCMFA that basically says
15 otherwise?

16 Q. No. Let me try again.

17 Are you aware of any other document
18 pursuant to which -- pursuant to which Highland
19 agreed not to make a demand on HCMFA until May
20 31st, 2021?

21 A. I'm -- I think there was something
22 in connection with -- with the -- with the
23 audit that basically says the same thing.

24 Q. Okay. And do you think that the
25 audit is referring to this particular document?

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2 A. I don't know.

3 Q. All right. This document is dated
4 April 15, 2019. Do you see that?

5 A. I do.

6 Q. And do you remember that the audit
7 was completed on June 3rd, 2019?

8 A. Yes.

9 Q. And do you recall that the audited
10 financials -- and I'm happy to pull them up if
11 you would like, but do you recall that the
12 audited financials included a reference to the
13 agreement pursuant to which Highland agreed not
14 to make a demand until May 31st, 2021?

15 A. Yes, I remember.

16 Q. And as part of the process, would
17 you have expected the corporate accounting team
18 to have provided a copy of this document to
19 PwC?

20 MS. DANDENEAU: Objection to form.

21 A. Yes, I would have expected something
22 like this, or again, you know, some document
23 that basically states -- states the deferral
24 till May 31 of 2020.

25 Q. Okay.

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2 A. May 31 of 2021, excuse me.

3 Q. And this document states the
4 deferral that you just described; correct?

5 A. It does.

6 Q. And this document states the
7 deferral that was described in the audited
8 financial statements that we looked at before;
9 correct?

10 A. It does.

11 MR. MORRIS: Okay. Can we scroll
12 down just a little bit to see who signed on
13 behalf of the acknowledgment there.

14 Q. Okay. So Mr. Dondero signed this
15 document on behalf of both HCMFA and Highland;
16 do you see that?

17 A. I do.

18 Q. Okay. Did you discuss this document
19 or the -- withdrawn.

20 Did you discuss the concept of the
21 deferral with Mr. Dondero in the spring of
22 2019?

23 A. I think I testified I don't recall.

24 Q. Okay. Do you know whose idea it was
25 to issue the acknowledgment in this form?

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2 A. I don't recall.

3 MR. MORRIS: Can we scroll back up
4 to the document, please.

5 Q. Do you see in the beginning it says,
6 reference is made to certain outstanding
7 amounts loaned from Highland to HCMFA for
8 funding ongoing operations.

9 Do you see that?

10 A. Yes.

11 Q. And were you aware as the CFO of
12 Highland and as the treasurer of HCMFA that as
13 of April 15, 2019, Highland had made certain
14 loans to HCMFA to fund HCMFA's ongoing
15 operations?

16 A. Yes.

17 Q. And were you aware that those loans
18 were payable on demand and remained outstanding
19 as of December 31st, 2018?

20 A. Yes.

21 Q. And were you aware that those
22 amounts were payable on demand, and they
23 remained outstanding as of April 15, 2019?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Well, this -- this document dated
3 April 15, 2019 says they have been deferred to
4 May 31, 2021.

5 Q. Right. But I'm just sticking to the
6 first paragraph where they refer to the
7 outstanding amounts. And in the end it says
8 the -- it remained outstanding on December
9 31st, 2018, and I think you told me that you
10 understood that, and then I'm just trying to
11 capture the last piece of it.

12 Did you understand that there were
13 amounts outstanding from the loan that Highland
14 made to HCMFA to fund ongoing operations as of
15 April 15th, 2019?

16 A. Yes.

17 Q. Thank you. Let's look at the next
18 sentence. HCMFA expects that it may be unable
19 to repay such amounts should they become due
20 for the period commencing today and continuing
21 through May 31st, 2021.

22 Do you see that?

23 MS. DANDENEAU: Objection to form.

24 A. I do.

25 Q. As the CFO -- withdrawn.

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2 As the treasurer of HCMFA, did you
3 believe that -- do you believe that statement
4 was true and accurate at the time it was
5 rendered?

6 A. I mean, it -- it -- the answer to
7 that is I really didn't have any -- I didn't
8 have an opinion really.

9 Q. Did you do anything to educate
10 yourself in April of 2019 on the issue of
11 whether HCMFA could repay the amounts that it
12 owed to Highland should they become due?

13 A. I don't believe so.

14 Q. Did you at any time form any
15 opinions as to HCMFA's ability to repay all
16 amounts due to Highland should they become due?

17 A. Not really. I guess I don't...

18 Q. Well, you told the retail board that
19 HCMFA's liabilities exceeded their assets in
20 2020; correct?

21 A. Yes.

22 Q. Based on the work that you did to
23 prepare for the retail board, did you form any
24 view as to whether HCMFA would be unable to
25 repay the amounts that it owed to Highland

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2 should they become due?

3 MS. DANDENEAU: Objection to form.

4 A. I mean, I -- when you look at that,
5 to answer you, completely, you know, again,
6 if -- the response I gave the retail board was,
7 you know, the -- the advice -- HCMFA advisors
8 have the -- have the full faith and backing of
9 Jim Dondero. So I didn't form an opinion of
10 whether the advisor could pay it or not.

11 Q. Did you form any view as to whether
12 the advisors could repay the amounts that it
13 owed to Highland should they become due without
14 the full faith and backing of Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Form.

17 A. I mean, if you -- if you -- if you
18 take that last statement out, I mean, it would
19 be difficult for HCMFA to pay back demand notes
20 at that time.

21 Q. And it was precisely for that reason
22 that you told the retail board that -- that the
23 retail -- that the advisors had the full faith
24 and backing of Mr. Dondero; correct?

25 MS. DANDENEAU: Objection to form.

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2 A. I mean, yes, as the mouthpiece, I
3 was relaying information.

4 Q. Okay. And you relayed that
5 information with the knowledge and approval of
6 Mr. Dondero; correct?

7 MS. DEITSCH-PEREZ: Object to the
8 form.

9 A. As I stated in the email, I don't
10 believe, and I think I testified I don't
11 believe I had conversations with Mr. Dondero at
12 the time of that board meeting.

13 Q. Did you tell the retail board that
14 the advisors had the full faith and backing of
15 Mr. Dondero without Mr. Dondero's prior
16 approval?

17 A. Yeah, I -- I -- yes, I'm -- like I
18 said, I think I testified earlier, I'm sure I
19 qualified it as well.

20 Q. What do you mean by that?

21 MS. DANDENEAU: Objection to form.

22 A. Again -- again, like I said in the
23 email, it has the full faith and backing of Jim
24 Dondero unless that has changed.

25 Q. Actually that is not what you said,

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2 so let's put the email back up.

3 A. It is -- it is -- it is in the
4 email.

5 Q. Let's put the email back up. You
6 didn't say unless it has changed. You said you
7 believe it hasn't changed; right?

8 A. Okay. And to my knowledge that
9 hasn't changed, that is what it says.

10 Q. That's right.

11 A. But, again, I mean, that is -- I
12 don't know everything. And I'm not in every
13 conversation. I'm not -- to presume that I am,
14 is -- and you have to put myself -- as you
15 started this out, Mr. Morris, I was at home in
16 October of 2020 with COVID -- or, you know,
17 under these COVID times that we described is
18 very difficult.

19 We have all been working at home for
20 really the first time ever, undergoing
21 processes, procedures, control environments
22 that have been untested, and there is poor
23 communication.

24 So I am relaying, as I'm telling you
25 now, what is in the email. And unless

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2 something has changed -- to my knowledge, it
3 hasn't changed, but it could have changed.

4 Q. When you say that the advisors have
5 the full faith and backing from Mr. Dondero,
6 did you intend to convey that, to the extent
7 the advisors were unable to satisfy their
8 obligations as they become due, Mr. Dondero
9 would do it for them?

10 MS. DANDENEAU: Object to the form.

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 And, John, we have given you a lot
14 of leeway here but this does not seem
15 relevant to this case. You seem sort of
16 taking a complete sort of diversion into
17 the allegations and the complaint just
18 filed on Friday, and so I would ask you to
19 move on because --

20 MR. MORRIS: And I will tell you --
21 I will tell you that I have never read that
22 complaint cover-to-cover. I have nothing
23 to do with the prosecution of those claims.
24 And this issue that we're talking about
25 right now is related solely to the

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2 promissory notes that your clients refuse
3 to pay.

4 So I'm going to continue to ask my
5 questions, and I would ask the court
6 reporter to read back my last question.

7 (Record read.)

8 MS. DEITSCH-PEREZ: And then I
9 believe there were objections to form.

10 Q. You can answer the question.

11 A. Yes.

12 Q. Thank you very much, sir.

13 MR. MORRIS: Can we go back to the
14 other document, please?

15 Q. Mr. Waterhouse, do you know if this
16 document was ever shared with the retail board?

17 A. I don't recall.

18 Q. Did you ever share it with the
19 retail board?

20 A. I don't recall.

21 Q. Did you ever tell the retail board
22 about the substance of this document?

23 A. I don't recall.

24 Q. Did you ever tell the retail board
25 that Highland had agreed not to make a demand

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2 against HCMFA until May 2021?

3 A. I don't recall.

4 Q. Do you know whether anybody on
5 behalf of the advisors ever informed the retail
6 board that Highland had agreed on April 15,
7 2019, not to make a demand against HCMFA under
8 the promissory notes?

9 A. I don't recall.

10 Q. Did you instruct Ms. Thedford or
11 anybody else responding to the retail board's
12 15(c) inquiry to disclose this document?

13 A. Did I instruct Ms. Thedford or
14 anyone else to -- to -- to produce this, to
15 disclose this document? Is that what you -- I
16 just want to make sure.

17 Q. Uh-huh.

18 A. Yeah, I don't -- I don't recall.

19 Q. Did you instruct anybody to inform
20 the retail board, in response to their question
21 as part of the 15(c) process, to -- to tell the
22 retail board about Highland's agreement not to
23 make a demand until 2021?

24 MS. DANDENEAU: Objection to form.

25 A. I don't recall.

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2 Q. Did you ever inform PwC that HCMFA's
3 liabilities exceeded its assets?

4 MS. DANDENEAU: Object to the form.

5 A. I don't -- I don't think I told
6 them. I mean, they -- they audited the
7 financial statements.

8 Q. Did -- do you know if anybody on
9 behalf of Highland ever informed
10 PricewaterhouseCoopers that HCMFA may be unable
11 to repay amounts owing to Highland, should they
12 become due?

13 MS. DANDENEAU: Objection to form.

14 A. Yes. Again, I think I testified
15 earlier that -- that this was communicated to
16 the auditors.

17 Q. Ideally --

18 A. I don't know who exactly did that.
19 I don't recall doing it, but, yeah, it was --
20 it was communicated. And that is why -- I
21 mean, there is a disclosure in the financial
22 statements; right?

23 Q. There is, and that disclosure
24 relates to the last sentence of this document;
25 correct?

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2 A. Yes.

3 Q. Do you recall looking in the
4 document and seeing anything that was disclosed
5 with respect to the sentence above that?

6 A. No.

7 Q. Do you know whether anybody on
8 behalf of Highland ever informed
9 PricewaterhouseCoopers that HCMFA expects that
10 it may be unable to repay amounts due and owing
11 to Highland should they become due?

12 MS. DEITSCH-PEREZ: Object to the
13 form. I think that is the third time.

14 A. I don't recall. Again, as I said,
15 we -- all of this was given to the auditors.

16 Q. Do you know if Highland received
17 anything of value in exchange for its agreement
18 not to demand payment on amounts owed by HCMFA
19 prior to May 31st, 2021?

20 MS. DEITSCH-PEREZ: Object to the
21 form. That is the second time.

22 MS. DANDENEAU: Object to the form.

23 A. I have answered this question.

24 MR. RUKAVINA: Hold on. Object to
25 legal conclusion. Go ahead.

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2 A. I have answered this question
3 before.

4 Q. And the answer was no?

5 A. I'm not aware.

6 Q. Now, this acknowledgment can't
7 possibly apply to the two notes that you signed
8 on behalf of HCMFA because those notes were
9 signed on May 2nd and May 3rd, 2019; is that
10 right?

11 MS. DANDENEAU: Objection to form.

12 A. Unless there is a drafting error.

13 Q. Okay. Are you aware of a drafting
14 error?

15 A. I'm not aware. I didn't -- I wasn't
16 part of -- I didn't sign this note or this
17 acknowledgment. I didn't draft it.

18 Q. But you do see it is dated April 15,
19 2019; right?

20 A. Yes.

21 Q. And this was a document that was
22 actually included by the advisors in a pleading
23 they filed with the Court; right?

24 MR. RUKAVINA: Well, I don't know
25 that so I object to form.

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2 Q. Okay. Let's go to the first page of
3 the document and just confirm that.

4 MR. AIGEN: Mr. Morris, I just note
5 that you already said there was some error
6 with the document that is listed as
7 exhibit --

8 MR. MORRIS: No. No, no, no.

9 MS. DEITSCH-PEREZ: Oh, okay.

10 MR. MORRIS: What I said is that
11 there is a few pages that were mistakenly
12 stapled to the end of the document.

13 MS. DEITSCH-PEREZ: Okay.

14 MR. MORRIS: There is no problem
15 with this document.

16 MS. DEITSCH-PEREZ: And just so
17 we're clear that the document -- the pages
18 that start with defendant's amended answer
19 are not intended to be part of this
20 document?

21 MR. MORRIS: That's correct.

22 MS. DEITSCH-PEREZ: And that the --
23 but it is your representation that the rest
24 of the document is -- is -- is correct
25 because we don't -- we don't have any way

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2 of verifying that, we're just --

3 MR. MORRIS: You do, actually. You
4 could just go to Docket No. 21-3004.

5 MS. DEITSCH-PEREZ: If you want to
6 stop this deposition so we can go and pull
7 that document up, we're happy to do it. So
8 I am just asking you for your
9 representation.

10 MR. MORRIS: Sure. I gave that.

11 MS. DEITSCH-PEREZ: Okay.

12 Q. So do you see that this is a
13 document that was actually filed with the Court
14 by Highland Capital Management Fund Advisors?

15 A. No. I get with the first page in
16 the section. Maybe I'm looking at the wrong
17 thing. It says, Highland Capital Management.

18 Q. Don't worry about it. Don't worry
19 about it.

20 A. Maybe I went back -- okay.

21 MR. MORRIS: All right. Can we put
22 up on the screen Exhibit 2.

23 (Exhibit 2 marked.)

24 MR. MORRIS: I think it is
25 Exhibit 1.

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2 MS. DANDENEAU: I'm sorry, John, did
3 you say Exhibit 2 or Exhibit 1?

4 MR. MORRIS: It is Exhibit 2 in the
5 binders so it is premarked Exhibit 2. And
6 now I'm asking -- right there -- going to
7 Exhibit 1 to the document that was marked
8 as Exhibit 2.

9 MS. DANDENEAU: Got it. In the
10 binder there is no --

11 MS. DEITSCH-PEREZ: There is no
12 Exhibit 1.

13 MR. MORRIS: All right. So look at
14 the one on the screen.

15 Q. Do you see, Mr. Waterhouse, that
16 this is a promissory note dated May 31st, 2017,
17 in the approximate amount of \$30.7 million?

18 A. Yes.

19 Q. And do you see that the maker of the
20 note is NexPoint?

21 A. Yes.

22 Q. And that Highland is the payee; is
23 that right?

24 A. Yes.

25 Q. Okay. And do you see in Paragraph 2

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2 this is an annual installment note?

3 A. Can you scroll down.

4 Q. Sure.

5 MR. MORRIS: Can we scroll down --
6 yeah, there you go.

7 A. Right there, yeah. Yes.

8 MR. MORRIS: And can we scroll down
9 to the signature line.

10 Q. And do you recognize that as
11 Mr. Dondero's signature?

12 A. Yes.

13 Q. And is this the promissory note that
14 we talked about earlier where NexPoint had made
15 certain payments in the aggregate amount of
16 about 6 to \$7 million against principal and
17 interest?

18 A. I don't recall discussing the
19 aggregate principal amounts of 6 to \$7 million,
20 but -- so I don't -- I don't recall that prior
21 discussion with those amounts.

22 Q. All right. Let's take a look.
23 NexPoint always included this promissory note
24 as a liability on its audited financial
25 statements; right?

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2 A. Yes.

3 Q. And NexPoint had its financial
4 statements audited; isn't that correct?

5 A. Yes.

6 Q. And was the process of NexPoint's
7 audit similar to the process you described
8 earlier for Highland and HCMFA?

9 A. Yes, it is similar.

10 Q. Okay.

11 MR. MORRIS: Can we put up
12 NexPoint's audited financials and let
13 everybody know what exhibit number it is,
14 La Asia?

15 MS. CANTY: It is going to be
16 Exhibit 46.

17 (Exhibit 46 marked.)

18 Q. And do you see, sir, that we've put
19 up NexPoint Advisors' consolidated financial
20 statements and supplemental information for the
21 period ending December 31st, 2019?

22 A. Yes.

23 Q. Did you participate in the process
24 whereby these audited financial statements were
25 issued?

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2 A. I didn't participate directly, as
3 I've described before, about the -- the team
4 performing the audit.

5 Q. Do you recall when the audit of
6 NexPoint's financial statements for the period
7 ending December 31st, 2019 was completed?

8 A. Yes.

9 Q. And when do you recall it being
10 completed?

11 A. In January of 2021.

12 Q. Do you know why the 2019 audit
13 report wasn't completed until January of 2021?

14 A. Yes.

15 Q. Why was the NexPoint audit report
16 for the period ending 12/31/19 not completed
17 until January 2021?

18 A. Because we had to deal with working
19 from home from -- with COVID, and on top of all
20 of our daily responsibilities and job duties
21 at -- at providing -- at Highland providing
22 services to NexPoint, we had to do all of this
23 extra work for a bankruptcy that was filed in
24 October of 2019.

25 MR. MORRIS: Can we go to the

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2 balance sheet on page 3? Okay. Stop right
3 there.

4 Q. Do you see under the liabilities
5 section, the last item is note payable to
6 affiliate?

7 A. Yes.

8 Q. And is that the note that we just
9 looked at?

10 MS. DANDENEAU: Objection to form.

11 Q. Withdrawn.

12 Is that the approximately
13 \$30 million note that we just looked at that
14 was dated from 2017?

15 MS. DANDENEAU: Objection to form.

16 A. I believe no.

17 Q. Okay. You're not aware of any other
18 note that was outstanding from NexPoint to
19 Highland as of the end of the year 2019, other
20 than that one \$30 million note; right?

21 A. I don't recall.

22 Q. And as of the end of 2019, the
23 principal amount that was due on the note was
24 approximately \$23 million; right?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. Approximately.

4 Q. And does that refresh your

5 recollection that between the time the note was

6 executed and the end of 2019, that NexPoint had

7 paid down approximately \$7 million?

8 A. Yes. If we are just doing the math,

9 yes.

10 Q. Okay. Did NexPoint complete its

11 audit from 2020?

12 A. Sorry, you kind of broke up. Do

13 NexPoint complete?

14 Q. The audit of its financial

15 statements for the period ending December 31st,

16 2020?

17 A. No.

18 Q. No, it's not complete?

19 A. No, it is not complete.

20 Q. Did HCMFA complete its audit for the

21 year ending December 31st, 2020?

22 A. No.

23 MR. MORRIS: Can we go to page 15,

24 please, the paragraph at the bottom.

25 Q. Do you see that NexPoint has

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2 included under notes payable to Highland a
3 reference to the amounts that were outstanding
4 as of the year-end 2019 under the note that we
5 looked at just a moment ago?

6 A. Yes. Are you talking about the
7 second paragraph?

8 Q. I'm actually talking about first
9 paragraph. Do you understand that the first
10 paragraph is a reference to the 2017 note, and
11 the amounts that were -- the principal amount
12 that was outstanding as of the end of 2019?

13 MS. DANDENEAU: Objection to form.
14 John, do you mean the first paragraph of
15 that page?

16 MR. MORRIS: No, the first paragraph
17 under notes payable to Highland.

18 A. Yeah, I see the paragraph, and
19 again, this is what I answered earlier. I
20 believe so, just because I don't -- again, this
21 is a number in a balance sheet, and without
22 matching it up and seeing the detail with the
23 schedule like I kind of talked about for
24 Highland's financial statements, it is a little
25 bit more difficult to tie everything in

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2 perfectly together.

3 Q. Okay. But you're not aware of any
4 note that was outstanding at the end of 2019
5 from NexPoint to Highland other than whatever
6 principal was still due and owing under the
7 \$30 million note issued in 2017; correct?

8 A. Well, it -- I don't -- there is
9 reference in the second paragraph. I don't --
10 I don't -- I don't recall what that is
11 referring to, so I don't -- I don't know.

12 Q. Well, if you listen carefully to my
13 question, right, I'm asking about notes that
14 were outstanding at the end of 2019, and if we
15 look at the paragraph you just referred to, it
16 says that during the year there were new notes
17 issued totaling \$1.5 million, but by the end of
18 the year, no principal or interest was
19 outstanding on the notes.

20 Do you see that?

21 A. Oh, I do, yes.

22 Q. So does that refresh your
23 recollection that there were no notes
24 outstanding from NexPoint to Highland other
25 than the principal remaining under the original

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2 \$30 million 2017 note that we looked at a
3 moment ago?

4 A. Well, we're at the bottom of the
5 page. Is there anything on page 16?

6 Q. That is a fair question, sure. That
7 is it.

8 A. Okay. So it appears that that is
9 the only note that is detailed in the notes in
10 the financial statement.

11 Q. And you don't have any memory of any
12 other note other than the 2017 note, right,
13 being outstanding as of the end of the year?

14 A. I deal with thousands of
15 transactions every year. I don't really have a
16 very specific memory for what exactly was
17 outstanding.

18 MR. MORRIS: Why don't we take a
19 break now. We've been going for a little
20 while. It's 3:26. Let's come back at
21 3:40.

22 VIDEOGRAPHER: We're going off the
23 record at 3:26 p.m.

24 (Recess taken 3:26 p.m. to 3:39 p.m.)

25 VIDEOGRAPHER: We are going back on

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2 the record at 3:39 p.m.

3 Q. All right. Mr. Waterhouse, we -- I
4 don't think we have a lot more here.

5 To the best of your knowledge and
6 recollection, were all affiliate loans and all
7 loans made to Mr. Dondero recorded on
8 Highland's books and records as assets of
9 Highland?

10 MS. DANDENEAU: Object to the form,
11 asked and answered.

12 A. To my knowledge, yes.

13 Q. Okay. Can you recall any loan to
14 any affiliate or Mr. Dondero that was not
15 recorded on Highland's books and records as an
16 asset?

17 A. Like during my time as CFO? I don't
18 recall.

19 Q. How about after the time that you
20 were CFO? Did you recall that there was a loan
21 by Highland to an affiliate or to Mr. Dondero
22 that hadn't been previously recorded on
23 Highland's books as an asset?

24 MS. DANDENEAU: Objection to form.

25 A. I guess I don't understand the

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2 question. I left Highland as of -- I'm not
3 aware of -- I left Highland in February --
4 probably the last day of February of 2021.

5 Q. Okay.

6 A. I'm not -- I'm not aware of any --
7 I'm not aware of anything past that date.

8 Q. Okay. While you were the CFO at
9 Highland, did Highland prepare in the ordinary
10 course of business a document that reported
11 operating results on a monthly basis?

12 A. Yes.

13 Q. And are you generally familiar with
14 the monthly operating reports?

15 A. Yeah. You are referring to the
16 reports that we filed to the Court every month?

17 Q. I apologize, I'm not. I'm taking
18 you back to the pre-petition period. There was
19 a report that I have seen that I'm going to
20 show you, but I'm just asking for your
21 knowledge.

22 MR. MORRIS: Let's put it up on the
23 screen, Exhibit 39.

24 (Exhibit 39 marked.)

25 Q. Do you see this is a document that

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2 is called operating results?

3 A. Yeah, that's the title of it.

4 Q. Okay. And was a report of operating
5 results prepared by Highland on a monthly basis
6 during the time that you served as CFO?

7 A. No.

8 Q. Are you familiar with a document of
9 this type? And we can certainly look at the
10 next page or two to refresh your recollection.

11 A. I'm just looking at the title. I
12 don't really -- again, as I discussed before, I
13 don't have any records or documents or emails
14 or appointments or anything that I was able to
15 use prior to -- prior to this deposition, so
16 I'm doing the best I can.

17 Q. Okay. You don't need to apologize.
18 I'm just asking you if you are familiar with
19 the document called Operating Results that was
20 prepared on a monthly basis at Highland?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 Q. If you're not, you're not.

24 A. I don't believe this was prepared on
25 a monthly basis.

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2 Q. Okay. Do you see that this one
3 is -- is dated February 2018?

4 A. Yes.

5 Q. Do you have -- do you believe --
6 have you ever seen a document that was
7 purporting to report operating results for
8 Highland?

9 MS. DANDENEAU: Objection to form.

10 A. Yes.

11 Q. Okay. And when you say that you
12 don't believe it was produced on a monthly
13 basis, was it produced on any periodic bases to
14 the best of your recollection?

15 A. I believe it was -- it was prepared
16 on an annual basis.

17 Q. Okay.

18 MR. MORRIS: Can we look at the next
19 page.

20 Q. Do you see that there is a statement
21 here called: Significant items impacting
22 HCMLP's balance sheet?

23 And it is dated February 2018.

24 A. Yes.

25 Q. Do you recall that there was a

1 WATERHOUSE - 10-19-21

2 report that Highland prepared that identified
3 significant items impacting the balance sheet?

4 A. A report that was prepared.

5 Q. Let me ask a better question: Did
6 Highland prepare reports to the best of your
7 recollection that identified significant items
8 that impacted its balance sheet?

9 A. Well, so Highland prepared a -- a
10 monthly close package. And maybe I'm
11 getting -- and -- and maybe change names at one
12 time or maybe I'm just -- again, just
13 misremembering -- but in that, yes, there is a
14 page that would detail just changes in -- you
15 know, just changes month over month on the
16 balance sheet.

17 Q. Okay. And maybe it is my fault.
18 Maybe I didn't know the proper name for it.
19 But let's use the phrase "monthly close
20 package."

21 Did Highland prepare a monthly close
22 package in the ordinary course of business
23 during the time that you served as CFO?

24 MS. DANDENEAU: Objection to form.

25 A. Yes.

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2 Q. And did the monthly close package
3 that Highland prepared include information
4 concerning significant items that impacted
5 Highland's balance sheet?

6 A. Yes, it had a page like that is --
7 that is on the screen that detailed items
8 like -- of that nature.

9 Q. And do you know who -- was there
10 anybody at Highland who was responsible for
11 overseeing the preparation of the monthly
12 reporting package?

13 A. That would have been -- again, it
14 varies over time during my tenure as CFO.
15 It -- it varied over -- over time, but -- but
16 typically a -- a corporate accounting manager.

17 Q. And who were the corporate
18 accounting managers during your tenure as CFO?

19 A. It would have been Dave Klos and
20 Kristin Hendrix.

21 Q. And did the corporate accounting
22 manager deliver to you drafts of the monthly
23 close package before it was finalized?

24 A. Sometimes.

25 Q. Was that the practice even if there

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2 were exceptions to the practice?

3 A. The practice meaning that they
4 sometimes lured them to me?

5 Q. That that was the expectation even
6 if circumstances prevented that from happening
7 from time to time.

8 MS. DEITSCH-PEREZ: Object to the
9 form.

10 A. I -- I would say it started out that
11 way but over the years it -- it was not
12 enforced.

13 Q. Okay. So you were -- you reviewed
14 and approved monthly -- monthly reporting
15 packages for a certain period of time and then
16 over time you stopped doing that.

17 Do I have that right?

18 MS. DANDENEAU: Objection to form.

19 A. Yes, I mean, if you're talking about
20 a formal meeting where we sit down and go
21 through and approve it. I would say that was
22 standard practice a decade -- you know, early
23 on. And as time went on that -- that -- that
24 practice wasn't followed.

25 Q. Okay.

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2 A. And, quite frankly, I don't even
3 know if these were -- these were sent to me
4 even in any capacity.

5 Q. What was the purpose of preparing
6 the monthly reporting package -- withdrawn.

7 What was the purpose of preparing
8 the monthly close package?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. The -- the original purpose was so
12 that it would just -- it would be a report that
13 was reviewed monthly with senior management.

14 Q. Who was included in the idea of
15 senior management?

16 A. You know, I think originally when
17 this was conceived that would have been like
18 Jim Dondero and Mark Okada.

19 Q. Were monthly reporting -- withdrawn.

20 Were monthly close packages prepared
21 to the best of your knowledge until the time
22 you left Highland?

23 A. To my knowledge -- I don't know,
24 actually. I mean, to my knowledge, I believe
25 it was being -- that was still being done. I

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2 don't know because, again, I wasn't reviewing
3 them. I hadn't reviewed a close package for --
4 for a long time. But I believe the standard
5 practice that was still being carried out.

6 Q. Did you ever have any discussions
7 with the debtor's independent board concerning
8 any promissory notes that were issued by any of
9 the affiliates or Mr. Dondero?

10 A. I can't -- I can't -- I can't recall
11 specifically.

12 Q. Did you speak with the independent
13 board from time to time?

14 A. Yes, from -- from -- from time to
15 time I had discussions with the independent
16 board members, you know, either -- either, you
17 know, by themselves or wholly, you know, as --
18 as a -- as a combined work.

19 Q. Okay. Before we talk about
20 Mr. Seery, do you recall ever having a
21 conversation with Mr. Nelms or Mr. Dubel
22 concerning any promissory note that was
23 rendered by one of the affiliates or
24 Mr. Dondero to Highland?

25 A. I don't recall any conversations

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2 specifically.

3 Q. Do you know if the topic was ever
4 discussed, even if you don't remember it
5 specifically?

6 MS. DANDENEAU: Objection to form.

7 A. It -- it -- it may have. I don't
8 know. I don't recall.

9 Q. Do you recall ever discussing any
10 promissory note issued by any of the affiliates
11 or Mr. Dondero with James Seery?

12 A. I don't -- I don't recall
13 specifically.

14 Q. Do you recall generally ever
15 discussing the topic of promissory notes issued
16 by any of the affiliates or Mr. Dondero to
17 Highland with Mr. Seery?

18 A. Nothing -- nothing is really jumping
19 out at me.

20 Q. Do you recall if you ever told
21 Mr. Seery that any of the affiliates or
22 Mr. Dondero didn't have an obligation to pay
23 all amounts due and owing under their notes?

24 A. I don't recall having that
25 conversation.

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2 Q. Did you ever tell Mr. Seery that you
3 had any reason to believe that the amounts
4 reflected in the notes issued by the affiliates
5 and Mr. Dondero were invalid for any reason?

6 A. I don't -- I don't recall.

7 Q. Did you tell Mr. Dondero -- did you
8 tell Mr. Seery that you thought the promissory
9 notes issued by the advisors and Mr. Dondero
10 that were outstanding as of the petition date
11 were assets of the estate?

12 A. I don't recall having a specific
13 conversation about those -- you know, those
14 notes outstanding as -- as of the petition date
15 being assets on the estate. I mean, we put
16 together -- you know, they're in the books and
17 records of the financial statements. I don't
18 recall having a specific conversation.

19 Q. Did you ever prepare any documents
20 that were delivered to Mr. Seery that concerned
21 the promissory notes issued by any of the
22 affiliates or Mr. Dondero?

23 MS. DANDENEAU: Objection to form.

24 A. Did I produce any that concerned --
25 you mean did I just -- did I give Mr. Seery

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2 anything that -- that said I have concerns over
3 these notes?

4 Q. No. Let me try again. Maybe it was
5 my question.

6 Did you ever give Mr. Seery any
7 information concerning any of the notes that
8 were issued by any of the affiliates or
9 Mr. Dondero?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall if I did or not. I
12 don't -- I don't remember. I mean, you have my
13 emails. You may have asked. Again, I don't --
14 I don't know.

15 MR. MORRIS: Can we put up the
16 document that has been premarked as Exhibit
17 39?

18 MS. DANDENEAU: John, that is this
19 document, isn't it?

20 MR. MORRIS: Oh, yeah, it might be,
21 as a matter of fact. Let's go to Number
22 40.

23 (Exhibit 40 marked.)

24 Q. During the bankruptcy,
25 Mr. Waterhouse, did you prepare documents that

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2 were filed with the bankruptcy court?

3 A. I didn't -- I didn't prepare them
4 personally.

5 Q. Did people prepare them under your
6 direction?

7 A. Yes. There were members of the team
8 that prepared them, and they worked in -- you
9 know, there were members of DSI that were
10 involved in the process as well.

11 Q. To the best of your knowledge, did
12 DSI rely on the employees of Highland for the
13 information that they used to prepare the
14 bankruptcy filings?

15 A. Yes. The books and records were
16 with the Highland personnel.

17 Q. Okay. And do you see on the screen
18 here, there is a document that we have marked
19 as Exhibit 40 that is -- that is titled Summary
20 of Assets and Liabilities?

21 A. Uh-huh.

22 Q. Okay. And do you recall reviewing
23 any summary of assets and liabilities before it
24 was filed with the bankruptcy court?

25 A. Yes, I recall reviewing this at a

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2 high level.

3 Q. And did you believe that it was
4 accurate at the time it was filed?

5 A. I didn't have any other reason to
6 believe otherwise.

7 Q. Okay. Do you see that the total
8 value of all properties listed in Part 1 is
9 approximately \$410 million?

10 MS. DEITSCH-PEREZ: Objection to
11 form.

12 A. Yes, it is in 1c.

13 Q. Yes.

14 A. Yes, I see that.

15 Q. Okay. If we go to the second page,
16 now I think I may just have excerpts here, just
17 so everybody is clear, but if we scroll down to
18 the second page, you will see that there is
19 a -- a little further. There you go. You will
20 see there is a reference to Item 71, notes
21 receivable.

22 Do you see that?

23 A. I do.

24 Q. And that was a reference to the
25 notes receivable from the affiliates and

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2 Mr. Dondero, among others; is that right?

3 MS. DANDENEAU: Objection to form.

4 A. Yes. The affiliate notes and the
5 Dondero notes were in this amount, but they
6 weren't -- again, like you said, and among
7 others.

8 Q. Okay. We will look at the
9 specificity because I'm not playing gaming
10 here, but do you know if the \$150 million of
11 notes receivable was included within the
12 \$410 million of total value of the debtor's
13 assets?

14 MS. DANDENEAU: Objection to form.

15 A. I -- I -- I believe so.

16 Q. Right. And so is it fair to say
17 that as of the date this document was prepared,
18 the notes receivable were more than one-third
19 of the value of the debtor's assets?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 MS. DANDENEAU: Object to the form.

23 A. Again, if you are just taking the
24 math, 150 divided by whatever the \$400 million
25 number is above, then yes, you get there.

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2 Q. Okay.

3 A. You know, but as of the time of this
4 filing, that is what was put in this filing,
5 right, but, you know, I mean, numbers --
6 numbers change, facts and circumstances change.

7 Q. But as the CFO of Highland, the
8 debtor in bankruptcy, did you believe that this
9 number accurately reflected the total amount
10 due under the notes receivable?

11 A. That is what we had in our books and
12 records.

13 Q. Okay. And did you believe as the
14 CFO that the books and records accurately
15 reported the then value of the debtor's assets?

16 MS. DANDENEAU: Objection to form.

17 A. We didn't -- as part of this filing,
18 there was no fair value measurement or
19 anything. These were just accounting entries
20 for the promissory notes. There is no analysis
21 for impairment or fair market value adjustments
22 or anything of that nature. This is purely
23 taking numbers and putting them in our form.

24 Q. Did you do any impairment analysis
25 at any time while you were employed by

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2 Highland?

3 A. Yes, we did do impairment analysis
4 on -- on assets.

5 Q. Okay. Did you ever do an impairment
6 analysis on any of the promissory notes that
7 were given to Highland by any of the affiliates
8 or Mr. Dondero?

9 A. Not that I recall.

10 Q. Under what circumstances do you
11 prepare impairment analyses?

12 A. As -- as -- if you're preparing
13 financials in accordance with GAAP, generally
14 accepted accounting principles, if you're
15 preparing full GAAP financials, you should be
16 preparing -- you should be undergoing on a
17 periodic basis any fair market value
18 adjustments to assets.

19 As I was instructed at the time of
20 the petition date, we weren't producing GAAP
21 financials. So this wasn't something I was
22 worried about nor concerned about.

23 Q. Okay. Were NexPoint and HCMFA and
24 Highland's audited financial statements
25 prepared in accordance with GAAP?

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2 A. The audited financials -- yes,
3 audited financial statements are prepared in
4 accordance with GAAP.

5 Q. Do you recall whether any of
6 Highland or HCMFA or NexPoint ever made a fair
7 market value adjustment to any of the notes
8 issued by any of the affiliates or Mr. Dondero
9 to Highland?

10 A. I do not recall that happening, but
11 the -- it is because under -- under GAAP,
12 the -- the treatment of liabilities is
13 different than assets.

14 Q. Okay. So then let's just focus on
15 Highland's audited financial statements.

16 The last audited financial
17 statements were for the period ending December
18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had -- you had an obligation
21 to disclose anything to PricewaterhouseCoopers
22 concerning any subsequent events between the
23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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2 A. Correct.

3 Q. Okay. To the best of your
4 knowledge, as Highland's CFO, did Highland ever
5 make any fair market value adjustments to any
6 of the promissory notes that were carried on
7 its balance sheet and that were issued by any
8 of the affiliates or Mr. Dondero?

9 A. I think I answered that question
10 earlier. I don't recall doing that for any of
11 the -- those -- those notes. So it would have
12 included the audit for the -- for the 2018
13 period.

14 Q. Okay.

15 MR. MORRIS: Can we go to the next
16 page.

17 Q. Do you see this is a note a list of
18 notes receivable? Do you see that?

19 A. Yes, I do.

20 Q. And do you see that this ties into
21 the page that we were just looking?

22 A. I'm sorry, can we go back to the
23 prior page? I mean, it was at 150,331,222. It
24 was on the prior page. Next page. Yes, it
25 agrees.

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2 Q. Okay. So now let's look at that
3 schedule. So this was the face amount of all
4 of the promissory notes that Highland held at
5 the time this document was filed with the
6 bankruptcy court; right?

7 A. Yes.

8 Q. There is a footnote there that says,
9 doubtful or uncollectible accounts are
10 evaluated at year-end.

11 Do you see that?

12 A. I do.

13 Q. Okay. And is it fair to say that as
14 of the year-end 2018, the year before this,
15 that to the extent any of these notes were
16 outstanding at that time, they weren't deemed
17 to be doubtful or uncollectible?

18 A. Yeah. For the 2018 audit, there
19 weren't any -- there weren't any adjustments to
20 fair value.

21 Q. Okay. And during the bankruptcy, do
22 you recall that Highland subsequently reserved
23 for the Hunter Mountain Investment Trust note?

24 A. Yes.

25 Q. Why did Highland -- were you

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2 involved in the decision to reserve the Hunter
3 Mountain Investment Trust note?

4 A. I was not.

5 Q. Do you know why Highland decided to
6 reserve for the Hunter Mountain Investment
7 Trust note?

8 A. I don't know yet decision was made.
9 I believe it was made by someone at DSI.

10 Q. Okay. I'm just asking if you know
11 why.

12 Did you ever ask anyone why they
13 reserved for that particular note?

14 A. I don't recall.

15 Q. Do you know whether the debtor
16 reserved for any other note on this list during
17 the bankruptcy?

18 A. Again, I don't recall. I wasn't
19 part of any process of -- again, like any fair
20 value adjustments or anything to that degree.
21 Like I said, a lot of that was done by DSI and
22 it was kind of out of our court.

23 Q. Okay. Do you know if any note
24 receivable on this list was ever deemed by the
25 debtor to be doubtful or uncollectible?

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2 A. I don't -- I don't have a
3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with
5 anybody at any time about whether any of the
6 notes receivable on this list should be deemed
7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were
9 told we didn't have to keep GAAP financials.
10 We weren't having -- you know, there is no
11 underlying audits being performed, so I mean,
12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation
15 with anybody about any of the notes receivable
16 and whether they should be deemed to be
17 doubtful or uncollectible? Did you have the
18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody
22 that you believed any of the notes receivable
23 on this list should be doubtful -- should be
24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall. I mean, it may have
3 happened, you know, again, when we initially
4 getting DSI up to speed and going through
5 financials, it may have happened, but I don't
6 recall specifically.

7 Q. While you were the CFO of Highland
8 during the time that the company was in
9 bankruptcy, did you have any reason to believe
10 that any of the notes receivable on this list
11 other than Hunter Mountain Investment Trust
12 should have been characterized as doubtful or
13 uncollectible?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Form.

16 A. I didn't know. I didn't form an
17 opinion. Bankruptcy was new to me. It still
18 is new to me, even after going through this.
19 So I really didn't know what to expect nor
20 really -- you know, I didn't know.

21 MR. MORRIS: I move to strike.

22 Q. During the period of Highland's
23 bankruptcy when you were serving as CFO, did
24 you have any reason to believe any of the notes
25 on this list were doubtful or uncollectible?

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2 MS. DEITSCH-PEREZ: This is like the
3 fifth time you've asked it. Object to the
4 form.

5 MR. MORRIS: I'm moving to strike,
6 if you haven't noticed, because he's not
7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering
9 the question, you just didn't like it, like
10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't -- we brought up a
14 myriad of issues at the start of the bankruptcy
15 case. I don't recall if this was one of them,
16 but, again, there are a lot of things we
17 couldn't change. Even, you know, I was told
18 status quo, blah, blah, blah, right, there is a
19 stay, you can't -- you know, I don't recall
20 specifically, but that doesn't mean it didn't
21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in
24 bankruptcy and you served as CFO, did you have
25 any reason to believe that any of the notes

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2 receivable on this list were doubtful or
3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,
9 yes, we -- at the beginning after filing and we
10 were getting DSI and others up to speed, you
11 know, we had a myriad of discussions of a lot
12 of things and this was likely one of them. I
13 don't -- but I don't recall specifically we
14 talked --

15 Q. I don't want to know -- I don't want
16 to know what was --

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him
19 finish his answer.

20 A. I spoke -- we had -- we were
21 bringing Fred Karesa and Brad Sharp (phonetic)
22 up to speed on all of these items, contracts,
23 and investments and going through -- we had
24 hours and hours and hours of discussion. And
25 then not only do I have to repeat this not

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2 once, twice, three, four times with -- you
3 know, I mean, we -- I don't -- I don't remember
4 the sum culmination of all these discussions.
5 They all kind of blend together.

6 MR. MORRIS: Okay. I move to strike
7 and I will try one more time.

8 Q. Did you ever tell anybody at DSI
9 that you believed any of the notes receivable
10 on this list were doubtful or uncollectible?

11 MS. DANDENEAU: Object to form.

12 A. Potentially.

13 Q. Potentially you told them or
14 potentially they were doubtful or
15 uncollectible?

16 A. Potentially I told them that we
17 needed to look at the value of these -- of
18 these assets.

19 Q. Okay. Did you -- okay. It is
20 potential that you told them and it is
21 potentially that you didn't; right?

22 MS. DANDENEAU: Objection to form.

23 A. I've gone through that. I don't
24 recall specifically.

25 Q. So you should just -- I don't want

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2 to tell what you to do. Do you have --

3 MS. DANDENEAU: Good.

4 Q. Other than -- other than telling
5 them that they should look at the values, do
6 you have any recollection whatsoever of ever
7 having told anybody at DSI that any of the
8 notes receivable on this page were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. I recall having general discussions
14 about everything on our balance sheet which
15 would have included these -- these notes
16 receivable.

17 Q. Okay.

18 A. I don't recall specifically where
19 those discussions delved into.

20 Q. Do you recall any discussion at all
21 on the topic of whether any of these notes on
22 this list were doubtful or uncollectible?

23 MR. AIGEN: Mr. Morris, how on earth
24 is that question different from the
25 question that you just asked for the last

1 WATERHOUSE - 10-19-21

2 five times? I mean, really I thought you
3 were -- (overspeak.)

4 MR. MORRIS: Because he never
5 answered it.

6 MS. DEITSCH-PEREZ: Are you
7 listening to him?

8 MR. MORRIS: You know --

9 MS. DEITSCH-PEREZ: He basically
10 said that he had a conversation with DSI
11 that went over all of this stuff and that
12 conversation could have included the notes
13 but he doesn't recall specifically.

14 What more do you want him -- to ask
15 of him?

16 MR. MORRIS: I want him -- I would
17 love him to say -- I would like him to
18 testify to the truth, and that is he has no
19 recollection.

20 MS. DEITSCH-PEREZ: Well, the truth
21 as you would like to see it, but -- but he
22 is testifying truthfully. And I -- and, by
23 the way, I move to strike that comment --

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: -- because it

1 WATERHOUSE - 10-19-21

2 suggests that he has not testified
3 truthfully.

4 MR. MORRIS: I will ask my question
5 again. And if at any time you want to
6 direct him not to answer, that is your
7 prerogative.

8 Q. Mr. Waterhouse, do you have any
9 recollection at all of ever telling anybody
10 from DSI that any of these notes were doubtful
11 or uncollectible?

12 MS. DANDENEAU: Object to form.

13 A. I don't remember specifically.

14 Q. Do you remember generally that
15 specific topic?

16 A. We generally talked about assets,
17 values. If -- we had discussions of that and
18 collectability in nature. I mean, of Highland,
19 the funds, the CLOs, the entire complex. We
20 had discussions like that, which is, you know,
21 as you look at a billion dollar consolidated
22 balance sheet.

23 So I generally remember -- this is
24 billions of dollars, including these assets --
25 having discussions of this -- of this type.

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2 Q. Do you believe that an affiliate
3 loan on this list was doubtful or
4 uncollectible? Would you have told that to
5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like -- again, if we --
9 if -- if we weren't preparing financial
10 statements in accordance with GAAP, and -- you
11 know, if DSI at that point -- they were --
12 again, I was new to bankruptcy.

13 The CRO is -- we are delegating
14 everything to the CRO. All the decisionmaking.
15 Remember -- remember when you and I went into
16 Delaware Court and we were saying DSI basically
17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and
19 basically we're running everything through DSI.
20 That was what this was like in the early part.

21 Everything was communicated through
22 DSI. So DSI says this. DSI says that. That
23 is what we're doing, and we're pointing out
24 things to them.

25 Now, they decide what direction this

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2 goes.

3 Q. Did you point out that any of
4 these --

5 A. I don't recall specifically.

6 Q. Okay. At any time that you served
7 as Highland's CFO, did you ever point out to
8 DSI that any of these loans were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. If you're asking me if I had a
14 conversation with DSI, if any of these loans
15 were doubtful or uncollectible, I don't recall
16 specifically.

17 Q. Do you recall that the debtor filed
18 on the docket monthly operating reports?

19 A. Yes.

20 Q. You prepared those personally,
21 didn't you?

22 MS. DEITSCH-PEREZ: Objection to
23 form.

24 A. I didn't personally prepare them,
25 the team did with DSI.

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2 Q. But you signed them; correct?

3 A. My signature is on the MORs.

4 Q. And you signed them as the preparer
5 of the document; correct?

6 A. Yes, I did this pursuant to DSI's
7 instructions.

8 Q. Okay. You wouldn't have signed the
9 document if you didn't believe it to be
10 accurate; correct?

11 A. If I had reason to believe it
12 wasn't, presumably I wouldn't have signed it.

13 Q. Okay. And do you have any reason to
14 believe right now that any monthly operating
15 report that has your signature on it was
16 inaccurate in any way?

17 MS. DEITSCH-PEREZ: Object to the
18 form.

19 A. My understanding of the monthly
20 operating reports is we were filing them in
21 accordance with the standards set by the Court.
22 It wasn't -- you know, again, I don't -- you
23 know, it wasn't GAAP. It wasn't these other
24 standards, so I testified I didn't have
25 experience in this. The CRO was running the

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2 show. I followed their advice.

3 Q. But you assured yourself that
4 everything in the report was accurate before
5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO
8 and their team and their experience and their
9 guidance for doing this for many, many, many
10 years to -- to -- to categorize and put things
11 in ways on the form.

12 You know, my team had -- had not
13 filled out these forms before and needed all of
14 this guidance. I'm not an expert in this. I
15 have oversight of it. I signed the form. DSI
16 told me to.

17 Q. And you and your team are the source
18 of the information that DSI used to create the
19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with
22 the -- with -- with the corporate accounting
23 team.

24 Q. Okay. And the corporate accounting
25 team was the corporate accounting team that was

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2 under your direction; correct?

3 A. Yes.

4 Q. So -- so your team was responsible
5 for maintaining Highland's books and records;
6 correct?

7 A. I'm sorry, my team was responsible?

8 Q. Correct.

9 A. Yes. They -- they -- they were
10 the -- the -- the general ledger of Highland,
11 that responsibility was with the corporate
12 accounting team.

13 Q. The corporate accounting group
14 reported to you; correct?

15 A. Yes.

16 MR. MORRIS: Can we put up 41,
17 please.

18 (Exhibit 41 marked.)

19 Q. All right. You will see that this
20 is a report that is dated January 31st, 2020,
21 but it is for the month ending December 2019.

22 Do you see that?

23 A. I do.

24 Q. And you signed this report in your
25 capacity as the chief financial officer of

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2 Highland; correct?

3 A. Yes.

4 Q. And you're the preparer -- you're
5 identified as the preparer of the report;
6 correct?

7 A. That is correct.

8 Q. Do you recall participating in the
9 preparation of monthly operating reports?

10 A. As I testified earlier, it was put
11 together, you know, with the team. The team
12 worked with DSI to put these monthly operating
13 reports together. We had no experience at this
14 time of the monthly operating reports or things
15 of this nature.

16 MR. MORRIS: Can you turn to the
17 next page, please.

18 Q. Do you see a line item under assets
19 due from affiliates?

20 A. Yes, I do.

21 Q. Okay. And to the best of your
22 knowledge and understanding, as the person who
23 is identified as the preparer of this report,
24 does that line item include the affiliate loans
25 that we've been talking about?

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2 A. Again, I would have to see, just
3 like we did with the financial statements of
4 Highland and NexPoint, I would have to see a
5 detailed build, but, you know, if you look at
6 the other line items, you know, the only other
7 place it could be would be in -- in other
8 assets.

9 Q. Okay. And as a matter of
10 arithmetic, is it fair to say that is the value
11 of the assets due from affiliates was more than
12 25 percent of the value of Highland's total
13 assets as of 12/31/2019?

14 MS. DANDENEAU: Objection to form.

15 A. I'm really not doing the mental math
16 right now, so I've been going at this depo for
17 hours, so I'm really not -- you know --

18 Q. All right. No problem.

19 A. -- these are millions of dollars.

20 Q. Let's look at the Footnote 1,
21 please. Do you see there is a reference to the
22 Hunter Mountain note?

23 A. Yes, I see that in Footnote 1.

24 Q. Okay. And that's the reserve that
25 was taken against that note?

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2 A. Yes, that is what this indicates.

3 Q. Okay. And were you aware that the
4 reserve was being taken on that it was?

5 A. I was -- I was aware, yeah, at some
6 point, yes.

7 Q. Okay. And are you aware of any
8 reserve being taken with respect to any other
9 note that was issued in favor of Highland?

10 A. Again, as I testified, we didn't go
11 through an analysis on -- on -- on the other
12 notes.

13 Q. Can we turn --

14 A. I believe -- I believe it says that
15 in Footnote 1, fair value has not been
16 determined with respect to any of the notes.

17 So this footnote -- footnotes, look,
18 there has been no determination.

19 Q. Okay. The determination was made in
20 the audited financial statements just six
21 months earlier; right? We saw that earlier?

22 A. That was as of 12/31/18. I mean,
23 things -- circumstances -- there's a bank --
24 circumstances change, things change -- things
25 change over time, you know, facts and

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2 circumstances change. Again, you have to do an
3 analysis.

4 Q. Okay. And you do recall that in
5 Highland's 2018 financial statement, all of the
6 notes issued by affiliates and Mr. Dondero that
7 were due at year-end had a fair value equal to
8 the carrying value; correct? We looked at
9 that?

10 A. Yes. That was in the -- in the
11 disclosure for the -- for the affiliate notes,
12 yes.

13 Q. And -- and you were obligated to
14 share with PwC any subsequent events between
15 the end of 2018 and the date that you signed
16 your management representation letter on June
17 3rd, 2019; correct?

18 MS. DEITSCH-PEREZ: Object to the
19 form.

20 A. Yes. I -- I -- I signed the
21 management, you know, my signature is in the
22 management representation letter -- I hope I'm
23 answering your question -- that is dated in
24 June with the representations made in that
25 management representation letter.

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2 Q. Okay. And there was nothing that
3 caused PricewaterhouseCoopers to include in
4 subsequent events any adjustment to the
5 conclusion that the fair value of the affiliate
6 notes and the notes issued by Mr. Dondero
7 equaled the carrying value; correct?

8 MS. DANDENEAU: Objection to the
9 form.

10 A. That is correct. That is what was
11 in the -- in the -- in the footnotes.

12 Q. Okay. So are you aware of anything
13 that occurred between June 3rd, 2019 and
14 December 31st, 2019 that would have caused the
15 fair value of the notes to differ from the
16 carrying value?

17 A. Yeah. Highland filed for
18 bankruptcy, things changed -- I mean, there was
19 a bankruptcy filed in October of -- of -- of
20 2019, right, the petition date that we've
21 described earlier.

22 I mean, I had a -- I guess looking
23 back naively, I thought we were going to get an
24 audit from PwC for year-ended 2019, and when we
25 had discussions with PwC, they were like, are

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2 you crazy, we're not auditing this. Values
3 change, all these things change, bankruptcy
4 changes the entire scenario. I mean -- and
5 they're like, we're not -- we're not touching
6 this.

7 And so, you know, I was like, okay,
8 sorry, I get it, okay, no an audit.

9 I mean, it is -- you know, and --
10 you know, and we weren't preparing GAAP
11 financial statements.

12 Again, I didn't know what we were
13 doing in relation to our financial statements,
14 but these were the discussions I was having at
15 the time. And yeah, I mean, filing bankruptcy
16 from what I got from outside auditors and
17 others involved changed things dramatically.

18 Q. Okay. Highland wasn't the obligor
19 under any of the notes that we're talking
20 about; correct?

21 A. No.

22 Q. So --

23 A. That's right.

24 Q. So can you identify any fact that
25 would cause the fair value to deviate from the

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2 carrying value during the seven-month period
3 between June 3rd and the end of the year, 2019?

4 MS. DANDENEAU: Objection to form.

5 A. No. I mean, I'm putting myself back
6 at that time, right. Hindsight is 2020, but we
7 didn't do an analysis, but we would have done a
8 fulsome analysis and looked at all of the facts
9 and circumstances at the time, but asset values
10 change. You know, there could have been a
11 market crash in hindsight in 2020, which --
12 which affected entities' abilities.

13 There could have been all of these
14 things, right, that -- that happen. It is --
15 it is easy to look back in hindsight, but when
16 you are looking at this in -- in realtime, the
17 analysis is different, and again, we didn't do
18 an analysis.

19 Q. Okay. You didn't do an analysis.

20 Do I have that right?

21 A. I don't -- I don't recall doing one
22 or maybe -- you know, I don't recall doing one.

23 MR. MORRIS: Okay. I'm going to
24 take a break. I may be done, so the time
25 now is -- is 4:30 your time. Let's just

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2 take a short break until 4:40 your time.

3 MS. DANDENEAU: Okay.

4 VIDEOGRAPHER: We're going off the
5 record, 4:31 p.m.

6 (Recess taken 4:31 p.m. to 4:43 p.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 4:43 p.m.

9 MR. MORRIS: I have no further
10 questions.

11 MR. RUKAVINA: Okay.

12 Mr. Waterhouse, I will go next.

13 EXAMINATION

14 BY MR. RUKAVINA:

15 Q. Sir, my name is Davor Rukavina. I'm
16 the lawyer for --

17 MR. MORRIS: Hey, Davor, just before
18 you begin, I just want to put on the record
19 Highland's objection to documents that were
20 produced to me 10 minutes before the
21 deposition began.

22 MR. RUKAVINA: What the basis of
23 your objection?

24 MR. MORRIS: That they were due
25 quite some time ago, and the fact that you

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2 had -- I just think it's appropriate to --
3 to dump documents on somebody 10 minutes
4 before the deposition. I just think
5 that's --

6 MR. RUKAVINA: Well, these are
7 documents Highland produced. I'm not aware
8 of any rule I have to give you advance
9 documents when I know for the record that
10 other than the exhibits that you sent to us
11 last week, most of the exhibits you used
12 today you did not provide to me prior to
13 this deposition.

14 MR. MORRIS: No, but the documents
15 were produced by me in -- in litigation,
16 right?

17 MR. RUKAVINA: I'm going to use
18 primarily, John, the documents that you
19 produced to me today, but you may.

20 MR. MORRIS: Primarily. I've got --
21 I've got my objection. You have got your
22 response. Proceed.

23 Q. Mr. Waterhouse, again, I represent
24 the advisors, HCMFA and NexPoint Advisors.

25 Do you understand that?

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2 A. Yes.

3 Q. You and I have never met or talked
4 before today, have we?

5 A. No, I have -- I have heard your
6 voice on calls before.

7 Q. Okay.

8 MR. RUKAVINA: Madam Court Reporter,
9 I will use a few exhibits today. My
10 associate, Mr. Nguyen, will find some way
11 to get them to you. I don't know how to do
12 that, but it looks like you guys do.

13 I am going to use numbers as well.
14 But to differentiate them from Mr. Morris
15 we're going to mark mine with the prefix A
16 for advisors.

17 Do you understand?

18 COURT REPORTER: Yes.

19 MR. RUKAVINA: Okay. Perfect.

20 Q. Okay. So, Mr. Waterhouse, let's
21 start with those two HCMFA notes that you were
22 asked about, one for 5 million and one for
23 2.4 million.

24 Do you recall those notes?

25 A. Yes.

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2 Q. Were you ever the CFO of HCMFA?

3 A. I don't recall.

4 Q. So to the best of your recollection,
5 you were still an officer of HCMFA in 2019,
6 just that your title was treasurer?

7 MR. MORRIS: Object to the form of
8 the question. There is no leading here.
9 He works for your client.

10 MS. DANDENEAU: That is not -- that
11 is not true.

12 MR. MORRIS: He's the treasurer --
13 he is the treasurer of your client. I
14 don't -- I'm going to object every time you
15 try to lead, so...

16 MR. RUKAVINA: Totally fine to
17 object.

18 MR. MORRIS: Okay.

19 Q. Please answer my question,
20 Mr. Waterhouse.

21 A. I'm sorry, could you repeat? There
22 was...

23 Q. Yes. You were -- you testified
24 earlier that in 2019 you were an officer of
25 HCMFA; correct?

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2 A. Yes, I testified that I was the
3 treasurer and I didn't know if that incumbency
4 certificate, you know, was one that appointed
5 me as a treasurer, but yes.

6 Q. I'm just trying to confirm that
7 sitting here today, to the best of your
8 recollection, at that time you were -- your
9 title was treasurer. It was not chief
10 financial officer.

11 A. I don't recall that being my title.

12 Q. Okay. And in May of 2019, however,
13 I think you testified you were the chief
14 financial officer of the debtor; correct?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes, I was -- yes.

18 Q. Okay. As such, in May of 2019, did
19 you have the authority, to your understanding,
20 to unilaterally loan \$5 million or \$2.4 million
21 to anyone on behalf of the debtor?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Sorry, can you repeat that?

25 Q. Yes. So in your capacity as the

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2 chief financial officer of the debtor, Highland
3 Capital Management, L.P., in May of 2019, did
4 you believe that you unilaterally, just Frank
5 Waterhouse, had the authority to loan on behalf
6 of the debtor to anyone \$5 million and
7 \$2.4 million?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. No.

11 Q. Is it because loans of that amount
12 would have had to be approved by someone else?

13 A. Yes.

14 Q. Who in '20 -- in May of 2019, if
15 Highland wanted to loan 5 million or
16 \$2.4 million to someone, what would have been
17 the internal approval procedure?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. If -- if we had loans of that nature
21 that needed to be made due to their size, we
22 would have gotten approval from the -- the
23 president of Highland.

24 Q. And who that was individual?

25 A. It was James Dondero.

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2 Q. Okay. Now, I'm going to ask you a
3 similar question but for a different entity.

4 In May of 2019, as the treasurer of
5 HCMFA, did you believe that you unilaterally
6 had the ability to cause HCMFA to become the
7 borrower of a \$5 million loan and a
8 \$2.4 million loan?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. No.

12 Q. What would -- what would the
13 approval have taken place -- strike that.

14 What would the approval process have
15 been like in May of 2019 at HCMFA for HCMFA to
16 take out a \$7.4 million loan?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. The process would have been similar
20 to what we just discussed on -- for Highland to
21 make a loan to others. So, again, you know,
22 we -- we would have -- either myself or someone
23 on the team would have discussed this with
24 the -- the president and owner of -- of HCMFA.

25 Q. And who was that individual?

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2 A. That was James -- Jim Dondero.

3 Q. So do I understand that in May of
4 2019, on behalf of both the lender, Highland,
5 and the borrower, HCMFA, Mr. Dondero would have
6 had to approve \$7.4 million in loans?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Yes.

10 Q. You mentioned when Mr. Morris was
11 asking you the NAV error, N-A-V error, with
12 respect to TerreStar, without writing us a
13 novel, unless you feel like you have to, can
14 you summarize what that NAV error was? What
15 happened?

16 A. There was a -- in the Highland
17 Global Allocation Fund, it owned at the time an
18 equity interest in a company called TerreStar.
19 And TerreStar is -- at the time was a private
20 company, and it may still be today. Again, I'm
21 putting myself back then as a private company.

22 We had -- sorry, I don't mean we --
23 the fund and the advisor used Houlihan Lokey
24 to -- to value that investment. And during
25 that time there was some trades that were

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2 executed at market levels that were much lower
3 than the Houlihan Lokey model.

4 And based on information and
5 discussions with the portfolio managers and,
6 you know, principals that were very familiar
7 with TerreStar, it was determined that those
8 trades were non-orderly and they were not
9 considered in the valuation as consulted with
10 Houlihan Lokey and PricewaterhouseCoopers at
11 the time.

12 Subsequent to a -- I can't remember
13 the exact circumstances of why the SEC got
14 involved. I think it was due to this -- this
15 investment became a material position in the
16 fund. It triggered an SEC, kind of, inquiry.
17 And as part of that inquiry, they questioned
18 the valuation methodology. "They" meaning the
19 SEC.

20 And at the culmination of that
21 process -- this is all summarized -- the value
22 that was -- that ultimately had to be used in
23 the fund's NAV was different than -- materially
24 different than what the original valuation at
25 Houlihan Lokey provided.

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2 And given that there was this fund
3 was, as we discussed -- I don't know if we
4 discussed it, but it was an open-ended fund
5 that was going -- that was converting to a
6 close-end fund.

7 Due to the fact that it was an
8 open-ended fund, you had to recalculate NAV and
9 see what the impact was on people -- on
10 investors coming in and out of the fund and if
11 there is a detrimental impact and to calculate
12 what that -- what that impact was and if there
13 was any amounts owed to the fund pursuant to
14 the error.

15 Q. Were you personally involved
16 internally at either Highland or HCMFA with
17 these investigations and discussions with the
18 SEC?

19 A. I was.

20 Q. Which other key people or senior
21 people at Highland were involved, to your
22 recollection?

23 A. Myself, Thomas Surgent, David Klos,
24 Lauren Thedford, Jason Post.

25 Q. Mr. Dondero, was he --

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2 A. I believe Cliff Stoops. I'm trying
3 to think. And maybe that is -- that is -- that
4 is -- that is all kind I can recall at the
5 moment.

6 Q. Do you recall whether it was
7 determined that the fund suffered losses as a
8 result of this error?

9 A. The -- the fund -- the -- the --
10 because the open-ended nature of the fund,
11 there were losses that were attributable to
12 investors. Meaning they -- they would have
13 redeemed and got a less money or -- or they
14 subscribed in and maybe because they didn't get
15 enough shares and then they later sold and then
16 they were harmed in that fashion.

17 And there is -- there is -- there
18 were very -- there were very detailed
19 calculations and, you know, all these different
20 scenarios that we had to -- I'm sorry, I keep
21 saying "we" -- that the individuals involved
22 had to calculate and quantify.

23 Q. Well, do you recall whether HCMFA
24 admitted certain fault and liability for this
25 error?

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2 A. I don't recall specifically.

3 Q. Do you recall whether HCMFA caused
4 any funds to be paid to the investors and the
5 fund the subject of the NAV error?

6 A. Yes.

7 Q. Do you recall the approximate amount
8 of funds, moneys paid to the investors and the
9 fund?

10 A. It was -- it was approximately
11 \$7 million.

12 Q. If I was to suggest 7.8 million,
13 would that ring more true or are you sticking
14 with your original answer?

15 A. It was -- it was approximately 7 --
16 7 to \$8 million. Again, I don't remember the
17 exact number, but it was in that ballpark.

18 Q. So regardless of whether HCMFA
19 accepted fault or liability, it caused some
20 \$7 million or more to be paid out to affected
21 investors in the fund?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. And I want to make sure I'm
25 understanding your question because there is a

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2 lot of different entities that are going on to
3 my head.

4 I think what you are saying is based
5 on this error, shareholders were harmed by this
6 approximately \$7.8 million -- by approximately
7 \$7.8 million. Is that what you are asking?

8 Q. Yes, sir.

9 A. Yes, that was -- again, I don't have
10 the exact numbers. If I take -- it was -- it
11 was in that ballpark, and there is a detail
12 calculation and write-up that could, that --
13 that exists someplace.

14 Q. Now, at that time, at the time that
15 the NAV error occurred, was there a contract in
16 place between HCMFA and the debtor pursuant to
17 which the debtor was providing services to
18 HCMFA?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Was that contract generally called a
23 shared services agreement?

24 A. It was generally called that, but
25 there were -- there were -- I mean, it -- it --

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2 it depends on who you talk to, but yes,
3 generally, there were -- there are multiple
4 agreements.

5 Q. Pursuant to one or more of those
6 agreements, was the debtor providing certain
7 services to HCMFA?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes.

11 Q. And can you at a very high level
12 summarize in 2018 and 2019 what those services
13 were?

14 A. Yes, there was a -- yes.

15 Q. Okay. Please -- please go -- go
16 through a short summary.

17 A. There was a -- a cost reimbursement
18 agreement between Highland Capital Management
19 Fund Advisors and Highland Capital Management,
20 L.P. That agreement was for what we referred
21 to as front office services, so investment
22 management, things of that nature.

23 There was I think what most people
24 refer to as the shared services agreement that
25 was -- that agreement was between Highland

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2 Capital Management Fund Advisors and Highland
3 Capital Management for back office services.

4 Q. And can you summarize what you mean
5 by back office services?

6 A. Those services were for accounting,
7 finance, tax, valuation, HR, IT, you know,
8 legal compliance, things of -- things of those
9 nature -- or things of that nature, excuse me.

10 Q. So in the spring of 2019, do you
11 recall whether HCMFA took the position that it
12 was actually Highland that caused the NAV error
13 to occur pursuant to the valuation services
14 that Highland was providing?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I do not recall.

18 Q. Did you ever have any discussions
19 with anyone, Jim Dondero or anyone in the first
20 half of 2019 as to whether Highland, the
21 debtor, that is, had any liability to HCMFA
22 related to the NAV error?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I do not recall.

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2 Q. And then you mentioned that the fund
3 was being closed and some compensation related
4 to that. Can you -- can you elaborate? What
5 were you referring to?

6 A. Right. So the advisor, pursuant to
7 board approval, put a proposal in front of the
8 shareholders of the Highland Global Allocation
9 Fund to convert it from an open-ended fund to a
10 closed-end fund.

11 So an open-ended fund, when
12 shareholders subscribe to the fund or redeem
13 into the fund, they do it at NAV.

14 When it is -- when you have a
15 closed-end fund, closed-end funds are -- are
16 publicly-traded, like on the New York Stock
17 Exchange, exchanges like that, and -- and
18 shareholders or investors, they're not --
19 they're -- they're not subscribing and
20 redeeming with the fund. They are like shares
21 of Apple.

22 Those shares of the Highland Global
23 Allocation Fund trade on an exchange, and that
24 is how you, you know, that is how, you know,
25 you become an equity owner in the fund or you

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2 sell your shares and you are no longer an
3 equity owner.

4 As part of that proposal, the
5 advisor told shareholders if you -- if you vote
6 for this proposal to -- to convert it from an
7 open-ended fund to a closed-end fund, we will
8 pay you some amounts of money. I forgot -- a
9 certain number of points. I think it was
10 like -- it was like two to three points or
11 something -- something like that.

12 Q. Okay. You mentioned when Mr. Morris
13 was asking you, going back to those two
14 promissory notes, you will recall the 5 million
15 and 2.4 million, you mentioned something to the
16 effect that Mr. Dondero told -- told you to pay
17 some moneys out of Highland. Do you remember
18 that discussion with Mr. Morris?

19 A. I do.

20 Q. So, to the best of your
21 recollection, did you have a discussion with
22 Mr. Dondero about making some payments in May
23 of 2019 out of Highland?

24 A. I recall, as I testified earlier,
25 that I had a conversation with Mr. Dondero

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2 for -- for these amounts attributable to -- it
3 was either the error -- you know, the error,
4 and in that conversation he said, go get the
5 money from Highland. I believe that is what I
6 testified earlier, and that -- that is my
7 recollection.

8 Q. Do you recall if that was an
9 in-person meeting or some other mode for the
10 meeting?

11 A. I -- I -- I recall that being
12 in-person.

13 Q. Do you recall if anyone else was
14 present, or was it just you and Mr. Dondero?

15 A. I recall just he and I.

16 Q. And the moneys that he told you to
17 find from -- or get from Highland, was that in
18 the amount of \$5 million and \$2.4 million?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I believe so, but I would have to go
22 back and look and see when those moneys were
23 actually paid into the -- into the fund and,
24 you know, when those transfers were done. If
25 they were all done around that same time, then

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2 yes, I would say it was -- it was all related
3 to that.

4 Q. Did Mr. Dondero tell you that those
5 funds would be a loan from Highland to HCMFA?

6 A. I don't recall.

7 MR. MORRIS: Objection to the form
8 of the question.

9 Q. Now, and forgive me, I'm probably
10 the only non-American born here, but I speak
11 reasonably well in English. I don't recall,
12 does that mean you don't remember or does that
13 mean it didn't happen?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it means I don't -- I don't
17 remember.

18 Q. Did Mr. Dondero tell you to have
19 those two promissory notes prepared?

20 A. I don't recall.

21 Q. When you -- again, when you say, I
22 don't recall today, that means that sitting
23 here today, you just don't remember one way or
24 the other. Is that accurate?

25 A. Yes.

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2 Q. Is it possible that you, having
3 heard what Mr. Dondero said and seeing funds
4 being transferred, assumed that that would be a
5 loan without him actually telling you that
6 would be a loan?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Sorry, I want to make sure -- did I
10 ask the amounts that were transferred that I --
11 that -- that I assumed that that was a loan?

12 Q. Well, let me -- let me take -- let
13 me try again.

14 So you have established already that
15 there were quite a number of promissory notes
16 back and forth -- I'm sorry, quite a number of
17 promissory notes with affiliated companies and
18 individuals owing Highland money; right?

19 A. Yes.

20 Q. And you have established that there
21 were many transactions and transfers going back
22 and forth over the years; right?

23 MS. DANDENEAU: Objection to form.

24 A. In -- yes, in my capacity as CFO and
25 my employment, yes, that is -- yes.

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2 Q. And that's part of the reason why
3 you just can't remember some of the details
4 today because this -- this happened years ago,
5 and there were a number of transactions. Is
6 that accurate?

7 MS. DANDENEAU: Objection to the
8 form.

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I mean, I deal with thousands of --
12 of -- of -- of transactions, you know, whether
13 it has -- the processing of transactions, you
14 know, if it has got, you know, more -- more
15 zeros, you know, behind it than others.

16 When you look at thousands of
17 transactions over the years for funds and
18 advisors and -- and, you know, financial
19 statements, I mean, it is -- it is very hard
20 going back in -- in -- in my -- you know,
21 14-ish year career at -- at Highland to
22 remember a lot of those details, especially
23 when I don't have any records or books or
24 anything like that, and -- and going back many
25 years.

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2 Q. And that is fine. That -- that --
3 that is why I asked the question.

4 Is it possible in May of 2019 when
5 Mr. Dondero told you to transfer the funds from
6 Highland, you just assumed on your own that
7 those would be loans without him actually
8 telling you that those would be loans?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I don't know.

12 Q. I'm sorry, you --

13 A. I said I don't know.

14 Q. Okay. Well, as the -- as the CFO
15 for Highland, if you saw \$7.4 million going
16 out, you would feel some responsibility to
17 account for that, wouldn't you?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. Yes.

21 Q. Is it fair to say that those would
22 be in the range large enough to rise up to your
23 level?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. If -- I don't know if I understand
3 your question. Those amounts would arise to my
4 level where I would be involved or...

5 Q. You would want to know what a
6 transfer for that amount, \$7.4 million, was all
7 about, as the CFO of Highland, wouldn't you?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, I make it -- I mean, I -- I
11 review all sorts of payments, I mean, even
12 smaller dollar payments on a periodic basis,
13 you know, to -- to -- to understand and to make
14 sure that we are paying things in a -- you
15 know, in -- in -- in an informed way. And, you
16 know -- and we're -- and we're paying things
17 pursuant to vendor contracts and things like
18 that.

19 Q. So as part of that, is it possible
20 that seeing \$7.4 million go out you would have
21 promissory notes made in order to keep a paper
22 trail, assuming that those were loans, when
23 perhaps they were never intended to be loans by
24 Mr. Dondero?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. I don't know. As I testified
4 earlier, I had conversations with Mr. Dondero
5 about -- about the -- the -- the moneys that
6 were needed for the NAV error. And I recall
7 him saying go get it from Highland -- or get it
8 from Highland.

9 Q. Well, why did you sign those
10 promissory notes and why didn't you have him
11 sign them?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. I don't know.

15 Q. You mentioned earlier that you
16 typically don't sign promissory notes. Am I
17 remembering your testimony correctly?

18 I mean, promissory notes on behalf
19 of the entities. Not yourself, obviously.

20 A. Yes, that is what I said earlier.

21 Q. Do you recall any other promissory
22 notes in the million-plus range that you had
23 ever signed before on behalf of any entity?

24 A. There is -- there has been a lot of
25 transactions over the years. I don't -- I

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2 don't -- I don't recall generally. I don't --
3 I don't recall.

4 Q. So -- but to the best of your
5 recollection, it was on your initiative,
6 following your discussion with Mr. Dondero,
7 that you had someone draft those two promissory
8 notes; is that correct?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes, we would have -- the team, as I
12 stated earlier, we don't draft promissory
13 notes. "The team" meaning the accounting and
14 finance team.

15 So the team would have worked with
16 the legal group at Highland to draft any notes.

17 Q. Do you believe or do you have any
18 recollection as to whether you would have done
19 that pursuant to an email or telephone call or
20 in-person meeting?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Are you asking if I would have -- if
24 those notes would have been drafted pursuant to
25 an email or phone call?

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2 Q. Strike that.

3 Do you recall whether you sent an
4 email to anyone asking them to draft those two
5 promissory notes?

6 A. I don't recall because, again,
7 once -- I would have instructed -- likely
8 instructed the team to -- to work with the
9 legal group to draft these documents.

10 I -- I -- I -- yeah, I didn't -- I
11 mean, that is more an operational-type
12 procedure. So, you know, a manager or a
13 controller or working with legal. You know,
14 they -- they can certainly handle that task to
15 get that -- you know, to request that from
16 legal.

17 Q. And who on your team do you think
18 you would have asked to do that?

19 MR. MORRIS: Objection --

20 Q. Who would have been the logical
21 person or people, if you don't remember their
22 name today?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. It -- it -- there is only two

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2 managers of the group. That would have been
3 Dave Klos or Kristin Hendrix.

4 Dave was the -- one of his duties
5 was managing the valuation team, and so he was
6 intimately involved with this process. So, you
7 know...

8 Q. Okay.

9 A. I don't recall specifically but, I
10 mean, my general -- you know, I -- I -- I
11 likely would have talked to Dave first about it
12 versus someone like Kristin who hadn't been
13 intimately involved.

14 Q. And -- and do you have a view as to
15 whether it is most likely that you would have
16 done that by email or in-person or how would
17 you believe you would have communicated that to
18 Mr. Klos?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I likely would have done that in
22 person. Again, if things of this nature
23 that -- again, you have to put ourselves back
24 to, we have been working on this very stressful
25 project for many, many months. And once the

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2 go-ahead was to -- you know, we see the light
3 at the end of the tunnel with wrapping this up
4 and making shareholders whole -- sorry to say
5 "we" -- you know, the -- so the folks that are
6 involved in it.

7 I like to talk to people
8 face-to-face and -- and -- and go to -- and go
9 to their desk, because that shows if I'm going
10 to their desk that -- that is something that I
11 want done, you know.

12 Q. And do you remember, Mr. Waterhouse,
13 getting those two promissory notes in paper
14 format or by email before they were executed?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall.

18 Q. For whatever was the ordinary course
19 back then in May 2019, would you expect to have
20 received them only on paper or would you have
21 expected to have received them in Word document
22 or PDF document by email?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I -- I didn't sign -- I signed very

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2 few documents via email. I can't say that it
3 never happened, but people either stopped by my
4 office and physically walked in documents for
5 signature that we discussed face-to-face.

6 Or documents were -- if -- if --
7 if -- if -- let's say I wasn't there or I
8 wasn't available, documents were dropped off.
9 I had -- I had some in- and outboxes in front
10 of my -- my office there at the Crescent.

11 Documents would be dropped off for
12 signature. There would be a cover sheet that
13 would be -- have been applied to those
14 documents detailing, you know, who dropped it
15 off, the purpose, why, what time.

16 And then, you know, as I stated, I
17 don't draft documents and I always go to the
18 legal group and the compliance group to make
19 sure that they're in the loop. And there is
20 a -- a box or section that says, Has legal
21 reviewed or approved, or something to that
22 nature.

23 Again, I don't -- I don't have
24 access to that cover sheet anymore, but it
25 was -- it was something to that effect.

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2 And my assistant, you know, if she
3 was there, she would review that -- you know,
4 whatever was being dropped off. And if that
5 has legal, you know, reviewed or -- reviewed or
6 approved it, if that wasn't -- if that stuff
7 hadn't been done, it was like she would just
8 tell them like, go -- go -- go to the legal
9 group, because --

10 Q. Let me -- let me pause --

11 MS. DANDENEAU: Let him finish.

12 MR. MORRIS: Thank you. Go ahead.

13 A. I take -- go to the legal group
14 because that -- that was my -- you know, I
15 didn't -- I didn't review anything that -- that
16 they weren't -- you know, or there wasn't some
17 representation made to me that they had
18 reviewed, approved in some capacity.

19 Again, my -- my -- my goal, as CFO,
20 is to provide transparency and make sure that
21 groups like compliance and other things -- and
22 the other group in legal are -- are in -- you
23 know, their -- they're made aware of
24 transactions of -- you know, that are crossing
25 my desk.

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2 Because I'm not in every
3 conversation. They're not in every
4 conversation -- meaning legal compliance -- and
5 I just want to make sure that -- that everyone
6 is in sync to, you know, to -- to the extent
7 possible.

8 Q. So if we summarize, you don't
9 specifically remember signing these two notes,
10 but most likely it would have been that they
11 would have presented -- been presented to you
12 physically on paper?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. They would -- they would have been
16 presented physically on paper most likely or
17 someone would have left it. But, I mean,
18 again, I don't -- I don't recall.

19 Q. I understand. Understand.
20 When you signed -- when you signed
21 documents, when you personally signed
22 documents, did you typically use a ink pen or
23 did you use a stamp?

24 A. No, I -- I -- I use a -- an -- an
25 ink pen.

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2 Q. Do you know -- was there a file at
3 Highland kept anywhere with ink-signed
4 originals of a promissory notes in general or
5 these two promissory notes specifically?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Sorry, I just want to make sure I
9 understand your question. Are you saying is
10 there a file somewhere that has ink-signed
11 originals of these two promissory notes?

12 Q. Yes.

13 A. I would -- I would assume they're
14 some place. I mean --

15 Q. Well, was there a -- was there a
16 place where Highland generally kept originals
17 of promissory notes owed to it?

18 A. I wouldn't -- no.

19 MR. RUKAVINA: Mr. Nguyen, would you
20 please pull up my A7, alpha 7.

21 Q. These are the two promissory notes,
22 Mr. Waterhouse.

23 (Exhibit A7 marked.)

24 Q. And please -- Mr. Waterhouse, please
25 command my associate to scroll down as you need

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2 to, but I want you to take a very close look at
3 your two signatures here and tell me whether
4 you believe, in fact, that you ink signed them
5 or whether you --

6 MS. DANDENEAU: Mr. Rukavina,
7 Mr. Waterhouse has the copies.

8 MR. RUKAVINA: Perfect. Then you
9 can take this down, Mr. Nguyen.

10 A. These -- these -- these signatures
11 are identical, now that I stare at them, and I
12 mean, they are so close -- I mean, they're
13 identical that, I mean, even with my chicken
14 scratch signature, I don't know if I can -- you
15 know, I do this 100 times, could I do that
16 as -- as precisely as I see between the two
17 notes.

18 Q. Well, that is why I ask.
19 Mr. Waterhouse, now that you have examined
20 them, does it seem like it is more likely that
21 you actually electronically signed these?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Is -- I don't -- I don't recall
25 specifically. As I said before, my assistant

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2 did have a -- an electronic signature, and that
3 was used from time to time. It wasn't as
4 common practice back in 2019. It definitely
5 was more common practice when we had to work
6 from home and remotely for COVID because it
7 that made it almost impossible to, right,
8 provide wet signatures since we're all working
9 from home remotely.

10 Q. Well, going just for these two
11 promissory notes, Mr. Waterhouse, in light of
12 your inability to remember any details, are you
13 sure you actually signed either or both of
14 those notes?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall specifically
17 signing -- actually physically signing these
18 notes. As I said before, I don't recall doing
19 that. This -- this looks like my signature,
20 but yet these two signatures are identical.

21 Q. So you don't recall physically
22 signing them, and I take it you don't recall
23 electronically signing them either?

24 A. I don't recall. You know, Highland
25 has all my emails. If that occurred, you know,

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2 you know, I don't have any of these records is
3 what I'm saying. I don't have any of those
4 records.

5 Q. That is why I'm asking you these
6 questions in great detail because I don't have
7 those emails. I'm trying to -- I'm hoping that
8 you will give me some names or some details so
9 I can go look for more emails, but again, you
10 don't remember any -- any individual, other
11 than Mr. Dondero that we've discussed, you
12 don't remember any individual with whom you
13 discussed these promissory notes prior to their
14 execution?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall discussing it with
18 anybody else.

19 Q. Okay.

20 A. I mean, prior --

21 Q. I understand.

22 A. You know, there was no one else --
23 there was no one else in that meeting that I
24 recall with Mr. Dondero.

25 Q. Now, when you established that by

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2 May of 2019 --

3 A. And -- and from what I recall, and
4 the reason why I was by myself is -- is, you
5 know, I don't -- I don't want to speculate, I'm
6 sorry.

7 Q. Okay. We have established that by
8 May of 2019, in your view, the liabilities of
9 HCMFA exceeded its assets; correct?

10 A. Yeah. I mean, again, I don't have
11 financial statements in front of me, but I
12 think, if I recall, we'd have to go through the
13 testimony with Mr. Morris, I believe that was
14 the case.

15 Q. In fact, you will recall that in
16 April of 2019, Mr. Dondero signed a document
17 that extended the demand feature of two prior
18 notes to May 31, 2019. Do you recall that?

19 MS. DEITSCH-PEREZ: I think you
20 might -- maybe have the court reporter read
21 that back. You might have misspoke.

22 (Record read.)

23 MR. RUKAVINA: And I did misspeak.

24 Q. I meant to say to May 31, 2021. Do
25 you recall that, sir?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Yes.

5 MR. RUKAVINA: And, Mr. Nguyen, just
6 so that the record is clear, will you please
7 pull up my Exhibit Alpha 10, A10.

8 (Exhibit A10 marked.)

9 Q. You don't have this one in front of
10 you, Mr. Waterhouse? This is the one that
11 Mr. Morris used earlier. Do you see that
12 document, sir?

13 A. Yes, I do.

14 Q. And this is what you were testifying
15 about before when Mr. Morris was asking you.
16 Do you remember that?

17 A. Yes.

18 Q. So here is my question for you,
19 Mr. Waterhouse: As the chief financial officer
20 of Highland, was it prudent for Highland less
21 than three weeks later to be lending
22 \$7.2 million to an insolvent entity that
23 couldn't even then pay its debts back to
24 Highland?

25 MS. DANDENEAU: Objection to form.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Sorry, I just want to make sure --
5 are you asking me, did you say, was it prudent
6 for Highland to loan \$7.4 million to HCMFA a
7 few weeks after this document was executed?

8 Q. Yes, and at a time when HCMFA's
9 liabilities exceeded its assets.

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't -- it is odd. I don't know.

13 MR. RUKAVINA: You can take this
14 exhibit down, Mr. Nguyen.

15 Q. Do you recall asking anyone,
16 Mr. Dondero or -- or anyone outside as to
17 whether Highland ought to be lending
18 \$7.4 million to HCMF regarding HCMF's
19 creditworthiness?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I don't recall.

23 Q. Did you receive personally any of
24 that \$7.4 million?

25 A. No.

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2 Q. Did you even --

3 MR. MORRIS: I didn't hear that
4 question, sir.

5 MR. RUKAVINA: The one that he
6 answered, John, or my new one?

7 MR. MORRIS: No, no, your question,
8 Davor.

9 MR. RUKAVINA: I had asked him
10 whether he received any of the
11 \$7.4 million. He said no.

12 MR. MORRIS: Yeah. I thought there
13 was a question after that. Maybe I was
14 mistaken. I apologize.

15 MR. RUKAVINA: I had started a new
16 question, so here, let me start the new
17 question again.

18 Q. Did you personally receive any
19 direct benefit from those two notes for
20 \$7.4 million?

21 A. No.

22 Q. Did you ever personally consider
23 yourself obligated to repay either or both of
24 those notes?

25 A. No.

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2 MR. RUKAVINA: Pull up those notes
3 again, Mr. Nguyen.

4 Q. You can have them in front of you,
5 Exhibit 7, Mr. Waterhouse, whatever is easier
6 for you. If you go to your signature page, my
7 question to you is, why did you not include
8 your title as treasurer by your name, Frank
9 Waterhouse?

10 MS. DANDENEAU: Objection to form.

11 A. I didn't -- I didn't draft this
12 document.

13 Q. So you relied on whoever drafted it
14 to draft it correctly?

15 A. Yes.

16 Q. Okay. But back then when you signed
17 this, did it ever cross your mind that you were
18 the maker on these notes?

19 A. No.

20 Q. Back then when you signed this
21 document, did it ever cross your mind that you
22 could be a co-obligor on these notes?

23 A. No. I didn't receive \$7.4 million,
24 I mean...

25 Q. But can you say that HCMFA received

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2 \$7.4 million?

3 A. I would have to go back and look and
4 check in, you know, the -- the financial
5 records and the bank statements.

6 MR. RUKAVINA: You can take this
7 exhibit down, Mr. Nguyen.

8 Q. Mr. Waterhouse, I'm not trying to be
9 a smart-ass, but if the law says that because
10 of the way that you signed this promissory
11 note, if that is what the law says, that that
12 made you personally -- personally liable, then
13 you would agree with me that that was never
14 your intent?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. That was never -- I wouldn't sign a
18 note and not get consideration in return.

19 Q. So putting all other issues aside,
20 if the law -- if the law says that you were
21 liable for those notes because of how you
22 signed them, then would you agree with me that
23 these notes are a mistake?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 MS. DANDENEAU: Objection to the
3 form.

4 A. Yes.

5 Q. So do you agree with me that it's
6 odd -- I think that is the word you used --
7 that Highland would be loaning \$7.4 million a
8 few weeks after that extension to an entity
9 whose liabilities exceeded its assets, and you
10 would agree with me that it was never your
11 intention to be in any way liable for these two
12 promissory notes; correct?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. Sorry, you -- you asked a lot there.

16 MR. RUKAVINA: I will strike it and
17 I will move on.

18 Let's go to -- pull up Exhibit 9,
19 please Mr. Nguyen -- Alpha 9, I'm sorry, Alpha
20 9, A9.

21 (Exhibit A9 marked.)

22 Q. Sir, take a moment to look at this,
23 but this is an email, and you will see attached
24 July 31, 2020 affiliate notes.

25 Do you see that attachment?

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2 A. Yes.

3 Q. Okay. And do you see an entry for
4 Highland Capital Management Fund Advisors?

5 MR. MORRIS: I'm sorry, hold on.
6 Where are you looking?

7 MR. RUKAVINA: Last page, John.

8 MR. MORRIS: Is it the page on the
9 screen?

10 MR. RUKAVINA: Oh, I'm sorry.
11 Mr. Nguyen just did it. Yes, the last page
12 there.

13 MR. MORRIS: Thank you.

14 Q. Do you see an entry there for HCMFA?

15 A. Yes.

16 Q. About \$10.5 million.

17 Do you see that?

18 A. I do.

19 Q. And, now, do you have any
20 explanation for why if HCMFA owed \$7.4 million,
21 plus the 5.3 million that had been extended,
22 why that amount was only 10.5 million?

23 A. I don't know. Okay.

24 MR. RUKAVINA: Close this one and
25 pull up, Mr. Nguyen, the schedules,

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2 schedule of assets. What exhibit is this
3 of ours, Mr. Nguyen?

4 MR. NGUYEN: This is All.

5 MR. RUKAVINA: Oh, this will be All.
6 (Exhibit All marked.)

7 Q. You don't have this in front of you,
8 Mr. Waterhouse?

9 A. Okay.

10 Q. This is what Mr. Morris used
11 earlier. Do you remember looking at this with
12 Mr. Morris?

13 A. Yes.

14 MR. RUKAVINA: You might have to
15 zoom in a little. Okay.

16 Q. Now, I see Affiliate Note A, B, and
17 C.

18 Do you have any recollection as to
19 why the names of the affiliates are omitted?

20 A. I don't. I testified earlier that,
21 you know, the team worked with DSI in providing
22 these. I -- I don't -- I don't know.

23 Q. Can we deduce -- is it logical to
24 deduce that Affiliate Note A would be NexPoint
25 given its size of \$24.5 million?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. I mean, it -- it is a -- it is -- it
5 is approximate.

6 Q. Well, can we -- can we deduce -- or,
7 I'm sorry, strike that.

8 Can you, sitting here today,
9 logically conclude that Affiliate Note B or C
10 represents HCMFA?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. I don't know. I don't know. I
14 can't.

15 Q. Okay. As of the petition date, we
16 have established that HCMFA, under promissory
17 notes, owed \$7.4 million and \$5.3 million to
18 the debtor; correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that
23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. It would be \$12.7 million. Is that
3 generally correct?

4 A. Sorry, the amounts were 7.4, 5.3.

5 Q. Yes.

6 A. Okay. Yeah, that -- that -- I can
7 do that math, yes.

8 Q. Do you have any explanation or any
9 understanding of why there is no similar entry
10 listed here on the schedule of assets filed
11 with the bankruptcy court?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. We have to look at
15 the supporting schedules, like I talked about
16 other -- presumably there is -- there is a
17 build to the schedule that would provide the
18 detail.

19 Q. Well, that was going to be my next
20 question. You anticipated it.

21 MR. RUKAVINA: You can -- you can
22 take this down, Mr. Nguyen.

23 Q. Do you believe that whenever you and
24 your team provided the underlying data to the
25 financial advisor that the actual names of the

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2 affiliates for Affiliate Note A, B, and C would
3 have been listed there?

4 A. Are you asking we provided the names
5 to the financial advisor? I don't -- I don't
6 understand who the financial advisor is.

7 Q. I'm sorry, DSI.

8 Let me ask the question this way,
9 Mr. Waterhouse.

10 Whenever you provided information
11 about the affiliate notes to DSI, do you
12 believe that you would have included the actual
13 names of the affiliates, you or your team, or
14 that you would have done the Affiliate Note A,
15 Note B, Note C?

16 MR. MORRIS: Objection to the form
17 of the question.

18 MS. DANDENEAU: Objection to the
19 form.

20 A. We -- like I testified earlier, when
21 we were -- we gave everything to -- to DSI. We
22 were giving all of our records, all of our
23 files, everything to DSI. We weren't redacting
24 information or saying, hey, here is a note,
25 here is Affiliate Note A or B.

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2 I mean, it was -- our job and our
3 focus -- and I testified in court back in 2019;
4 right -- was -- was to be transparent and, you
5 know, get DSI up to speed on -- on the matters
6 at Highland. So I can't see us redacting at
7 that point.

8 MR. RUKAVINA: Mr. Nguyen, will you
9 please pull up Mr. Morris' Exhibit 36.
10 Just the very first page, the very top
11 email. You might zoom in a little bit.

12 Q. Now, you recall being asked about
13 this by Mr. Morris?

14 A. Yes, I do.

15 Q. And you wrote: The HCMFA note is a
16 demand note.

17 You wrote that; right?

18 A. Yes.

19 Q. And, in fact, weren't there by that
20 point in time several notes?

21 A. Yes, there were. Again, I don't --
22 I don't remember everything specifically. I
23 mean --

24 Q. I understand. I understand.

25 So this is an example where -- where

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2 you might have made a mistake by referring to a
3 singular instead of a plural; right?

4 A. Yes.

5 Q. Okay. And you -- you wrote -- a
6 couple of sentences later, you wrote: There
7 was an agreement between HCMLP and HCMFA the
8 earliest they could demand is May 2021.

9 You wrote that; right?

10 A. Yes.

11 Q. But I think you -- you agreed with
12 Mr. Morris that that can't possibly apply to
13 the May 2019 notes, can it?

14 MR. MORRIS: Objection to the form
15 of the question. That is not what he
16 testified to.

17 Q. Let me ask -- let me ask a different
18 question.

19 Sitting here today -- or if you can
20 answer me from your memory on October 6,
21 2020 -- did the April acknowledgment that
22 extended the maturity date apply to the
23 May 2019 notes also?

24 A. I don't recall specifically.

25 Q. Well, you recall that the notes that

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2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on
5 your experience, that had they intended to have
6 a different or a set maturity date, you would
7 have instructed that that set maturity date be
8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Sorry, just want to make sure I
12 understand. You are saying that -- that the
13 \$5 million note, the \$2.4 million note, if
14 those were supposed to be a term note, that I
15 would have made sure that those were a term
16 note?

17 Q. I'm saying -- I'm saying,
18 Mr. Waterhouse, that on May the 2nd and May the
19 3rd, 2019, if you intended that those two
20 promissory notes could not be called until May
21 2021, would you have included such language in
22 those two promissory notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I guess -- I'm sorry, I don't recall

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2 putting language in those May notes. I don't
3 remember what language you are referring to.

4 Q. Well, let's read this again.

5 There was an agreement between HCMLP
6 and HCMFA the earliest they could demand is May
7 2021.

8 Do you recall that agreement?

9 A. Yes, that was the agreement we
10 looked at earlier; correct?

11 Q. Okay. Yes.

12 Do you -- do you understand now that
13 that agreement that we looked at earlier also
14 applied to the May 2019 notes that you signed?

15 A. I don't -- I don't know.

16 Q. But as of October 6, 2020, you're
17 writing that there is one demand note and
18 you're categorizing that demand note as not
19 being demandable on May 2021; correct?

20 A. Yes.

21 Q. And you know now that you made at
22 least one mistake in this email; correct?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. Yes.

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2 MR. RUKAVINA: You can pull this
3 down, Mr. Nguyen.

4 Q. So, Mr. Waterhouse, you don't
5 remember Mr. Dondero telling you to make these
6 loans or not. HCMLP was loaning \$7.4 million
7 to someone that their assets were less than
8 their liabilities.

9 We don't see on the July list of
10 notes, where there is \$12.7 million of notes,
11 we don't see that on the bankruptcy schedules,
12 and we have this Exhibit 36 where you are
13 confused.

14 Are you prepared to tell me, sir,
15 today that you might have made a mistake in
16 executing those two promissory notes?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. I -- I don't know.

20 Q. And if it turns out that you're
21 personally liable for those promissory notes,
22 it would certainly be a mistake, wouldn't it?

23 MS. DANDENEAU: Objection to the
24 form.

25 MR. MORRIS: Join.

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he
4 never told you to make these loans, would you
5 disagree with his testimony?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Like I testified earlier with my
9 conversation with Mr. Dondero, all I recall is
10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that
12 he, in consultation with other senior personnel
13 at Highland, decided that Highland needed to
14 pay HCMFA \$7.4 million as compensation for the
15 NAV error and not a loan, would you have any
16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. If that was -- if that was his
20 intent, yes, it would -- I would --

21 Q. Do you have any reason to disagree
22 with him?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. If that was his intent, I don't

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2 know. I don't know how I disagree with that.

3 Q. And just to confirm, you don't
4 remember ever asking Mr. Dondero whether you
5 should have two promissory notes prepared?

6 A. No.

7 Q. And you don't remember discussing
8 with Mr. Dondero what the terms of those two
9 promissory notes should be?

10 A. I don't recall -- I testified all I
11 recall is he said, get the money from Highland.
12 I don't -- the -- the terms of the note, I
13 don't recall ever having a discussion around
14 the terms of the note, but since I don't draft
15 the notes, that -- there could have been a
16 conversation with other people later.

17 Q. Do you have any memory of whether
18 after the notes were drafted, but before you
19 signed them, that you communicated with
20 Mr. Dondero in any way to just confirm or -- or
21 get his blessing or ratification to signing
22 those notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Again, the only thing you remember,
3 sitting here today, was Mr. Dondero said, get
4 the money from Highland, and that is it, that
5 is all you remember?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. I testified to that several times.
9 This was over two years ago. A lot has
10 happened. That is all I recall.

11 Q. And help me here. I'm not very
12 technologically astute. When you -- and I -- I
13 recognize that you do it rarely, but when you
14 sign a document electronically, do you believe
15 that there is an electronic record of you
16 having authorized or signed a document
17 electronically?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. I -- I don't know the tech answer to
21 that, but, you know, since I don't have -- I
22 don't ever attach my signature block
23 electronically, my assistant would have done
24 that, and if that is done over email like we
25 did several times -- you know, multiple,

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2 multiple times over COVID, she would attach my
3 signature block and then email it out to
4 whatever party.

5 Q. What was your assistant's name in
6 May 2019?

7 A. It was Naomi Chisum.

8 Q. Is she the only one? I'm sorry, was
9 she your only assistant that would have maybe
10 facilitated logistically something like you
11 just described?

12 A. You know, she was out on maternity
13 leave at some point. I don't -- I don't recall
14 those dates where she was out for maternity
15 leave. There was -- there were folks backing
16 her up. I don't recall specifically who
17 those -- who those, you know, administrative
18 assistants were, and I don't recall
19 specifically if she was out during this time on
20 maternity leave.

21 I do know that that she was out for
22 a period of time, or who knows, or she could
23 have been on vacation that day or, you know, I
24 don't know.

25 Q. Switching gears now, the two

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2 complaints that have been filed that is against
3 HCMFA and NexPoint, did you see any drafts of
4 those complaints before they were filed?

5 MR. MORRIS: Objection to the form
6 of the question, and to the extent that you
7 had any communications with counsel or you
8 were shown drafts of the complaints by
9 counsel while you were employed by
10 Highland, I direct you not to answer.

11 A. I -- I reviewed documents yesterday
12 with counsel here. I believe that is the first
13 time I have ever seen those.

14 Q. Okay. Did you ever discuss with
15 Mr. Seery these two lawsuits before or after
16 they were filed?

17 A. I don't recall.

18 Q. Were you ever interviewed by legal
19 counsel, to your knowledge, about these
20 promissory notes before the complaints were
21 filed? Without going into what was said, were
22 you ever interviewed by legal counsel?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Obviously with COVID, it changed,
3 but -- but before COVID, did you used to meet
4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID -- so
6 we're talking kind of late March, early April,
7 right, there was about -- I don't remember the
8 specific date when the board for Highland was
9 appointed. I believe it was around February of
10 2020, so maybe there was a month-and-a-half,
11 two-month window where we were meeting
12 in-person or, you know, like we were actually
13 in the office, excuse me, we were in the
14 office.

15 And, you know, when they were first
16 appointed, the board members and Mr. Seery
17 were -- were definitely down here more
18 in-person.

19 Q. Did you ever see Mr. Seery taking
20 written notes of -- of his meetings with you or
21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video
24 conference with Mr. Seery, seeing him take
25 notes, written notes?

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2 A. The Zoom calls we had, I don't
3 recall having seen video or, you know, or if it
4 was on Zoom, I just remember it being -- well,
5 no, you know what, there were some -- you know,
6 I take that back.

7 So there were -- there were some
8 times that I did remember seeing Mr. Seery
9 on -- on some of the Zoom calls.

10 Q. Well, let me --

11 A. I don't -- sorry, I'm thinking. I'm
12 thinking -- I'm going back. I'm trying to
13 process this.

14 Q. I can make it much quicker,
15 Mr. Waterhouse. I have heard -- I have heard
16 that Mr. Seery is a copious note taker.

17 Do you have any knowledge about
18 that?

19 A. No.

20 Q. Okay. Switching gears yet again,
21 and this will be last theme. Do you need a
22 restroom break, or are you good to go for
23 another half an hour?

24 MS. DEITSCH-PEREZ: I need a
25 restroom break.

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2 MR. RUKAVINA: Can we make it five
3 minutes?

4 THE WITNESS: Five minutes would be
5 great.

6 VIDEOGRAPHER: We're going off the
7 record at 5:53 p.m.

8 (Recess taken 5:53 p.m. to 5:59 p.m.)

9 VIDEOGRAPHER: We are back on the
10 record at 5:59 p.m.

11 Q. Mr. Waterhouse, I had asked you
12 earlier about contracts between HCMFA and the
13 debtor, and now I'm going to talk about
14 contracts between the debtor and NexPoint
15 Advisors. Okay?

16 A. Okay.

17 Q. Now, were there contracts similar to
18 the ones with HCMFA that NexPoint had in the
19 nature of employee reimbursement and shared
20 services?

21 A. Yes, they -- NexPoint Advisors and
22 Highland Capital Management Fund Advisors had
23 cost reimbursement and shared services
24 agreements with Highland Capital Management,
25 L.P.

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2 Q. And was that shared services
3 agreement, to the best of your understanding,
4 in place as of December 31, 2020?

5 A. It was -- it was terminated at some
6 point, and I remember the contracts had
7 different termination dates, but I think the --
8 the date of termination was January 31st of
9 2021, after the termination was put in.

10 So yeah, it would be in place at the
11 end of the year of December -- it would be in
12 place at December 31st, 2020.

13 Q. And pursuant to that agreement as of
14 December 31st, 2020, was the debtor providing
15 what you would describe as back office services
16 to NexPoint?

17 A. Yes.

18 Q. Would those have included accounting
19 services?

20 A. Yes.

21 Q. And as part of those accounting
22 services, would the debtor have assisted
23 NexPoint with paying its bills?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes.

3 Q. So let's break that up. You were a
4 treasurer of NexPoint as well in December of
5 2020?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes.

9 Q. Okay. And in December of 2020, did
10 NexPoint have its own bank accounts?

11 A. Yes.

12 Q. And did it use those bank accounts
13 to pay various of its obligations?

14 A. Yes.

15 Q. Did employees of the debtor have the
16 ability to cause transfers to be made from
17 those bank accounts on behalf of NexPoint?

18 A. Yes.

19 Q. And is that one of services that the
20 debtor provided NexPoint, basically ensuring
21 that accounts payable and other obligations
22 would be paid?

23 A. Yes.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. You answered yes?

3 A. Yes.

4 Q. And the payments, though, whose
5 funds would they be made from?

6 A. From the bank account of NexPoint
7 Advisors. If they were NexPoint advisor
8 obligations, it would be made from NexPoint
9 Advisors' bank account.

10 Q. So let's pull up Exhibit Alpha 1.
11 You should have that -- it is my Tab 1 or my
12 Exhibit 1.

13 (Exhibit A1 marked.)

14 Q. So this is a -- this is a series of
15 emails, Mr. Waterhouse. Let's look at the
16 first page here, November 25, 2020, between
17 Kristin Hendrix and yourself.

18 Do you see that, sir?

19 A. I do.

20 Q. And do you see where Ms. Hendrix
21 writes: NPA.

22 Do you know what NPA stood for?

23 A. Yes.

24 Q. And what does it stand for?

25 A. NexPoint Advisors.

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2 Q. And was that how you-all internally
3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her
6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what --

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is -- what is Ms. Hendrix
14 here on November 25 asking of you?

15 A. She is asking me -- so she -- these
16 are -- these are payments -- typically we would
17 do an accounts payable run every week at the
18 end of every Friday. But looking at this date,
19 it is Wednesday, November 25th, which means, to
20 me, it is likely Thanksgiving weekend.

21 So this is the day before
22 Thanksgiving, so this is the last kind of --
23 kind of day before the holidays and vacation
24 and things of that nature. So it is
25 effectively the Friday of that week.

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2 So she is -- she is putting in all
3 the payments for the week because we batch
4 payments weekly. And these are the payments
5 that go out that week, and she is informing me
6 of the payments and -- you know, again, at the
7 bottom of the email, she is asking for my okay
8 to -- to release these payments in the wire
9 system.

10 Q. So these would be accounts payable
11 of NexPoint?

12 A. I mean, it would be accounts payable
13 for all of these entities listed on this email.

14 Q. And who was Ms. Hendrix employed by
15 in November and December of 2020?

16 A. Highland Capital Management.

17 Q. Okay. So -- so part of the services
18 that NexPoint had contracted with was for
19 Highland to ensure that NexPoint timely paid
20 its accounts payable; is that accurate?

21 MR. MORRIS: Objection to the form
22 of the question. You have got to be
23 kidding me.

24 Q. Is that accurate?

25 A. Yes.

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2 Q. And did NexPoint rely on employees
3 of the debtor to ensure that NexPoint's
4 accounts payable were timely paid?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes.

8 MR. RUKAVINA: Let's flip to the
9 next page, Mr. Nguyen, if you will please
10 scroll to the next page.

11 Q. So this is an email similar to the
12 prior one, November 30th.

13 Do you see where it says, NPA HCMFA,
14 USD \$325,000 one-day loan?

15 Do you see that, sir?

16 A. I do.

17 Q. Do you have any memory of what that
18 was?

19 A. I don't recall what that -- what
20 that payment was for.

21 Q. Did it sometimes occur that one
22 advisor would, on very short-terms, make loans
23 to another advisor?

24 A. Yes. This -- this -- this occurred
25 from -- from -- from time to time. It actually

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2 looking at -- I'm -- I'm looking at the date of
3 this email. It is November 30th. It is the
4 last day of the month.

5 HCMFA has obligations it needs to
6 pay to its broker-dealer, which is HCFD. And
7 it likely was short funds to make those
8 obligations under that -- under its agreement,
9 and so it provided a one-day loan because on
10 the next business day on 12/1 -- or the next
11 business day in December, it would receive
12 management fees from the underlying funds that
13 it managed and it would be able to pay back
14 that loan to NexPoint Advisors.

15 Q. So -- so here Ms. Hendrix was
16 seeking your approval to transfer \$325,000 from
17 NexPoint to HCMFA for a one-day loan; is that
18 correct?

19 A. That is correct.

20 Q. Let's flip to the next page, sir.

21 MR. RUKAVINA: And, Mr. Nguyen, if
22 you will please scroll down.

23 Q. Now we have as an entry for
24 \$325,000, 11/30 loan payment.

25 Do you see that, sir?

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2 A. Yes.

3 Q. And that is probably the loan that
4 was approved on the prior page?

5 A. Yes, most likely.

6 Q. So is it also true, sir, that in
7 addition to accounts payable debtor employees
8 would be assisting NexPoint with respect to
9 paying back its debt?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I mean, yes, for loans of this
13 nature, yes.

14 Q. Well, what about long term loans?
15 Was it reasonable for NexPoint to expect debtor
16 employees to ensure that NexPoint timely paid
17 its obligations under long-term notes?

18 MR. MORRIS: Objection to the form
19 of the question.

20 MS. DANDENEAU: Objection to form.

21 A. I mean, that is one of the things
22 that the Highland personnel did provide to the
23 advisors. Yes, we would -- we would -- over
24 the years, yes, we -- we -- we -- we did do
25 that generally. Again, I don't remember

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2 specifically but, yes, generally we -- you
3 know, we did do that.

4 Q. So do you recall -- and we can pull
5 it up, if need be -- that under the NexPoint
6 note that Mr. Morris asked you about earlier,
7 the one for more than \$30 million, that
8 NexPoint was obligated to make an annual
9 payment of principal and interest?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yes, it was -- yes, it -- it was an
13 amortizing note. It was -- you know, from what
14 we reviewed earlier, it was payable by
15 December 31st of each year. So -- but are --
16 are you asking me --

17 Q. I'm just asking you, sir, if you
18 recall the note.

19 A. Yes, the \$30 million note, yes, we
20 reviewed it earlier, yes.

21 Q. And do you recall Mr. Morris had you
22 go through the fact that NexPoint had made
23 payments in years prior to 2020 on that note?

24 A. I do.

25 Q. And do you believe that employees of

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2 the debtor would have played any role in
3 NexPoint having made those prior payments?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. Yes.

7 Q. And what role in years prior to 2020
8 would employees of the debtor have had with
9 respect to NexPoint making that annual payment?

10 A. We -- we -- we would have -- I keep
11 saying "we." The team would have calculated
12 any amounts due under that loan and other
13 loans, as -- as standard course.

14 We would -- since we provided
15 treasury services to the advisors, we would
16 inform the -- the -- the -- we informed
17 Mr. Dondero of any cash obligations that are
18 forthcoming, whether we do cash projections.

19 If, you know, any of these payments
20 would have -- or, you know, the sum total of
21 all of these payments, including any note
22 payments, if there were any cash shortfalls, we
23 would have informed Mr. Dondero of any cash
24 shortfalls. We could adequately plan, you
25 know, in instances like that.

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2 Or, sorry, we -- I say "we" -- I
3 keep saying "we" -- I keep wearing my -- again,
4 my -- my treasurer hat.

5 But, yes, it is to -- it is to
6 inform Mr. Dondero of the obligations of the
7 advisors in terms of cash and obligations that
8 are -- are upcoming and that -- and that are --
9 are scheduled to be paid.

10 Q. And would those obligations that are
11 upcoming and scheduled to be paid prior to 2020
12 have incurred the annual payment on that
13 NexPoint \$30 million note?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Davor, I think
16 you misspoke. You might want to just
17 repeat the question.

18 Q. Okay. Let me repeat the question,
19 sir.

20 Prior to 2020, those services that
21 you just described, would that -- on behalf of
22 the debtor, would that have included NexPoint's
23 payments on the \$30 million note?

24 A. Yes.

25 Q. So someone at the debtor in treasury

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2 or accounting would have sent some schedule or
3 a reminder that a payment would be coming due
4 in the future. Is that generally the practice?

5 A. Yes, we would -- you know, again, I
6 didn't -- I didn't micromanage the teams, but
7 we had a -- a corporate accounting calendar
8 that we use as kind of a tickler file to keep
9 track of payments.

10 I actually, you know, don't know how
11 actively they're using that in -- in prior to
12 2020, but it was actively used at some point.

13 We did look at NexPoint cash
14 periodically and cash for the other advisors as
15 well and payments. You know, we -- payments
16 like this would have appeared in our cash
17 projections, in the advisor's cash projections.

18 And, again, as like I said earlier,
19 they would have appeared there, so there would
20 be time to plan for making any of these
21 payments.

22 Q. And based on your experience, would
23 it have been reasonable for NexPoint to rely on
24 the debtors' employees to inform NexPoint of an
25 upcoming payment due on the \$30 million

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2 promissory note?

3 MR. MORRIS: Objection to form of
4 the question.

5 MS. DANDENEAU: Objection to form.

6 A. Yes. Yes, they did. I mean, but I
7 mean, but I don't think these -- these notes
8 were any secret to anybody.

9 Q. I understand, and I'm not suggesting
10 otherwise.

11 MR. RUKAVINA: Please pull up Alpha
12 2, Mr. Nguyen.

13 (Exhibit A2 marked.)

14 Q. Now, this document is similar to the
15 ones we've seen before as of December 31, 2020,
16 and I don't see under NTA anything there for
17 paying the promissory note to Highland.

18 Do you see anything like that?

19 A. I do not.

20 MR. RUKAVINA: You can pull that --
21 that exhibit down, Mr. Nguyen.

22 Q. You are aware, of course, by now
23 that, in fact, NexPoint failed to make the
24 payment due December 31, 2020, are you not?

25 A. I am aware, and yes, I do understand

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2 it.

3 Q. Were you aware that Highland
4 accelerated that \$30 million promissory note?

5 A. I am aware.

6 Q. Were you aware of that acceleration
7 at the time that it occurred?

8 A. I don't remember specifically.

9 Q. Do you recall whether anyone asked
10 you -- prior to the acceleration, anyone asked
11 you at Highland, what Highland should do with
12 respect to the missed payment?

13 A. Did anyone ask me what Highland
14 should do about the missed payment?

15 Q. Yes, before acceleration.

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. I mean, what -- what I recall is
19 there was the -- sorry, are you asking me --

20 MS. DANDENEAU: Why don't you just
21 repeat the question, Mr. Rukavina.

22 Q. Let me try again, Mr. Waterhouse,
23 let me try again.

24 I am saying you're the CFO of
25 someone, in this case, Highland, and the

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2 borrower failed to make the required payment.

3 Are you with me so far?

4 A. I am.

5 Q. Did anyone then ask you, what should
6 we do with respect to our rights against the
7 borrower that missed the payment?

8 A. Not that I recall.

9 Q. Did you play a role in the decision
10 to accelerate that \$30 million promissory note?

11 A. I did not.

12 Q. Do you recall whether Mr. Seery ever
13 asked you before the acceleration as to whether
14 he should accelerate the note?

15 A. I don't recall.

16 Q. And you don't recall when you
17 learned of the acceleration itself?

18 MR. MORRIS: Objection to the form
19 of that question.

20 A. It was -- it was sometime in
21 early -- in early 2021. I don't remember
22 specifically.

23 Q. But do you recall whether it was
24 after the acceleration had already been
25 transmitted?

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2 MS. DANDENEAU: Objection to the
3 form of the question.

4 A. I don't recall.

5 Q. Do you recall in early to mid
6 January of 2021, after the default, discussing
7 the default with Mr. Dondero?

8 A. I do recall discussing with
9 Mr. Dondero after December 31, 2020?

10 Q. Yes, the fact of the default.

11 A. I don't recall.

12 MR. RUKAVINA: Let's pull up my
13 Exhibit 6, Alpha 6.

14 (Exhibit A6 marked.)

15 MR. RUKAVINA: And, Mr. Nguyen, if
16 you will please scroll down.

17 Q. This email chain begins with you
18 writing to Ms. Hendrix on January the 12th:
19 NexPoint note to HCMLP.

20 Do you see that, sir?

21 A. I do.

22 Q. Were you discussing this same
23 \$30 million note we're talking about right now
24 with Ms. Hendrix?

25 A. Yes.

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2 Q. Okay. Do you recall what prompted
3 you to send that email to her?

4 A. Yes, I had -- I had a conversation
5 with Jim.

6 Q. Okay. And what -- what did you
7 discuss with Jim that led to this email chain?

8 A. He -- he called me and he said he
9 wanted to make payment on the NexPoint note,
10 and I didn't -- I didn't know the -- the amount
11 offhand, so I reached out to Kristin and got
12 the details and relayed that to him.

13 Q. And you see you sent that email to
14 her at 11:15 a.m. Does that help you remember
15 when you had this discussion with Mr. Dondero?
16 In other words, was it that morning or the day
17 before, or can you -- can you --

18 A. No, it was -- it was that morning.

19 Q. And do you recall how you had that
20 conversation with him?

21 MR. MORRIS: Objection to the form
22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he -- he called me. I was at
25 home. We were working from home here in

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2 December of 2020. He called me from home. He
3 said he was in court. He wanted to -- he asked
4 about, you know, making payment on the note and
5 the amount, and so I didn't have those numbers
6 in front of me, so I said I would get back to
7 him. I wanted all the details, so here is
8 this -- so I reached out to Kristin.

9 Q. And then she gave you that
10 \$1,406,000 figure?

11 MR. RUKAVINA: Mr. Nguyen, if you
12 will scroll up, please.

13 A. Yes. Yeah, she -- the \$1,406,112.

14 Q. And do you recall whether you
15 conveyed that amount to Mr. Dondero?

16 A. Yes. I -- I called him back and
17 gave him -- gave him this amount.

18 Q. Are you aware of whether NexPoint,
19 in fact, then made that 1 million 406 and
20 change payment?

21 A. Yes, they did.

22 Q. Did you discuss with Mr. Dondero at
23 that time, either the first conference or the
24 second conference that day -- strike that.

25 When you conveyed the number to

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2 Mr. Dondero, was -- was it also on January
3 12th?

4 A. Sorry, when I conveyed the
5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that -- it was --

8 Q. So you had --

9 A. It was that point.

10 Q. Well, to the best of your
11 recollection, you had a conference with
12 Mr. Dondero by the telephone in the morning,
13 and then another conference with him by
14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember -- yeah, it
16 was either that morning or it could have been,
17 you know, early afternoon, but again, I
18 remember calling him back, relaying this
19 information to him, and he said, okay, pay --
20 you know, make -- make this payment.

21 Q. And during either of those two
22 calls, did you tell Mr. Dondero anything to the
23 effect that making those -- I'm sorry, making
24 that payment would not de-accelerate the
25 promissory note?

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2 A. No.

3 Q. Did you tell him anything to the
4 effect that making that payment would not cure
5 the default?

6 A. No.

7 Q. Did you discuss that in any way with
8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have
11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. He -- he -- he didn't go into
15 specifics.

16 Q. Did he say anything to you to the
17 effect that if NexPoint makes that payment,
18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one
23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't
25 recall, you mean you don't remember right now

1 WATERHOUSE - 10-19-21

2 either way; correct?

3 A. Yeah, I don't remember. I don't
4 remember us discussing that.

5 Q. Now -- and we're almost done, I
6 promise. I'm just going to -- I don't know how
7 to ask this question, so I'm just going to try
8 to do my best.

9 Prior to the default on December 31,
10 2020, did Mr. Seery ever tell you any words to
11 the effect that you or someone at Highland
12 should ensure that NexPoint doesn't make its
13 payment?

14 A. No.

15 Q. Did you have any hint or any belief
16 that anyone at NexPoint -- I'm sorry, strike
17 that.

18 Did you have any reason to believe
19 that anyone with Highland was actively trying
20 to get NexPoint to make that default by not
21 paying on December 31?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Are you asking, did any Highland
25 employees actively work to make -- to

1 WATERHOUSE - 10-19-21

2 somehow --

3 Q. Yes. Let me take a step back. Let
4 me take a step back.

5 So you are aware now that as a
6 result of that default, what was still some
7 25-year note was accelerated and became
8 immediately due. You are aware of that now;
9 right?

10 A. Yes.

11 Q. And can you see how someone at
12 Highland might actually have been pleased with
13 that development?

14 MR. MORRIS: Objection to the form.

15 Q. Not that they were --- not that they
16 were pleased, but you can see how someone at
17 Highland might have been pleased with that
18 development?

19 MR. MORRIS: Objection to the form
20 of the question.

21 MS. DANDENEAU: Object to form.

22 A. I don't know how they would have
23 reacted to that.

24 Q. Okay. But you're not -- you're not
25 aware of any instructions or any actions being

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2 given or taken at Highland by Mr. Seery, the
3 independent board, DSI, that -- that would have
4 basically led Highland to ensure that NexPoint
5 would fail to make that payment?

6 A. I'm not aware.

7 Q. In other words, there wasn't a trick
8 or a settlement; right?

9 MS. DEITSCH-PEREZ: Objection to
10 form.

11 MS. DANDENEAU: Object to form.

12 MR. MORRIS: Object to form.

13 A. I'm not aware.

14 Look, I'm not aware. I'm not in
15 every conversation. I mean, and I'm just --
16 again, I'm sitting at home. It is the end of
17 the year. Again, I'm not aware.

18 Q. That is a perfectly legitimate
19 answer. I don't know why -- why you think
20 otherwise.

21 Okay. Just give me one second to
22 compose my thoughts.

23 MS. DEITSCH-PEREZ: While you're
24 taking your one second, why don't we take
25 three minutes. I will be right back.

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2 VIDEOGRAPHER: Do we want to go off
3 the record?

4 MR. RUKAVINA: Yes.

5 VIDEOGRAPHER: All right. We're
6 going off the record at 6:27 p.m.

7 (Recess taken 6:27 p.m. to 6:30 p.m.)

8 VIDEOGRAPHER: We are back on the
9 record at 6:30 p.m.

10 MR. HORN: Is Deb back?

11 MS. DANDENEAU: Are you asking about
12 me? I'm here.

13 MR. HORN: Oh, okay. I don't see
14 you, sorry.

15 Q. Actually, yeah, Mr. Waterhouse, so
16 when you had --

17 MS. DANDENEAU: Are you asking about
18 Deb Dandeneau or Deborah? I mean, there
19 are a lot -- as we talked about, a lot of
20 Debs. I'm here.

21 MS. DEITSCH-PEREZ: I'm here.

22 MR. HORN: Yes, I was asking about
23 DDP.

24 MS. DEITSCH-PEREZ: Oh, DDP is here.

25 MR. HORN: Okay. Here we go. I'm

1 WATERHOUSE - 10-19-21

2 going back on mute.

3 MS. DANDENEAU: Get the right
4 nomenclature.

5 Q. Mr. Waterhouse, on January 12th,
6 2021, when you had those talks with Mr. Dondero
7 about the \$1.4 million payment, did you have a
8 communication or a conversation with Mr. Seery
9 about that payment after January 12th, 2021?

10 A. I don't recall.

11 Q. Well, in response to Mr. Dondero
12 reaching out to you, do you recall on that day,
13 January 12th, talking to Mr. Seery or anyone at
14 Highland other than the email chain we just saw
15 about Mr. Dondero's call with you?

16 A. Did I talk to -- I spoke with
17 Kristin -- I don't know if I spoke to her. I
18 likely spoke to Kristin Hendrix because we had
19 to get the wire on NexPoint's behalf to make
20 the payment to Highland.

21 Q. So it is true, then, that -- that
22 employees of the debtor did actually cause that
23 payment to be made when it was made after
24 January 12th?

25 A. Yes, I mean, we -- we -- as I

1 WATERHOUSE - 10-19-21
2 testified earlier, we provided that accounting
3 finance treasury function as -- under the
4 shared services agreement. And so once I
5 got the -- I talked to Jim, got the approval to
6 make this payment, we have to then make the
7 payment, or the team does, and so the payment
8 was made.

9 Q. Okay. But -- okay. And -- and
10 sitting here right now, after Jim called you,
11 you don't remember talking to anyone other than
12 the -- the couple of people you mentioned,
13 talking to anyone about something to the effect
14 that, hey, Jim wants to make this payment now?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't -- I don't recall.

18 Q. And does that include legal counsel?

19 Without going into any detail, on
20 January 12th or before that payment was made,
21 did you consult with legal counsel about
22 anything having to do with the \$1.4 million
23 payment?

24 A. I don't recall.

25 Q. Okay. Thank you, sir, for your

1 WATERHOUSE - 10-19-21

2 time.

3 MR. RUKAVINA: Pass the witness.

4 MR. MORRIS: I just have a few
5 questions, if I may.

6 MS. DEITSCH-PEREZ: Don't you go at
7 the end?

8 MR. MORRIS: Oh, I apologize. He is
9 your witness. I'm surprised you want to
10 ask him questions, but go right ahead.

11 MS. DEITSCH-PEREZ: Just have a
12 couple of things.

13 MR. RUKAVINA: And I will just
14 object to that, that he's our witness.
15 That's not --

16 MR. MORRIS: I'm not talking to you.
17 I'm not talking to you.

18 MS. DANDENEAU: Also, Mr. Morris, it
19 is -- it is --

20 MS. DEITSCH-PEREZ: He is not my
21 witness. He's been subpoenaed by you.
22 Okay?

23 That is no offense, Mr. Waterhouse,
24 I'm -- I'm not -- okay. Anyway.

25 EXAMINATION

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2 BY MS. DEITSCH-PEREZ:

3 Q. Good evening. I'm very sorry to be
4 going last and I know you have had a long and
5 taxing day, so I thank you for indulging me.

6 The kinds of services that you
7 describe that the -- that Highland provided for
8 NexPoint, did Highland also provide similar
9 services to that to HCRE and HCMS?

10 A. Yes.

11 MR. MORRIS: Objection to the form
12 of the question.

13 Q. What kind of services did Highland
14 provide to HCRE and HCMS?

15 MR. MORRIS: Objection to the form
16 of the question.

17 MS. DEITSCH-PEREZ: What is your
18 objection, John?

19 MR. MORRIS: It is vague and
20 ambiguous. Unlike the advisors and
21 NexPoint, they actually had shared services
22 agreements.

23 MS. DEITSCH-PEREZ: I got -- I
24 understand your objection. That is fine.

25 Q. Let's take them one at a time.

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2 What kinds of services did Highland
3 provide to HCRE?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. HCMS, Highland employees provided
7 accounting services, treasury management
8 services, potentially legal services. I
9 don't -- but I wouldn't have been directly
10 involved in that. But as far as the teams that
11 I manage, it was accounting, treasury, things
12 of that nature.

13 Q. Okay. And that was for HCM, LLP --

14 A. And -- and, sorry, it would also be
15 any asset valuation if needed as well.

16 Q. Okay. We went back and forth on
17 each other and I apologize, so just to clarify.

18 You were talking about the services
19 that Highland Capital Management provided to
20 HCMS; is that right?

21 A. HCMS. So, again, yes. And
22 accounting, treasury, valuation, and also tax
23 services too.

24 Q. Okay.

25 A. Tax services. Look, I'm expanding

1 WATERHOUSE - 10-19-21

2 this, their HR services as well.

3 Q. Okay. And did that include bill
4 paying?

5 MR. MORRIS: Objection to the form
6 of the question.

7 Q. Did the services that HCM provided
8 to HCMS include bill paying?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes.

12 Q. And did the services that HCMLP
13 provided to HCMS include scheduling upcoming
14 bills?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. And did HCMLP regularly pay -- cause
19 to be paid the payments on loans HCMS had from
20 HCMLP?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Yes.

24 Q. Typically -- if there is a
25 typically, how far in advance of due dates did

1 WATERHOUSE - 10-19-21

2 HCMLP cause HCMS to pay its bills?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I mean, it -- it -- it depend -- it
6 depended on the nature of the payment and the
7 vendor, but, you know, if there were -- if
8 there were larger scheduled payments, you know,
9 I would like to give at least 30 days notice.

10 And that is -- that is kind of my
11 rule of thumb so no one is surprised.

12 Q. Okay. And was it generally HCMLP's
13 practice to timely pay HCMS' bills?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it -- it -- that depended on
17 the nature of the payment.

18 Q. Okay. And can you explain what you
19 mean by that?

20 A. Yeah, I mean if -- if it was -- I
21 mean -- if there was some professional fees
22 that weren't -- you know, they were due but
23 they weren't urgent, those fees may not be paid
24 as timely as others that have a due date or --
25 or things like that.

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2 Q. Okay. Are loan payments the kinds
3 of thing that HCMLP would pay on time because
4 of potential consequences of not paying on
5 time?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes. As I testified earlier, we
9 would want to give, you know, notice on -- on
10 -- on larger payments and -- and things of that
11 nature so we didn't miss due dates.

12 Q. Okay. And over the course of time,
13 did HCMLP generally pay HCMS' loan payments in
14 a timely fashion?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I can't remember specifically, but
18 generally, yes.

19 Q. Okay. Now, did HCMLP provide
20 similar services to HCRE that you have
21 described it provided to HCMS?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, but I don't think it -- it
25 provided -- I don't think it provided HR

1 WATERHOUSE - 10-19-21

2 services.

3 Q. Can you describe the accounting and
4 treasury services that HCMLP provided for HCRE?

5 A. Yeah, it -- it would provide
6 bookkeeping services on a -- on a periodic
7 basis. It would make payments, you know, as
8 needed.

9 Q. Okay. So did it provide --

10 A. And -- and I believe it -- it -- it
11 provided tax services as well.

12 Q. Okay. And so did it provide the
13 same kind of bill -- did HCMLP provide the same
14 kind of bill-paying services for HCRE that it
15 provided for HCMS and NexPoint?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Yes.

19 Q. And over the course of time, did
20 HCMLP generally cause to be made the loan
21 payments that HCRE owed to HCMLP?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes.

25 Q. Did HCMLP make loan payment -- the

1 WATERHOUSE - 10-19-21

2 loan payment that was due from HCMS to HCMLP in
3 December of 2020?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I don't believe that payment --
7 payment was made.

8 Q. Okay. And when HCMLP caused HCMS in
9 the past to make loan payments, whose money did
10 it use to make those payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. It was the -- the money in HCMS's
14 operating account would be made to that --
15 those moneys would be used to make payment to
16 Highland Capital Management.

17 Q. Okay. And Highland -- is it correct
18 that Highland Capital Management personnel had
19 the access to HCMS's accounts to be able to
20 cause such payments to be made?

21 A. Yes, Highland personnel had access
22 to those accounts.

23 Q. Okay. And so now for HCRE, whose
24 money was used when HCMLP caused HCRE
25 payments -- loan payments to Highland to be

1 WATERHOUSE - 10-19-21

2 made?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. It was -- it was cash in HCRE's bank
6 account that would be used to make payments to
7 Highland Capital Management.

8 Q. Okay. And so did Highland Capital
9 Management have access to HCRE's funds in order
10 to be able to make such payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Personnel at Highland Capital
14 Management had access to HCRE's bank account to
15 effectuate the payments.

16 Q. Okay. And was the payment due from
17 HCRE to HCMLP due in December of 2020 made?

18 A. It --

19 Q. In December of 2020.

20 A. It was not.

21 Q. Okay. And was there money in HCRE's
22 account that would have enabled the payment to
23 be made had HCM personnel attempted to make the
24 payment?

25 MR. MORRIS: Objection to the form

1 WATERHOUSE - 10-19-21

2 of the question.

3 A. I -- I don't recall.

4 Q. Do you have any reason to believe
5 that either HCRE or HCMS simply didn't have the
6 funds on hand to make the December 2020
7 payments?

8 A. I don't know.

9 Q. I guess I'm asking, do you have any
10 reason to believe that they didn't have the
11 funds?

12 A. We managed cash for so many
13 different entities and funds, and I don't
14 recall, you know, where the cash position was
15 for HCRE and HCMS at 12/31/2020.

16 Q. Okay.

17 A. I just don't recall, and I don't --
18 and I don't remember what the loan payment
19 obligations were from HCRE to Highland, and
20 from HCMS to Highland. I don't recall. I
21 don't recall, I mean...

22 Q. Let me come at it a different way.
23 Were the -- were the payments that would
24 otherwise have been due in December of 2020
25 made in January of 2021 for HCMS and HCRE?

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2 A. I believe the HCRE payment was made
3 in January of 2021. I don't recall any
4 payments being made from HCMS to Highland.

5 Q. If it -- how is it the HCRE payment
6 came to be made? Why did you make it -- why
7 did HCM make the payment in January of 2021?

8 A. Jim -- Jim called me and instructed
9 me to -- to make the payment on behalf of HCRE,
10 Jim Dondero -- Jim Dondero.

11 Q. Did he seem upset that -- that the
12 payment had not been made?

13 A. Yeah. On the note that was, you
14 know, that was the term note, yes, he -- he was
15 displeased that the -- that the payment had not
16 been made by year-end.

17 Q. Okay. And did you make the -- cause
18 the payment to be made as -- as requested?

19 A. Yes.

20 Q. And did anyone else from HCM
21 participate with you in causing the payment to
22 be made to -- on the HCRE loan?

23 A. Yes. It would have been Kristin
24 Hendrix. I -- again, I don't -- as I testified
25 earlier, I'm not an officer of HCRE. I don't

1 WATERHOUSE - 10-19-21

2 believe I'm an authorized signer. So I
3 can't -- other personnel have to make payment
4 from HCRE to -- to -- to -- to Highland.

5 Q. Okay. And in the conversation
6 that -- that you had with Mr. Dondero when he
7 requested the payment to be made, did you say
8 to him words to the effect, Jim, this loan is
9 going to stay in default, what are you making
10 the payment for, anything like that?

11 A. No.

12 Q. In fact, did you have the impression
13 from him that he thought that the loan would
14 be -- the default would be cured by making the
15 payment?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Did I get the impression from Jim
19 Dondero that the loan would be cured if the
20 payment from HCRE --

21 Q. Yeah, if that is what he thought.

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. I didn't get any impression from him
25 on that at the time.

1 WATERHOUSE - 10-19-21

2 Q. Do you know whether there was an
3 HCMS term loan that had a payment due in
4 December of 2020?

5 A. I don't recall.

6 Q. Okay. And so the reason you don't
7 recall whether or not there was a payment in
8 January of 2021 is because you just don't
9 remember whether there was such a loan at all?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't remember. There is -- there
13 is so many notes, and I mean, demands, and I
14 don't -- I don't remember. It's a lot to keep
15 track in your head.

16 Q. I understand, and -- and I hear your
17 frustration when you have explained that the
18 debtor has your documents and you don't, and so
19 I fully appreciate it, and this is no knock on
20 you. It's a knock on somebody else on this
21 call.

22 MR. MORRIS: I move to strike. That
23 was pretty obnoxious, but go ahead.

24 Q. Okay. But so, Mr. Waterhouse, if --
25 if a payment on the HCMS loan was made in

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2 January of 2021, do you think it was part of
3 the same conversation where Jim Dondero said,
4 hey, why didn't that get paid, please make
5 that -- get that payment done?

6 MR. MORRIS: I object to the form of
7 the question.

8 A. Yes. Likely it would have been -- I
9 mean, again, I don't recall a payment being
10 made, but, you know, again, I don't remember
11 everything.

12 Q. Okay. Did -- at the time you were
13 communicating with Kristin Hendrix about the
14 payment being made, whichever payments were
15 made in January, did she say anything to you
16 about the payments not curing the loan
17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to
20 take you back to very early in the deposition
21 when Mr. Morris was asking you about the --
22 the -- the -- the agreement with respect to
23 the -- the forgiveness element of the loans, so
24 that is just to orient you.

25 Do you remember that there was a

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2 time that you and Mr. Dondero were
3 communicating about potential means of
4 resolving the Highland bankruptcy by what was
5 colloquially referred to as a pot plan?

6 A. Yes.

7 Q. Okay. And can you tell me generally
8 when that was?

9 A. Like mid -- mid 2020, sometime in
10 2020, mid 2020.

11 Q. Okay. And did the process of trying
12 to figure out what the numbers should be
13 involve looking at what one should pay for the
14 Highland assets?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. Okay. And did there come a time
19 when you were proposing some potential numbers
20 and Mr. Dondero said something to you like,
21 well, why are you including payment for the
22 related party notes, those, you know, were
23 likely to be forgiven as part of my deferred
24 executive compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we did have that conversation.

4 Q. Okay. Was that conversation in
5 connection with trying to figure out the right
6 numbers for a pot plan?

7 A. Yeah. I mean, it was -- it was -- I
8 mean, Jim -- Jim would ask for, you know,
9 most -- most recent asset values, you know, for
10 Highland, and -- and myself and the team
11 provided those to him, so it was in that
12 context.

13 Q. Okay. And does that refresh your
14 recollection that these communications were in
15 2020 rather than 2021?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. The -- the -- the executive
19 compensation discussions were definitely in
20 2020.

21 Q. Okay. Now, did you ever make
22 proposals that took into account Jim's comment
23 that the notes were likely to end up forgiven
24 as part of his compensation?

25 MR. MORRIS: Objection to the form

1 WATERHOUSE - 10-19-21

2 of the question.

3 A. Yes, we -- the team and myself put
4 together, you know, asset summaries of Highland
5 at various times for all the assets of
6 Highland, and not including the notes.

7 Q. Okay. And were those presentations
8 communicated to -- to Mr. Seery?

9 A. No. Well, look, I didn't tell -- I
10 didn't tell Mr. Seery. I don't know what
11 Mr. Dondero did with the information.

12 Q. Okay.

13 A. I did not have conversations with
14 Mr. Seery.

15 Q. Okay. Do you know who saw the
16 presentations that you put together that didn't
17 include the value of the related party notes?

18 A. We're talking presentations -- these
19 are -- these are Excel spreadsheets?

20 Q. Uh-huh.

21 A. I don't know who -- these were given
22 to -- to Jim Dondero. I don't know what was
23 done with them after that.

24 Q. Okay. You also mentioned earlier
25 that sometime during your tenure at Highland

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2 you knew of the practice of giving forgivable
3 loans to executives.

4 MR. MORRIS: Objection to the form
5 of the question.

6 Q. Can you -- can you tell me what you
7 recall about that practice?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, so there were -- there were --
11 during my tenure at Highland, there were loans
12 or -- given to employees that were later
13 forgiven at a future date and time.

14 Q. Okay. And when the loans were
15 given, did the notes, to your recollection, say
16 anything about the potential forgiveness term?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. When you say "did the notes," did
20 the promissory notes detail the forgiveness?

21 Q. Yes.

22 A. Not that I recall.

23 Q. And until such time as whatever was
24 to trigger the forgiveness occurred, were the
25 notes bona fide notes as far as you were

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2 concerned?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. Yes, similar to -- yes.

6 Q. Okay. You were going to say similar
7 to what?

8 A. Mr. Morris earlier today showed
9 notes of the financial statements about various
10 affiliate loans. I -- I -- I do recall these
11 notes because I -- at that time personally
12 worked on the -- the financial statements of
13 Highland. That was, you know, in my role as a
14 corporate accountant.

15 And there were -- those loans
16 were -- to the partners were detailed in the
17 notes to the financial statements, similar to
18 what we went through earlier today in the prior
19 testimony about what we saw with Highland
20 and -- and -- and the -- and HCMFA.

21 Q. Is it fair to say that on Highland's
22 balance sheet there were any number of assets
23 that the value of which could be affected by
24 subsequent events?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes. I mean, yes, that -- there
4 are. And that is -- yes.

5 Q. Okay. And is it typical accounting
6 practice that until there is some certainty
7 about those potential future events, that asset
8 value listed on -- on the books doesn't take
9 into account those potential future events?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yeah, if those -- yes. If -- if
13 those future events, you know, at the time of
14 issuance are not known or knowable, like I
15 discussed earlier with, like, market practice,
16 asset dislocation, or, you know, I mean, things
17 like that, you -- I mean, it -- it could affect
18 its fair value --

19 Q. Okay.

20 A. -- in the future.

21 Q. And am I correct you wouldn't feel
22 compelled to footnote in every possible change
23 in -- in an asset when those possibilities are
24 still remote?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. The accounting standard is you have
4 to estimate to the best -- you know, to -- to
5 the best of your ability, the fair value of an
6 asset as of the balance sheet date under --
7 under GAAP.

8 Q. Did -- strike that.

9 Okay. Give me a minute. I'm
10 close -- I'm close to done. Let me just go off
11 and look at my notes for a second. So take two
12 minutes.

13 VIDEOGRAPHER: We're going off the
14 record at 7:02 p.m.

15 (Recess taken 7:02 p.m. to 7:03 p.m.)

16 VIDEOGRAPHER: We are back on the
17 record at 7:03 p.m.

18 Q. Mr. Waterhouse, is it generally your
19 understanding that people you work with now
20 have been asking the debtor for full and
21 unfettered access to their own former files?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, I am -- I am generally aware.

25 Q. Okay. And do you think you could

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2 have been better prepared for this deposition
3 if the debtor had complied with those requests?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I -- I -- I most certainly -- yes.
7 I mean, again, these are multiple years,
8 multiple years ago, lots and lots of
9 transactions.

10 You know, we asked about NAV errors
11 and, you know, things like that and these
12 are -- it would make this process a lot more --
13 a lot easier and if we had -- if we had access
14 to that.

15 Q. Okay. And has the debtor -- is the
16 debtor suing you right now?

17 A. Yes.

18 Q. And is the debtor trying to renege
19 on deals that it had previously made with you?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. Sorry, I need to -- it is my
23 understanding that the litigation trust is
24 suing me. And not being a lawyer, I don't
25 know -- is that the debtor?

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2 Is that -- I don't know the
3 relationship. So, again, I'm not the lawyers.
4 I've said many times. But my understanding is
5 the litigation trust is suing me. I could be
6 wrong there. I don't know.

7 Q. Okay. I understand.

8 Someone with some connection to the
9 Highland debtor has brought a claim against
10 you; is that fair?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Yes.

14 Q. Okay. And is there also some motion
15 practice in the bankruptcy where the debtor or
16 someone associated with the debtor is
17 attempting to undo something that was
18 previously resolved with you?

19 A. Yes.

20 Q. And so in one action somebody is
21 associated with the debtors trying to --
22 threatening you with trying to take money from
23 you, and then in the other -- and trying to --
24 and in the other they are threatening not to
25 pay you things that had previously been agreed;

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2 is that correct?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I want to be -- yes, I -- there
6 is -- I'm being sued, again, on -- on something
7 that was agreed to with Mr. Seery and myself.
8 I don't -- I don't -- I don't own that claim.

9 Q. Okay.

10 A. To be transparent, I don't own that
11 claim. So it is not my personal property.

12 Q. Okay.

13 A. And -- and being the nonlawyer, I
14 don't know how I can get sued for something
15 that I don't owe or, like, I don't own
16 anything. I'm not the lawyer. But, I mean, if
17 that is -- if I'm understanding the facts
18 correctly.

19 Q. Okay. And the lawsuit that was
20 filed that names you, that was just filed
21 this -- this past week; is that right?

22 MS. DANDENEAU: Ms. Deitsch-Perez, I
23 do want to interrupt at this point because
24 just as I told Mr. Morris, that this is a
25 deposition about the noticed litigation.

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2 I really don't want to go -- go
3 afield --

4 MS. DEITSCH-PEREZ: Yeah.

5 MS. DANDENEAU: -- and open up a
6 whole new line of inquiry about the lawsuit
7 or the -- the motion and the bankruptcy
8 court. We will be here all night.

9 MS. DEITSCH-PEREZ: And I
10 understand.

11 Q. My -- my point is: Do you feel
12 like -- like there is some effort by these
13 parties related to the debtor to intimidate
14 you -- not that you -- I'm not saying you are
15 or you aren't.

16 But do you feel like there is some
17 effort to intimidate you and maybe an effort to
18 deter you from being as prepared as you might
19 be in this deposition?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I was -- I was surprised by the
23 lawsuit, by me being named, because, again, I
24 don't own the asset and things like that.
25 Yeah, I just -- I want to move forward with my

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2 life at Skyview.

3 MS. DEITSCH-PEREZ: Thank you.

4 THE WITNESS: Thank you.

5 FURTHER EXAMINATION

6 BY MR. MORRIS:

7 Q. If I may, I just have a few
8 questions.

9 Mr. Waterhouse, we saw a number of
10 documents that Mr. Rukavina put up on the
11 screen where Ms. Hendrix would send you a
12 schedule of payments that were due on behalf of
13 certain Highland affiliates.

14 Do you remember that?

15 A. Yes.

16 Q. And in each instance she asked for
17 your approval to make the payments; is that
18 right?

19 A. Yes, she did.

20 Q. And was that the -- was that the
21 practice in the second half of 2020 whereby
22 Ms. Hendrix would prepare a list of payments
23 that were due on behalf of Highland associates
24 and ask for approval?

25 A. Yes.

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2 Q. And I think you said that there was
3 a -- a --

4 A. It was -- I think I testified to
5 this earlier when we talked about procedures
6 and policy, you know, again, I want to be
7 informed of -- of -- of -- of -- of any
8 payments that are going out. I want to be made
9 aware of these payments, and that was just a
10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting
16 group would prepare a calendar that would set
17 forth all of the payments that were anticipated
18 in the -- in the three weeks ahead; is that
19 right?

20 A. I -- like I testified earlier, we
21 had a corporate calendar that was set up, you
22 know, to -- to provide reminders or, you know,
23 of anything of any nature, whether it is
24 payments or -- or financial statements or, you
25 know, whatever it is, you know, to meet

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2 deadlines.

3 I don't know how, as I testified
4 earlier, how much they were using that
5 calendar.

6 Q. Okay. But -- but you did get notice
7 and a request to approve the payments that were
8 coming due on behalf of Highland's affiliates.
9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you
12 know, as we saw with these emails, generally, I
13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the
15 payment -- do you know why there was no payment
16 made by NexPoint at the end of 2020?

17 A. Yes. There was -- there was -- we
18 talked about these agreements between the
19 advisors and Highland, the shared services and
20 the cost reimbursement agreement.

21 And in late 2020, there were
22 overpayments, large overpayments that had been
23 made over the years on these agreements, and it
24 was my understanding that the advisors were --
25 were talking with -- like Jim Seery and others

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2 to offset any obligations that the advisors
3 owed to Highland as offset to the overpayments
4 on these agreements.

5 Q. Okay. Did you participate in any of
6 those conversations?

7 A. I did not.

8 Q. Okay. Do you know -- do you recall
9 that the -- at the end of November, the debtor
10 did notice to the advisors of their intent to
11 terminate the shared services agreements?

12 A. Like I testified earlier, there
13 was -- the agreements weren't identical, from
14 what I recall, and there is one that had a
15 longer notice period, which I think had a
16 60-day notice period. I don't recall which one
17 that was, so not all of them were -- notice
18 hadn't been given as of November 30th, for all
19 of the agreements.

20 Q. Upon the receipt of the -- the
21 termination notices that you recall, do you
22 know if the advisors decided at that point not
23 to make any further payments of any kind to
24 Highland?

25 MR. RUKAVINA: Objection, form.

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2 A. No. The advisors -- the advisors
3 had stopped making payments prior to that
4 notice.

5 Q. Okay. And how do you know that the
6 advisors stopped making -- making payments
7 prior to the notice?

8 A. I had -- I had a conversation
9 with -- with Jim Dondero.

10 Q. And did Mr. Dondero tell you that
11 the advisors would no longer make payments to
12 Highland?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes, he -- he -- again, he said
16 they -- they -- the advisors have overpaid on
17 these agreements, to not make any future
18 payments, and that there needs to be offsets,
19 and they're working on getting offsets to these
20 overpayment.

21 Q. Do you know if anybody ever
22 instructed Highland's employees to make the
23 payment that was due by NexPoint at the end of
24 the year?

25 A. Did anyone instruct Highland's

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2 employees to make that payment?

3 Q. Correct.

4 A. Anyone -- not that I'm aware.

5 Q. Were any of Highland's employees
6 authorized to make the payments on behalf of
7 its affiliates -- withdrawn.

8 Was any of Highland's employees
9 authorized to effectuate the payment on behalf
10 of NexPoint that was due at the end of the year
11 without getting approval from either you or
12 Mr. Dondero?

13 A. They had the -- they had the ability
14 to make the payment, but they didn't -- you
15 know, that -- that payment needed to be
16 approved.

17 Q. Okay. And it needed to be approved
18 by you or Mr. Dondero; is that right?

19 A. I mean, I'm not going to make the
20 unilateral decision.

21 Q. Is that a decision that you
22 understood had to be made by Mr. Dondero?

23 A. Yes. Sitting back in December of
24 2020, the -- that -- there was this off --
25 offset negotiation that -- that was happening,

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2 so I mean, until those negotiations were
3 resolved, you know, there wasn't any
4 payments -- there weren't any payments.

5 Q. And -- and there were no payments
6 until the negotiations were resolved because
7 that was the directive that you received from
8 Mr. Dondero; correct?

9 A. I don't think he said -- I mean, I
10 think -- yeah, I mean -- I'm trying to recall
11 the conversation. It was -- you know, there
12 is -- there is these negotiations. There's --
13 there needs to be these offsets. They're
14 talking with the debtor. So, you know, until
15 this is resolved, right, I mean, depending on
16 how, whatever that resolution was, were we to
17 take any action.

18 Q. Okay. How about with respect to
19 HCMS, did HCMS have a term payment due at the
20 end of the year?

21 A. Again, I don't -- I don't recall.

22 Q. Okay. You discussed briefly two
23 payments that were made in January of 2021, one
24 on behalf of NexPoint, and one on behalf of
25 HCMS. Do I have that right?

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2 A. No. The two payments I recall were
3 NexPoint and HCRE.

4 Q. Okay. And those two payments --
5 thank you for the correction. And those two
6 payments were made because Mr. Dondero
7 authorized those payments to be made; correct?

8 A. Yes.

9 Q. And they hadn't been made before
10 that because Mr. Dondero had not authorized
11 them to be made?

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. Yes, because of these negotiations.

15 Q. Okay. Just a couple of more
16 questions.

17 Did anybody, to the best of your
18 knowledge, on behalf of HCMFA, ever tell the
19 SEC that HCMLP was responsible for the mistakes
20 that were made on the TerreStar valuation?

21 A. Did anyone from Highland on HCMFA's
22 behalf tell the SEC that Highland -- that
23 Highland was responsible for there -- I just
24 want to make sure --

25 Q. It was a little bit different, so

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2 let me try again.

3 A. These are very long questions, John.

4 I'm not trying to be --

5 Q. That is good. Do you know whether
6 anybody -- do you know whether anybody on
7 behalf of HCMS -- HCMFA ever told the SEC that
8 Highland was the responsible party for the
9 TerreStar valuation error?

10 A. Not that I'm aware.

11 Q. Okay. Did anybody on behalf of
12 the -- on behalf of HCMFA ever tell the retail
13 board that Highland was responsible for the
14 TerreStar valuation error?

15 A. Not that I'm aware.

16 Q. Do you know if HCMFA made an
17 insurance claim with respect to the damages
18 that were incurred in relation to the TerreStar
19 valuation error?

20 A. Yes.

21 Q. And do you know why they made that
22 insurance claim?

23 A. Because there was an error. I
24 mean --

25 Q. Was the insured's claim made -- was

1 WATERHOUSE - 10-19-21

2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the
5 petition date -- withdrawn.

6 You were asked a couple of questions
7 where -- where you said that Mr. Dondero told
8 you that he was ascribing zero value to the
9 notes as part of a pot plan because he believed
10 that the notes were part of executive
11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that
17 before the time that Mr. Dondero told you that
18 in the conversation about the pot plan?

19 A. Had I heard that prior to my
20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context
24 of his formulation of the settlement proposal;
25 is that right?

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2 A. I mean, generally, yes. You know,
3 we were asked to provide asset values, right,
4 and he was having settlement discussions.
5 Again, I don't know who those went to
6 ultimately. I don't recall.

7 MR. MORRIS: I have no further
8 questions. Thank you very much for your
9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay
11 on about your email when --

12 MR. RUKAVINA: Hold on, I'm not
13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor
15 still has questions. Sorry. I was going
16 to say both John and Davor, could you stay
17 on afterwards just to talk about the
18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now
22 testifying about a discussion you had with
23 Mr. Dondero where he said something like no
24 more payments.

25 Do you remember that testimony?

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2 A. Yes.

3 Q. Okay. And was that late November or
4 early December of 2020?

5 A. It was, I would say, first or second
6 week of November.

7 Q. Okay. Do you recall whether --
8 whenever you had that discussion, whether
9 Mr. Dondero had already been fired by the
10 debtor?

11 A. Yes, I -- I believe he was not an
12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this
14 with Mr. Dondero and he said no more payments,
15 you were discussing the two shared services
16 agreements and employee reimbursement
17 agreements we testified -- you testified about
18 before; is that correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. That is correct.

22 Q. And had your office or you -- and we
23 will talk at a future deposition about the
24 administrative claim.

25 But had -- by that time that you

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2 talked to Mr. Dondero, had your office or you
3 done any estimate of what the alleged
4 overpayments were?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes, we had -- there was a -- there
8 was a detailed analysis that was put together
9 by David Klos at the time.

10 Q. And do you recall just generally
11 what the total amount for both advisors of the
12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I -- I remember it was an
18 eight-figure number. I don't remember
19 specifically.

20 Q. Okay. And did you convey that
21 number to Mr. Dondero when you had that
22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

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2 Q. Is it fair to say he was upset?

3 A. Yes.

4 Q. Did Mr. Dondero ever expressly tell
5 you to not have NexPoint make the required
6 December 31, 2020, payment?

7 A. Yes, I recall him saying don't make
8 the payment because it was being negotiated, as
9 I discussed with Mr. Morris, this offset
10 concept. So there were obligations due by the
11 advisors to Highland, they should be offset
12 that -- you know, those obligations should be
13 offset by this -- by this overpayment.

14 Q. And when did he tell you that?

15 A. I would say -- I would say around --
16 probably December -- December-ish.

17 Q. Early December, late December?

18 A. I don't recall with as much
19 specificity as -- as -- as -- as stopping the
20 shared services payments, because we had
21 actually made one shared services payment in
22 November. So that is why I need to remember
23 that one more clearly. I don't remember where
24 exactly in December that conversation occurred.

25 Q. Did Mr. Dondero expressly use the

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2 word "NexPoint" when he was saying don't make
3 these payments?

4 MR. MORRIS: Objection to the form
5 of the question, asked and answered.

6 A. Yeah, we were -- we were discussing
7 advisor obligations. So it was -- you know, it
8 was just obligations from the advisors.

9 And -- and he specifically talked
10 about the NexPoint payment as well.

11 Q. Okay. And it is your testimony that
12 he expressly told you not to make that NexPoint
13 December 31 payment?

14 MR. MORRIS: Objection, asked and
15 answered twice.

16 A. Yes, he -- he did, during that
17 conversation.

18 Q. And did you ever follow up with him
19 after that about whether NexPoint should or
20 shouldn't make that payment?

21 A. I did not.

22 Q. Did you ever, on or about
23 December 31, 2020, remind him and say, hey,
24 this payment is due, what shall I -- what
25 should I do?

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2 A. I did not.

3 Q. So sitting here today, you -- you
4 remember distinctly that Dondero in December of
5 2020 expressly told you not to have NexPoint
6 make that payment?

7 MR. MORRIS: Objection, asked and
8 answered three times.

9 A. Yes.

10 Q. Can you say categorically it wasn't
11 just some general discussion where he told you
12 not to make payments?

13 MR. MORRIS: Objection, asked and
14 answer four times.

15 MR. HORN: Four times now. Go for
16 five.

17 A. Yes.

18 Q. Did you tell Mr. Seery that?

19 A. I don't believe I did. I don't
20 recall.

21 Q. And was this an in-person discussion
22 or telephone or email? Do you remember?

23 A. This was a phone -- a phone
24 conversation.

25 Q. Okay. Would you have a record of --

1 WATERHOUSE - 10-19-21

2 on your cell phone of when that conversation
3 might have taken place?

4 I'm sorry, strike that.

5 Was that by cell phone?

6 A. I believe -- yes, because we -- I
7 was at home. I mean, I don't have a landline.
8 All I have is my cell phone.

9 Q. Do you know whether your cell phone
10 still has records of conversations from
11 December 2020 on it?

12 A. My call log doesn't go back that
13 far.

14 Q. Okay. Thank you.

15 MR. RUKAVINA: I will pass the
16 witness.

17 MS. DEITSCH-PEREZ: Just a couple
18 quick questions.

19 FURTHER EXAMINATION

20 BY MS. DEITSCH-PEREZ:

21 Q. With respect to HCRE and HCMS, am I
22 correct there was -- there was no direction not
23 to pay those loan payments?

24 MR. MORRIS: Objection to the form
25 of the question.

1 WATERHOUSE - 10-19-21

2 A. Yes, I don't recall having
3 conversations about, you know, those -- those
4 entities.

5 Q. And, in fact, what was the tone that
6 Mr. Dondero had when he talked to you about the
7 fact that HCRE and HCMS payments hadn't been
8 made when he found out that they hadn't been
9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was -- it was -- it was -- it
14 was very negative. I mean, I think he cursed
15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that
17 consistent with the fact that he was surprised
18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

1 WATERHOUSE - 10-19-21

2 Thank you, Mr. Waterhouse. We appreciate
3 your time. I am logging off the discussion
4 and I will talk to y'all tomorrow.

5 MR. MORRIS: Super.

6 VIDEOGRAPHER: If there are no
7 further questions, this ends the
8 deposition -- excuse me. This ends the
9 deposition, and we are going off the record
10 at 7:30 p.m.

11 (Deposition concluded at 7:30 p.m.)

12

13

14 _____
FRANK WATERHOUSE

15

16 Subscribed and sworn to before me
17 this day of 2021.

18

19 -----

20

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 C E R T I F I C A T E

3

4 I, SUSAN S. KLINGER, a certified shorthand
5 reporter within and for the State of Texas, do
6 hereby certify:

7 That FRANK WATERHOUSE, the witness whose
8 deposition is hereinbefore set forth, was duly
9 sworn by me and that such deposition is a true
10 record of the testimony given by such witness.

11 I further certify that I am not related to
12 any of the parties to this action by blood or
13 marriage; and that I am in no way interested in
14 the outcome of this matter.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this 19th of October, 2021.

17



18

19 Susan S. Klinger, RMR-CRR, CSR

20 Texas CSR# 6531

21

22

23

24

25

1 WATERHOUSE - 10-19-21

2 NAME OF CASE: In re: Highland Capital

3 DATE OF DEPOSITION: October 19, 2021

4 NAME OF WITNESS: Frank Waterhouse

5 Reason Codes:

6 1. To clarify the record.

7 2. To conform to the facts.

8 3. To correct transcription errors.

9 Page____ Line____ Reason_____

10 From_____ to_____

11 Page____ Line____ Reason_____

12 From_____ to_____

13 Page____ Line____ Reason_____

14 From_____ to_____

15 Page____ Line____ Reason_____

16 From_____ to_____

17 Page____ Line____ Reason_____

18 From_____ to_____

19 Page____ Line____ Reason_____

20 From_____ to_____

21 Page____ Line____ Reason_____

22 From_____ to_____

23 Page____ Line____ Reason_____

24 From_____ to_____

25

EXHIBIT 82

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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:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

vs.

NEXPOINT ADVISORS, L.P., JAMES
DONDERO, NANCY DONDERO, AND THE
DUGABOY INVESTMENT TRUST,
Defendants.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§
§ Adversary Proceeding
§
§
§ Case No. 21-03005-sgj
§
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§

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”);

WHEREAS, on December 4, 2019, the Delaware Court entered an order transferring venue of Highland’s Bankruptcy Case to this Court [Bankr. Docket No. 186];²

WHEREAS, on February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., as Modified* [Bankr. Docket No. 1808] (the “Plan”).

WHEREAS, the Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. *See Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Bankr. Docket No. 2700].

WHEREAS, on September 7, 2021, the Court entered its *Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues* [See Adv. Proc. No. 21-3005 at Docket No. 70]³ (the “Scheduling Order”), pursuant to which the discovery schedules in the Adversary Proceedings are consolidated.

WHEREAS, on October 29, 2021, NexPoint filed its *Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3005 at Docket No. 86] (the “NexPoint Motion”).

WHEREAS, on October 29, 2021, HCMS filed *Defendant Highland Capital Management*

² Refers to the docket number maintained in the Bankruptcy Case.

³ Refers to the docket maintained in the Adversary Proceeding.

Services, Inc.’s Motion to Extend Expert Disclosure and Discovery Deadlines [Adv. Proc. 21-3006] (the “HCMS Motion”).

WHEREAS, on October 29, 2021, HCRE filed *Defendant HCRE Partners, LLC’s Motion to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3007] (the “HCRE Motion,” and together with the NexPoint Motion and HCMS Motion, the “Motions”).

WHEREAS, the Parties have conferred and desire to enter into a mutually agreeable proposed scheduling order regarding the Motions, as specifically set forth below.

NOW, THEREFORE, it is hereby stipulated and agreed, and upon approval of this Stipulation by the Court, it shall be SO ORDERED:

1. A hearing on the Motions is set for **December 13, 2021 at 10:30 a.m. (Central Time)**.
2. A response to the Motions (the “Response”) shall be filed on or before **December 1, 2021**, unless otherwise agreed in writing by the Parties.
3. Replies to the Responses shall be filed on or before **December 8, 2021**, unless otherwise agreed in writing by the Parties.
4. All deadlines set forth above are effective as of **5:00 p.m. (Central Time)** on each applicable date.
5. If approved by the Court, this Stipulation shall only be modified in a writing signed by the Parties or upon the entry of an order of the Court entered upon notice to the Parties.
6. The Court shall retain jurisdiction over all disputes arising out of or otherwise concerning the interpretation and enforcement of this Stipulation.

Dated: November 23, 2021.

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Services, Inc. and HCRE Partners, LLC (n/k/a
NexPoint Real Estate Partners, LLC)*

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

vs.

NEXPOINT ADVISORS, L.P., JAMES
DONDERO, NANCY DONDERO, AND THE
DUGABOY INVESTMENT TRUST,
Defendants.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
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§ Case No. 21-03005-sgj
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¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

1. The Stipulation, a copy of which is attached hereto as Exhibit A, is **APPROVED**.

2. The Parties shall abide by the following briefing and hearing schedule in connection with the Motions pursuant to the Stipulation:

- A hearing on the Motions is set for **December 13, 2021 at 10:30 a.m. (Central Time)**.
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###End of Order###

EXHIBIT 83

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FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

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Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

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DONDERO, NANCY DONDERO, AND THE
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§ Chapter 11
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WHEREAS, on December 4, 2019, the Delaware Court entered an order transferring venue of Highland’s Bankruptcy Case to this Court [Bankr. Docket No. 186];²

WHEREAS, on February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., as Modified* [Bankr. Docket No. 1808] (the “Plan”).

WHEREAS, the Plan went Effective (as defined in the Plan) on August 11, 2021, and Highland is the Reorganized Debtor (as defined in the Plan) since the Effective Date. *See Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Bankr. Docket No. 2700].

WHEREAS, on September 7, 2021, the Court entered its *Order Approving Stipulation Governing Discovery and Other Pre-Trial Issues* [See Adv. Proc. No. 21-3005 at Docket No. 70]³ (the “Scheduling Order”), pursuant to which the discovery schedules in the Adversary Proceedings are consolidated.

WHEREAS, on October 29, 2021, NexPoint filed its *Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3005 at Docket No. 86] (the “NexPoint Motion”).

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Dated: November 23, 2021.

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*Counsel for Highland Capital Management
Services, Inc. and HCRE Partners, LLC (n/k/a
NexPoint Real Estate Partners, LLC)*

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###End of Order###

EXHIBIT 84

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
Reorganized Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding
	§	
vs.	§	
	§	Case No. 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	
	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”);

WHEREAS, on December 4, 2019, the Delaware Court entered an order transferring venue of Highland’s Bankruptcy Case to this Court [Bankr. Docket No. 186];²

WHEREAS, on February 22, 2021, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., as Modified* [Bankr. Docket No. 1808] (the “Plan”).

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/s/ Michael P. Aigen

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Services, Inc. and HCRE Partners, LLC (n/k/a
NexPoint Real Estate Partners, LLC)*

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

vs.

NEXPOINT ADVISORS, L.P., JAMES
DONDERO, NANCY DONDERO, AND THE
DUGABOY INVESTMENT TRUST,
Defendants.

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§ Chapter 11
§
§ Case No. 19-34054-sgj11
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§ Adversary Proceeding
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§ Case No. 21-03005-sgj
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¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

1. The Stipulation, a copy of which is attached hereto as Exhibit A, is **APPROVED**.

2. The Parties shall abide by the following briefing and hearing schedule in connection with the Motions pursuant to the Stipulation:

- A hearing on the Motions is set for **December 13, 2021 at 10:30 a.m. (Central Time)**.
- A response to the Motions (the "Response") shall be filed on or before **December 1, 2021**, unless otherwise agreed in writing by the Parties.
- Replies to the Responses shall be filed on or before **December 8, 2021**, unless otherwise agreed in writing by the Parties.
- All deadlines set forth above are effective as of **5:00 p.m. (Central Time)** on each applicable date.

3. The Court shall retain jurisdiction over all disputes arising out of or otherwise governing the interpretation and enforcement of this Order.

###End of Order###